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VOLUME 208

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1907

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
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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.

CARRINGTON *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 223. Argued December 16, 1907.—Decided January 6, 1908.

An office commonly requires something more than a single transitory act to call it into being.

A money contribution by the Philippine Government to the performance of certain military functions, and entrusting the funds to an officer of the United States Army, who is held to military responsibility therefor by court-martial, does not make that officer a civil officer of the Philippine Government and amenable to trial in the civil courts for falsification of his accounts as a public official.

The fact that an officer of the United States Army, entrusted with money by the Philippine Government to be expended in connection with his military command, signs his account "Disbursing Officer" instead of by his military title, does not make him a civil officer of the Philippine Government; and *quære* whether he could become such a civil officer in view of the act of March 3, 1883, 22 Stat. 567, prohibiting the appointment of officers of the United States Army to civil offices.

THE facts are stated in the opinion.

Mr. Holmes Conrad, with whom *Mr. R. A. Ballinger* was on the brief, for plaintiff in error:

It appears from the record that the plaintiff in error was

not on February 12, 1904, or at any other time, a public officer of the United States civil government of the Philippine Islands, nor was he a duly appointed, qualified, and acting disbursing officer for public funds of that government, as stated in the charge. Accused could not be a public official of such civil government at any time under the laws of the United States. 22 Stat. 567; 1st Supp. Rev. Stat., ch. 124, p. 412.

The charge against this man is official misconduct, "abuse of his office." To sustain this criminal charge, there must be shown, first, that there was such an office as that which he is charged with having held; secondly, that he was duly appointed to that office; thirdly, that he qualified as such officer; fourthly, that he actually held that office under such appointment and qualification; and, fifthly, that the "abuse of his office" with which he is charged, viz., that he did "falsify a public or official document of which he had charge," is an offense known to the common law, or the statute law, or even to the Philippine law. *In re Bonner*, 151 U. S. 259.

While holding the office of major of the First Infantry, United States Army, and while on duty as such officer, under the assignment and orders of his superior officers, he was not amenable to the courts or subject to the laws of the civil government of the Philippine Islands for any offense committed by him in connection with the performance of his duties as a major of infantry in the United States Army.

As citizen of the United States and a commissioned officer of its army, lawfully stationed in the Philippine Islands, he was entitled to a trial by jury.

The punishment to which he was sentenced was illegal because cruel and unusual.

The Solicitor General for defendant in error:

The facts as to defendant's holding a civil office were that upon his own initiative, by resolution of the Philippine Commission and the action of the Governor, he was designated to receive, expend and account for a certain fund for the Philip-

pine Scout Exhibit at the St. Louis Exposition, and he accepted the post and acted accordingly. The Philippine Supreme Court found that he acted as a publie official and took part in the performance of public duties. Whether he held a civil office or not, strictly speaking, he was empowered by competent authority, he accepted and discharged the duties imposed upon him, and held himself out as a public official of the Philippine government. He was thus an officer *de facto*, and not a mere intruder, and he cannot escape liability by denying title. *Hussey* v. *Smith*, 99 U. S. 20; *Buck* v. *City of Eureka*, 109 California, 504; *Allen* v. *McNeel*, 1 Mills (S. Car.), 229; *Diggs* v. *State*, 49 Alabama, 311; *People* v. *Church*, 1 How. Pr. 366; *State* v. *Long*, 76 N. Car. 254; *Wendell* v. *Fleming*, 8 Gray, 613. He was an official within § 401 of the Philippine Penal Code. And see 2 Viada, 695, as to the wide extension and latitude of the law.

The provisions of § 1222, and par. 4, § 1860, Rev. Stat., as amended, are inapplicable. They apply to the United States and organized Territories and not to the Philippines. They were enacted long before the islands were acquired, and their provisions have not been extended to the islands. Evidently neither Carrington nor his military superiors thought that he was subject to these prohibitions.

Carrington was not entitled to a trial by jury. *Dorr* v. *United States*, 195 U. S. 138. A soldier has no greater right than any other person in this respect. In the United States he is amenable to the civil courts for civil offenses, and if he is sent under the orders of his commanding officers to a State where the common law as to juries is not followed, he could not demand presentment and trial under the Constitution. The constitutional guarantees of trial by jury apply only to citizens and others within the United States or who are brought there for trial for offenses committed elsewhere, and not to residents or temporary sojourners abroad. *In re Ross*, 140 U. S. 453. The reasoning of that decision applies equally to citizens, whether soldiers or not, in a territorial possession of

the United States and before courts under the authority of the United States proceeding without a jury. To have two systems in the Philippines for different classes of persons is an impossible conception, and would be inconsistent with the express guarantee of the equal protection of the laws to all persons in the islands, contained in the Philippine Bill of Rights.

There is no foundation for the idea or claim that Carrington as an officer of the army was not subject to the jurisdiction of the Philippine courts at all. Nothing to that effect was intimated in *Grafton* v. *United States*, 206 U. S. 333. The points of decision in that case involved the implication that the military and civil jurisdiction were concurrent, and that the civil trial and conviction there would have been valid if the court-martial had not first tried and acquitted. The question always is, which jurisdiction attaches first? The civil courts took jurisdiction here, and subsequently, Carrington was court-martialed on the same transactions under the 61st Article of War, and was dismissed from the service.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was convicted in the Court of First Instance, and, on appeal, by the Supreme Court of the Philippine Islands, of the crime of falsification of a public document by a public official. He brings the case here by writ of error, setting up rights under the Constitution and statutes of the United States that were denied by the decision below.

The complaint alleges that the plaintiff in error "being then and there a public official of the United States civil government of the Philippine Islands, to wit, a duly appointed and commissioned major of the First Infantry, United States Army, and the duly designated, qualified and acting commander of the Provisional Battalion of the Philippine Scouts, and a duly appointed, qualified and acting disbursing officer for public funds of the said United States civil government of the Philippine Islands, appropriated on account of said Provisional Battalion and on account of the Louisiana Purchase Exposi-

tion at St. Louis," made a false voucher for the payment of seven hundred and seventy pesos.

The plaintiff in error denies that he was a public official within the meaning of the Philippine Penal Code, Art. 300, or that, under the act of March 3, 1883, c. 134, 22 Stat. 567 (see Rev. Stat. §§ 1222, 1860), he could be, while he remained an officer in the Army on the active list. The facts are as follows: In October, 1903, the plaintiff in error wrote a letter to the Executive Secretary of the Insular Government, suggesting that, as the Second Battalion of Philippine Scouts was expected to take part in the Louisiana Purchase Exposition, it would be well to allow the writer, with his scouts, to put up a model administration building of native materials for his use, at St. Louis, decorated with native arms, etc., and estimating that he could do this work for $3,000, gold. Governor Taft referred his letter to the Exposition Board, recommending the project, and the board accepted it. In November the Civil Commission passed a resolution, authorizing the transfer "to the credit of Major F. L. Carrington, 1st United States Infantry, commanding the Provisional Battalion of Philippine Scouts to be transported to St. Louis in 1904 in connection with the Philippine Exhibit," the sum of $3,000, "to be used and accounted for by Major Carrington in the construction" of a model administration building. It was resolved further that the disbursing officer of the Philippine Exposition Board should deposit to the credit of Major Carrington the further sum of $500, with which to pay some of the expenses of families of scouts allowed to accompany them to St. Louis, and that, on the approval of the resolutions by certain officials, the Civil Government might "designate Major Carrington as disbursing officer to receive the funds mentioned." The resolutions were approved, and Governor Taft in the same month addressed a letter to "Major Frank de L. Carrington, 1st U. S. Infantry, commanding Provisional Battalion Philippine Scouts," saying, "You are hereby designated to withdraw, receive, expend, and account for, the funds" above mentioned,

"to be expended in the preparation and display of a Scout Exhibit at the Louisiana Purchase Exposition as set forth in said resolution." These are all the facts that are supposed to constitute the plaintiff in error a public official within the Philippine Penal Code, although, it should be added, that in signing the false document he added, after his name, "Maj. 1st Infantry, D. O.;" the last letters meaning, it may be presumed, Disbursing Officer.

At this time the plaintiff in error was an officer of the Army on the active list, detached to command a battalion of Philippine scouts, admitted to be a part of the military establishment of the United States. Leaving names on one side, what happened was that he received $3,500 from civil sources, to be used by him in connection with his military command, in the performance of duties incident to that command. On the face of it the proposition is extravagant that the receipt of a small sum to be spent and done with forthwith in this way made him an officer of the civil government, notwithstanding the source from which it came, or the fact that he sent his accounts to the same quarter. An office commonly requires something more permanent than a single transitory act or transaction to call it into being. The letter of Governor Taft which designated Major Carrington to receive the fund says nothing about appointing him a civil or any kind of officer, nor did he qualify as one in any way. He was addressed by Governor Taft and he acted in his military capacity and under his military responsibility. He has been held to that responsibility by a court-martial. The only color for an additional liability is in the words quoted from the resolution of the Civil Commission, authorizing the Civil Governor to designate Major Carrington as disbursing officer, words which the Governor wisely did not adopt, and in the fact that the plaintiff in error gave himself that name. It is unnecessary to inquire whether he could have made himself a civil officer if he had tried, in view of the act of Congress absolutely prohibiting it. Act of March 3, 1883, c. 134; 22 Stat. 567. No one dreamed

that he was attempting it, and if he could have succeeded at the expense of his place in the Army under Rev. Stat. § 1222, no one supposed that he had done so, but he continued in his military command undisturbed.

We think it entirely plain that the acceptance of the duty of spending and accounting for this small fund did not amount to holding a civil office within the statutes of the United States. We see no sufficient reason to believe that the Philippine Penal Code, Art. 300, purports or attempts to reach a case like that of the plaintiff in error. The provision in Art. 401 that for this purpose every one shall be considered a public official who, . . . by popular election or appointment by competent authority, takes part in the exercise of public functions, does not help Article 300. That also seems to contemplate an office having some degree of permanence. But however that may be, the plaintiff in error was performing no public function of the civil government of the Philippines; he was performing military functions to which the civil government contributed a little money. As a soldier he was not an official of the Philippines but of the United States. If Philippine legislation attempted to add to the immediate responsibilities of the soldier in the course and performance of his duty under the paramount authority from which that legislation derives its right to be, we should have to inquire whether we could gather from any act of Congress the intention to permit what might become the instrument of dangerous attacks upon its power. It is a wholly different question from that where a soldier not in the performance of his duty commits an ordinary crime. But we do not understand the Penal Code to have the suggested scope.

Judgment reversed.

The same judgment will be entered in Nos. 224 and 225, which were to abide the result of this case.

CHIN YOW *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 76. Submitted December 13, 1907.—Decided January 6, 1908.

The conclusiveness of the decision of the Commissioner of Immigration, denying a person the right to enter the United States under the immigration laws, must give way to the right of a citizen to enter and also to the right of a person seeking to enter, and alleging that he is a citizen, to prove his citizenship, and it is for the courts to finally determine the rights of such person.

A Chinese person seeking to enter the United States and alleging citizenship is entitled to a fair hearing, and if, without a fair hearing or being allowed to call his witnesses, he is denied admission and delivered to the steamship company for deportation, he is imprisoned without the process of law to which he is entitled; and although he has not established his right to enter the country, the Federal court has jurisdiction to determine on *habeas corpus* whether he was denied a proper hearing and if so, to determine the merits; but unless and until it is proved that a proper hearing was denied the merits are not open. *United States* v. *Ju Toy*, 198 U. S. 253, distinguished.

Denial of a hearing by due process cannot be established merely by proving that the decision on the hearing that was had was wrong.

THE facts are stated in the opinion.

Mr. Maxwell Evarts, for appellant:

A United States District Court cannot refuse to grant a writ of *habeas corpus* upon a petition alleging that the applicant is a citizen of the United States, and asserting facts showing that he was ordered deported from his country by the arbitrary action of the immigration officers and the abuse of their discretion and powers.

Where, as in this case, the petitioner alleges facts which show an abuse of the power and discretion vested in the im-

migration officer who heard his case, and gives in his petition the names of a number of persons, who, as he alleges, could easily have shown conclusively that he was a citizen of the United States, and further states in his petition, that he was prevented by the immigration officer from producing these witnesses before him, and that his attorneys were not permitted to see and read the evidence which had been taken before the immigration officer upon the investigation of his case, then, in such a case, the rules laid down by this court in the case of *United States* v. *Ju Toy*, 198 U. S. 253, do not apply.

The privilege of the writ of *habeas corpus* cannot be denied to a man who insists that he is a citizen of the United States, and that he is excluded by the arbitrary action of, and the abuse of the powers and discretion reposed in, the immigration officers, and is to be deported from his country without an opportunity in the courts to show whether what he says with reference to an abuse of the discretion and power by the immigration officials is true.

The rights of a citizen are very different from the rights of an alien. *United States* v. *Wong Kim Ark*, 169 U. S. 649, 653. *The Japanese Immigrant Case*, 189 U. S. 86, *Lem Moon Sing* v. *United States*, 158 U. S. 538, and *Fok Yong Yo* v. *United States*, 185 U. S. 296, and other immigration cases discussed and distinguished.

Mr. Assistant Attorney General Cooley, for appellee:

This court has no jurisdiction of the appeal herein. The lack of the certificate required by the act of March 3, 1891, c. 517, § 5, 26 Stat. 826, or some equivalent thereof, is fatal to the appeal. *Courtney* v. *Pradt*, 196 U. S. 89, 91, 92.

The petition does not expressly assert any right or privilege under the Constitution. Whatever may be sought to be implied, it certainly cannot be said that it appears from the petition, "by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does

really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States." *Western Union Telegraph Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 244; *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 281; *Carey* v. *Houston and Texas Central Ry. Co.*, 150 U. S. 170, 181.

The constitutionality of the rules and regulations of the Secretary of Commerce and Labor, referred to in the petition, was upheld by this court in the cases of *United States* v. *Sing Tuck*, 194 U. S. 161, and *United States* v. *Ju Toy*, 198 U. S. 253. That is no longer an open question, and cannot be made the basis of an appeal to this court, even if it were properly raised.

The averment of the petition that, had the "petitioner been given opportunity to have an attorney, and to communicate with his friends and other persons, he could have produced abundant and overwhelming evidence to show that he was born in the United States, and remained within the United States, until 1904, when he departed to China on a temporary visit," was insufficient to show that he would have been able to prove that he was a citizen of the United States. Under the *Wong Kim Ark case*, 169 U. S. 649, 705, birth alone of a Chinese child in the United States is not sufficient to make him a citizen, but it must further appear that his parents at the time of his birth had a permanent domicil and residence in the United States and were not employed in any diplomatic or official capacity under the Chinese Government. The allegations of the petition do not meet these requirements.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for *habeas corpus* by a Chinese person, alleging that he is detained unlawfully by the General Manager of the Pacific Mail Steamship Company on the ground that he is not entitled to enter the United States. The petition alleges that the petitioner is a resident and citizen of the United

States, born in San Francisco of parents domiciled there, but it discloses that the Commissioner of Immigration at the port of San Francisco, after a hearing, denied his right to land, and that the Department of Commerce and Labor affirmed the decision on appeal. The petitioner thereupon was placed in custody of the steamship company to be sent to China. So far the case is within *United States* v. *Ju Toy*, 198 U. S. 253, and the petition was dismissed for want of jurisdiction (presumably on the ground of that decision), as sufficiently appears from the record, the reasons assigned for the appeal and the order allowing the same. But the petition further alleges that the petitioner was prevented by the officials of the Commissioner from obtaining testimony, including that of named witnesses, and that had he been given a proper opportunity he could have produced overwhelming evidence that he was born in the United States and remained there until 1904, when he departed to China on a temporary visit. We do not scrutinize the allegations as if they were contained in a criminal indictment before the court upon a special demurrer, but without further detail read them as importing that the petitioner arbitrarily was denied such a hearing and such an opportunity to prove his right to enter the country as the statute meant that he should have. The question is whether he is entitled to a writ of *habeas corpus* on such a case as that.

Of course if the writ is granted the first issue to be tried is the truth of the allegations last mentioned. If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. And, by way of caution, we may add that jurisdiction would not be established simply by proving that the Commissioner and the Department of Commerce and

Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced. But, supposing that it could be shown to the satisfaction of the District Judge that the petitioner had been allowed nothing but the semblance of a hearing, as we assume to be alleged, the question is, we repeat, whether *habeas corpus* may not be used to give the petitioner the hearing that he has been denied.

The statutes purport to exclude aliens only. They create or recognize, for present purposes it does not matter which, the right of citizens outside the jurisdiction to return to the United States. If one alleging himself to be a citizen is not allowed a chance to establish his right in the mode provided by those statutes, although that mode is intended to be exclusive, the statutes cannot be taken to require him to be turned back without more. The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation on the one side and the conclusiveness of the Commissioner's fiat on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts. In order to decide what we must analyze a little.

If we regard the petitioner, as in *Ju Toy's case* it was said that he should be regarded, as if he had been stopped and kept at the limit of our jurisdiction, 198 U. S. 263, still it would be difficult to say that he was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China. The case would not be that of a person simply prevented from going in one direction that he desired and had a right to take, all others being left open to him, a case in which the judges were not unanimous in *Bird* v. *Jones*, 7 Q. B. 742. But we need not speculate upon niceties. It is true that the petitioner gains no additional right of entrance by being allowed to pass the

frontier in custody for the determination of his case. But on the question whether he is wrongly imprisoned we must look at the actual facts. *De facto* he is locked up until carried out of the country against his will.

The petitioner then is imprisoned for deportation without the process of law to which he is given a right. *Habeas corpus* is the usual remedy for unlawful imprisonment. But on the other hand as yet the petitioner has not established his right to enter the country. He is imprisoned only to prevent his entry and an unconditional release would make the entry complete without the requisite proof. The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship a longer restraint would be illegal. If he fails the order of deportation would remain in force.

We recur in closing to the caution stated at the beginning, and add that while it is not likely, it is possible that the officials misinterpreted Rule 6 as restricting the right to obtain witnesses which the petitioner desired to produce, or Rule 7, commented on in *United States* v. *Sing Tuck*, 194 U. S. 161, 169, 170, as giving them some control or choice as to the witnesses to be heard. But unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong.

Order reversed.
Writ of habeas corpus to issue.

MR. JUSTICE BREWER concurs in the result.

NEW YORK *ex rel.* EDWARD AND JOHN BURKE, LIMITED, *v.* WELLS *et al.*, AS COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY OF NEW YORK.

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

No. 39. Argued November 5, 6, 1907.—Decided January 6, 1908.

While the State may not directly tax imported goods or the right to sell them, or impose license fees upon importers for the privilege of selling, so long as the goods remain in the original packages and are unincorporated into the general property, *Brown* v. *Maryland*, 12 Wheat. 419, when the article has lost its distinctive character as an import and been mingled with other property, it becomes subject to the taxing power of the State. *May* v. *New Orleans*, 178 U. S. 496.

When a foreign manufacturer establishes a permanent place of business in this country for the sale of imported articles, although the bulk of the proceeds may be sent abroad, such proceeds as are retained here as cash in bank and notes receivable, and are used in connection with the business, lose the distinctive character which protects them under the Federal Constitution and become capital invested in business in the State and carried on under its protection and are subject to taxation by the laws of that State.

Whether this rule applies to open accounts for goods sold, not decided, the state court not having passed on that question.

184 N. Y. 275, affirmed.

THIS is a writ of error to the Supreme Court of the State of New York to review the judgment rendered upon a remittitur from the Court of Appeals of the same State, wherein an assessment of taxes against the plaintiff in error, imposed by the Board of Taxes and Assessments of the City of New York, who are the defendants in error, was affirmed. The taxes were for the year 1903, and were imposed under the statutes of the State of New York taxing non-residents of the State doing business in the State on the capital invested in such business, as personal property at the place where such business is carried on, to the same extent as if they were residents of the State. N. Y. General Tax Law, chap. 908, Laws of 1896, § 7.

The respondents, in the return to the writ of certiorari issued

by the Supreme Court of New York, stated that the method by which the assessment for the year 1903 was arrived at was as follows:

"On the statement submitted to us (Schedule A) it appeared that the relator was a corporation organized under the laws of the Kingdom of Great Britain and Ireland, that it had procured a certificate authorizing it to do business in this State, that the business of the corporation proposed to be carried on within this State, stated in its application under the provisions of chapter 687 of the Laws of 1892, was importers, that the place within the State named in said application as its principal place of business was 409 West 14th street, that the company transacted business within this State at No. 409 West 14th street, in the City of New York, Borough of Manhattan, and that the company was assessed by the State Comptroller for $124,000.

"It further appeared that the relator kept a wareroom and offices in the Borough of Manhattan, to which it sent its products from Ireland in unbroken original packages to be sold, that on all these goods it paid duties to the United States, that the proceeds of the goods were at once remitted to the main office in Dublin, after reserving the necessary amount for paying the expenses of the business conducted in the City of New York, that the value of the goods on hand, as shown in the statement, was about the average amount of the goods usually kept here for sale, that the greater part of the cash on hand and in bank was in process of transmission to the main office, that the bank account was to a very large extent kept to cover the payment of duties on the goods shipped here for sale, and that the entire amount of bills receivable resulted from the sales of imported goods in unbroken original packages, as did the cash on hand and in bank.

The amount receivable on notes and open accounts was stated to be	$111,751.53
The value of goods, wares and merchandise in this State	45,841.21

The value of safes, fixtures and furniture in this State	$ 797.68
Cash on hand and in bank	6,122.63
Cost price of imported goods on hand in unbroken original packages	45,841.21
Amount of bills and accounts payable, incurred for items included in the sales and assets enumerated	24,053.91

"It was admitted that the amount invested in business in this State was $797.68, which was the value of the relator's safes, fixtures and furniture in this State.

"From all this evidence we determined that the relator had on the second Monday of January, 1903, established and was conducting a permanent and continuous business in this State.

"We further determined that the amount receivable on notes and open accounts, and the cash on hand and in bank, constituted capital of the relator invested in its business in this State, and that such items were properly assessable by us. We accordingly fixed the assessment against the relator for the year 1903 for capital invested in business in this State at the sum of $94,600, which amount was approximately the aggregate value of the amount receivable on notes and open accounts, the safes, fixtures and furniture in this State, and the cash on hand and in bank, less the amount of bills and accounts payable incurred for the items included in the sales and assets enumerated in said statement."

The assessment was confirmed when brought for review upon certiorari before the New York Supreme Court, which judgment was affirmed in the Appellate Division, and the latter judgment was affirmed by the Court of Appeals (184 N. Y. 275), from which judgment, upon remittitur, the judgment was rendered in the Supreme Court to which this writ of error is prosecuted.

Mr. Edmund Wetmore for plaintiff in error:

A state tax upon the proceeds received for the sale of an

article in original and unbroken packages, imported only for sale, and upon which duties have been paid, and where the only disposition made of said proceeds is to collect them and at once remit them to the importer abroad, after deducting the amount of duties paid and the expenses necessarily incident to said importation and sale, is a tax upon imports and a violation of the Constitution of the United States. *Brown* v. *Maryland*, 12 Wheat. 436; *Fairbank* v. *United States*, 181 U. S. 283, 295; *The People* v. *Maring*, 3 Keyes, 374, 376.

A tax upon the sale of imported goods, as above set forth, is not affected by the form of the tax, whether it is *eo nomine* upon the right to sell, or upon the proceeds, or upon the business of importing, or in any other form, provided it is the same in effect as if it was upon the right to sell, and must be paid by the importer in like manner as a direct duty on the article itself would be paid. *Cook* v. *Pennsylvania*, 97 U. S. 566; *McCulloch* v. *Maryland*, 4 Wheat. 436; *Crandall* v. *State of Nevada*, 6 Wall. 35; *Case of the State Freight Tax*, 15 Wall. 232; *Western Union Tel. Co.* v. *Alabama*, 132 U. S. 472; *Fargo* v. *Michigan*, 122 U. S. 230; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688; *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 236.

The tax complained of was, in effect, levied on the goods of the plaintiff in error, and paid by the plaintiff in error for the right to sell them, and the proceeds from which the tax was deducted had not become part of the common mass of property within the State of New York, nor were they invested therein.

The proceeds of the imported goods represented by bills receivable and cash in bank were not taxable by the State, as they had not become part of the common mass of property within the State and were not invested in business there. Their identity as the proceeds of the sale of the goods in original packages was never lost. They were transmitted to the plaintiff in error as soon as they were transmissible. The plaintiff in error is a foreign resident, did no other business in the State

of New York except the sale of its products in original packages and the collection and remittance of the said proceeds, and there is no proof or assertion that it had any other property in the State than said goods and proceeds outside of office furniture and fixtures. The said proceeds were not invested in the State of New York and did not constitute taxable capital invested in business in said State.

The fact that the plaintiff in error does business in New York is immaterial. Its claim is that it has received from the United States the right to sell certain goods while in their original packages, whether said sales are made in the course of that business or not, and that the State cannot impose a tax, in any form which directly impairs that right, whether the said goods are or are not capital invested in the State, and that the tax on the proceeds of said sale is a direct impairment of that right.

The tax cannot be sustained simply as a tax on business. *Crandall* v. *State of Nevada*, 6 Wall. 35, and cases cited *supra*.

The sale of the goods in the original packages is the conversion of said goods into money. The right to make that conversion is the very thing which the Constitution protects. Mere conversion of the imported goods which are an asset of the business, into an asset of another form, namely, money paid or to be paid, is not such an incorporation of the proceeds with the general property of the country as renders them subject to state taxation. *People ex rel. National Sewing Machine Co.* v. *Feitner*, N. Y. Law Journal, March 15, 1899.

The fact that part of the proceeds represented by deferred payments may be retained and expended for expenses incidental to the original sales or in payment of duties on subsequent importations because duties must be paid in advance of taking the goods out of the custom house, does not relieve the tax under consideration from its unconstitutional character.

Mr. George S. Coleman, with whom *Mr. Francis K. Pendleton* was on the brief, for defendants in error:

The credits and moneys of the plaintiff in error, representing

proceeds of sales of its goods within the State of New York, constituted capital invested in business in said State under the provisions of the tax law.

From the fact of the final confirmation of the assessment in this case by the highest court of the State of New York, it will, we assume, be accepted as the law of that State, without argument or citation of other authorities, that cash in hand or in bank and bills and accounts receivable, being the proceeds of goods sold in regular course of a continuous business, constitute capital invested in such business. *People ex rel. Farcy & Oppenheim Co.* v. *Wells*, 183 N. Y. 264.

The tax imposed upon the credits and moneys representing proceeds of sales did not contravene the provisions of the Federal Constitution.

The tax imposed on the assessment in question violates none of the rules established by the highest court. The value of the imported goods in original unbroken packages was deducted from the total assets, so that there is no tax imposed on imports as such. It is not a license tax that an importer must pay before he can sell, nor a tax upon the sales made by him throughout the year. It is merely the annual tax on a part of the general mass of taxable property in the State. *Brown* v. *Maryland*, 12 Wheat. 419; *Cook* v. *Pennsylvania*, 97 U. S. 566, and *Warring* v. *Mayor*, 8 Wall. 110, distinguished.

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

It is the contention of the plaintiff in error that the assessment upon $94,617.93, made upon office furniture, cash on hand and in bank and the amount receivable upon bills and accounts payable, is void, except as to the item of office furniture, because of the protection afforded by the Constitution of the United States against taxes by States upon imports.

As to the open accounts which might be included in the bills receivable, the Court of Appeals declined to pass upon the

validity of the taxes on them, as, according to the practice in that State, it was incumbent upon the relator to point out what part of the bills receivable were of that class, but did hold that the cash, and the notes which it was admitted were held in New York until maturity, although the proceeds of sale of goods imported and sold in the original packages, were properly within the taxing power of the State of New York under the section of the statute referred to, and that such exercise of power did not violate the Constitution of the United States.

The section of the Constitution relied upon by the plaintiff in error in the argument in this court is Article I, § 10, which provides:

"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

The contention of the learned counsel for plaintiff in error is succinctly stated in his brief as follows:

"The ground taken by the plaintiff in error is that the tax on the proceeds of the goods in original packages in the course of transmission to the owner abroad is in essence and effect a tax upon the sale of said goods, and, therefore, a tax upon imports and a violation of the Constitution under the principle laid down in *Brown* v. *State of Maryland*, 12 Wheat. 419, and the cases following that decision."

The case referred to (*Brown* v. *Maryland*) is the leading one upon this subject, and has been cited perhaps as often as any of the great decisions of Chief Justice Marshall, and not attempted to be modified in the subsequent decisions of this court. In that case this section, as well as Article I, § 8, the commerce clause of the Constitution, were given consideration by the court. It was held that an act of the State of Maryland,

which required an importer of foreign merchandise, under certain penalties, to take out a license from the State, for which he should be taxed $50, before he should be authorized to sell the imported articles in the original packages, was in violation of the commerce clause of the Constitution and within the prohibition on the States of the right to levy duty on importations. And in this connection the Chief Justice discussed and laid down certain general principles by which to determine whether an act of the legislature does interfere with the paramount purpose of the Constitution in these respects.

In a late case in this court *Brown* v. *Maryland* is fully considered, and the following propositions are said to be established in that case:

"1. That the payment of duties to the United States gives the right to sell the thing imported, and that such right to *sell* cannot be forbidden or impaired by a State:

"2. That a tax upon the thing imported during the time it retains its character as an import and remains the property of the importer, 'in his warehouse, in the original form or package in which it was imported,' is a duty on imports within the meaning of the Constitution; and

"3. That a State cannot, in the form of a license or otherwise, tax the right of the importer to *sell;* but when the importer has *so acted upon* the goods imported that they have become incorporated or mixed with the general mass of property in the State, such goods have then lost their distinctive character *as imports,* and have become from that time subject to state taxation, not because they are the products of other countries, but because they are property within the State in like condition with other property that should contribute, in the way of taxation, to the support of the government which protects the owner in his person and estate." *May* v. *New Orleans,* 178 U. S. 496, 507.

In *Cook* v. *Pennsylvania,* 97 U. S. 566, it was held that the tax by the State on the amount of sales of goods made by an auctioneer of imported goods, before incorporation into

the general property in the State, was a tax on the goods themselves. Previous cases were reviewed by Mr. Justice Miller, and the result of them stated to be, p. 573:

"The tax on sales made by an auctioneer is a tax on the goods sold, within the terms of this last decision, and, indeed, within all the cases cited; and when applied to foreign goods sold in the original packages of the importer, before they have become incorporated into the general property of the country, the law imposing such tax is void as laying a duty on imports."

And in the late case of *The American Steel & Wire Co.* v. *Speed*, 192 U. S. 518, the distinction was pointed out between taxes upon goods imported from abroad, imported in the legal sense, and those sent from another State; as to which latter class of merchandise the States have the power, after the goods reach their destination and are held for sale, to tax them. Whereas, following *Brown* v. *Maryland*, where goods are imported in the strict sense they preserve their character as imports so long as they are not sold in the original packages in which they are imported or by the act of the importer incorporated into the general property of the State.

It may be stated as the result of the decisions that as to imported goods the State may not impose taxes directly upon the goods or upon the right to sell them, or impose license fees upon importers for the privilege of selling, so long as the goods remain in the original package unincorporated into the general property. All such attempts at taxation are in violation of the Constitution and void.

But in *Brown* v. *Maryland*, and in subsequent cases in this court, the principle is recognized, as was stated by Chief Justice Marshall in the original case, that this prohibition in the Constitution should be carried "no further than to prevent the States from doing that which it was the great object of the Constitution to prevent;" which was interference with either the collection of duties upon imports or the right of the importer, who has paid duty, to sell the imported goods in the unbroken packages in which they were imported.

The Chief Justice instanced the case of the pedler who carried goods unpacked from the original packages for sale through the country, and the case of the importer of plate for his own use, whose privileges did not extend beyond the protection of the right of the importer to sell in the original packages, and whose conduct in reference to the goods had been such as to destroy their character as original packages and mingle them with the goods and property of the country, and thus, notwithstanding their importation, to make them, for the purpose of taxation, part of the general property of the country and liable to contribute in consideration of the protection received, to the general welfare, by way of taxes levied for public purposes. This right of taxation by the State was distinctly recognized in *May* v. *New Orleans*, 178 U. S. 496, where the goods imported in the original packages were separated therefrom and placed on the shelves and counters of the importing merchant.

The exact question in this case is, has a condition of facts arisen which renders applicable the principle that the thing taxed has lost its distinctive character as an import in such sense that it has become subject to the taxing power of the State?

The power of the State of New York to impose a tax upon the cash and these notes as capital employed in a business within the State, laying aside for the moment the question as to their character as proceeds of the sale of imports, cannot be doubted in view of the previous decisions of this court. Particularly the recent case of *Metropolitan Life Insurance Co. of New York* v. *City of New Orleans*, decided at the last term, 205 U. S. 395, wherein it was held that those engaged in the business of lending money in a State, being non-residents of the same, might be taxed upon the capital employed in such business, precisely as the State could tax the capital of its own citizens.

The constitutional protection as we have seen is intended to secure the right to bring in and to sell in the original packages

the goods imported; and, that this right may not be impaired, direct taxes upon goods or license taxes for the privilege of sale cannot be levied, and the decision in *Brown* v. *Maryland* recognizes that the importer may lose this right of protection by mingling such goods with other property and altering their character as importations in original packages, and making them by his conduct subject to the taxing power of the State. And we think the same principle may be applied to the proceeds of the sale of the goods, which, while not directly taxable as such, any more than the goods themselves, may be dealt with by the owner in such wise as to become subject to taxation as other property.

And we think such a case is presented in the facts now before us. The plaintiffs in error have established a warehouse and place of business in the State of New York for the sale of their imported goods. This business is of a permanent character; the goods are constantly received and sold and replaced by other goods. Cash is deposited in bank in New York and is subject to use as the needs of the business may require. In this business it takes notes for sales of such goods. These notes are not directly transmitted to its home office in Dublin, but are held for collection in connection with the business in New York, and while the bulk of the proceeds may be sent abroad, sufficient sums are retained to meet the expenses of the business and pay duties on subsequent importations of goods.

We think the constitutional protection afforded the importer against state action does not require the property thus held and used to be exempted from state taxation. While it is true that a large proportion of proceeds of the notes after collection are sent to the home office of the plaintiffs in error, they are not taxed in transit as the proceeds of sale of imported goods, for the notes are held in New York for collection, and when paid a part of the proceeds are held for other purposes in connection with the business and the balance remitted to the home office.

By reason of this course of conduct we think these proceeds have lost that distinctive character which would give them the right to the protection of the Federal Constitution under the clause invoked, and the cash taxed and the amount of these notes have become capital invested in business in the State of New York, which business is carried on under the protection of the laws of that State, and, so far as the capital is invested in it, is subject to taxation by the laws of the State.

We think the Court of Appeals did not err, and the judgment of the Supreme Court rendered upon remittitur from the Court of Appeals is

Affirmed.

YOSEMITE GOLD MINING AND MILLING COMPANY *v.* EMERSON.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 69. Argued December 13, 1907.—Decided January 6, 1908.

The object of requiring the posting of the preliminary notice of mining claims is to make known the purpose of the discoverer and to warn others of the prior appropriation; and one having actual knowledge of a prior location and the extent of its boundaries, the outlines of which have been marked, cannot relocate it for himself and claim a forfeiture of the original location for want of strict compliance with all the statutory requirements of preliminary notice.

The determination by the trial court that the locators of a mining claim had resumed work on the claim after a failure to do the annual assessment work, required by § 2324, Rev. Stat., and before a new location had been made, and the finding by the highest court of the State that such determination is conclusive, do not amount to the denial of a Federal right set up by the party claiming the right to relocate the claim, and this court cannot review the judgment under § 709, Rev. Stat.

Quære and not decided, whether a forfeiture arises simply from a violation of a mining rule established by miners of a district which does not expressly make non-compliance therewith work a forfeiture.

149 California, 50, affirmed.

THE facts are stated in the opinion.

Mr. W. C. Kennedy, for plaintiff in error. *Mr. A. H. Jarman* was on the brief:

Coyle never made a valid location of the Slap Jack Mine, because he failed to comply with the miners' rules and the regulations of the miners of Tuolumne County, duly made in pursuance of § 2324 of the Revised Statutes of the United States, and this being so the ground at the time of the location by McWhirter was open, public mineral land of the United States.

To make a location of a mining claim under these rules and regulations the United States laws must be followed in reference to marking the boundaries on the ground so that the same may be readily traced, and, in addition thereto, a notice of location must be posted at each end of the claim. When this is done a claim is located, and not before. These initiatory steps must be taken before any right vests in the locator. There must be a vested right of some kind before there can be a forfeiture of that right. A man cannot forfeit that which he has not, or never has had. *Adams* v. *Crawford*, 116 California, 498.

The recording of the notice is not an act of location, but something that follows the acts of location. The acts of location are what are done upon the ground. The local rules of Tuolumne County prescribed what should be done upon the ground in order to make the location, and these rules should have been followed.

The rules so adopted by the miners of the district, except where in conflict with some laws of the United States or of the State of California, being authorized and sanctioned by express statutory enactment, are, when in force, as valid and binding as if they were a part of the statute itself. *Gird* v. *California Oil Co.*, 60 Fed. Rep. 531–534. See also *Howeth* v. *Sullinger*, 113 California, 550; *Carter* v. *Baccigalupi*, 83 California, 188; *Northmore* v. *Simmons*, 97 Fed. Rep. 388; and *Harvey* v. *Ryan*, 42 California, 626.

Miners have the authority of the United States statutes and the law of the State of California, authorizing and empowering

them to make regulations governing the location of a mining claim, and such regulations must be followed, otherwise the attempted location not following such regulations is invalid *ab initio*.

Mr. John E. Laskey, with whom *Mr. J. P. O'Brien* was on the brief, for defendants in error:

After a claim has been marked on the ground and after the notice has been recorded, the notice posted on the claim has served its purpose, and it then becomes *functus officio*. Thereafter it is immaterial whether one notice or a dozen has been posted.

Besides, the mining rules of the Tuolumne Mining District do not provide a penalty for a failure to post two notices; consequently that requirement is simply directory and does not operate as a forfeiture of title.

The failure of a party to comply with a mining rule or regulation cannot work a forfeiture of his title thereto unless the rule itself so provides. *Emerson* v. *McWhirter*, 133 California, 511; *McGarrity* v. *Byington*, 12 California, 426; *Bell* v. *Red Rock T. & M. Co.*, 36 California, 214; *Rush* v. *French*, 1 Arizona, 99; *Johnson* v. *McLaughlin*, 1 Arizona, 493; *Jupiter M. Co.* v. *Bodie M. Co.*, 11 Fed. Rep. 666; *Flaherty* v. *Gwinn*, 1 Dak. Append. 509.

When McWhirter attempted to relocate the Slap Jack Mine he had all the knowledge and information concerning the prior location thereof which he could possibly have obtained if a dozen notices had been posted upon the claim. He was not, and could not, therefore, be injured or misled in any way by the failure of Coyle to post the second notice.

Mining rules enacted by the miners for their own protection should be liberally construed so as to effectuate that purpose. *Talmadge* v. *St. John*, 129 California, 430.

It was not intended by the framers of these rules that they should be given such a hypertechnical construction as would enable a midnight marauder to despoil a locator of the fruits

of his industry. *Lawson* v. *United States Mining Co.*, 207 U. S. 1.

MR. JUSTICE DAY delivered the opinion of the court.

This case originated in an action brought to quiet title to a certain mining claim called the Slap Jack Mine situated in Tuolumne County, California. The case was twice in the Supreme Court of California. In the first trial the Superior Court of Tuolumne County gave judgment in favor of the then defendant McWhirter; on appeal this judgment was reversed. 133 California, 510. After the case went back the present plaintiff in error, the Yosemite Gold Mining and Milling Company as the successors in interest to McWhirter and defendants Argall, was made a defendant.

As to the Argall interest, covering nine-twentieths of the property, based on the same location, while judgment was rendered in the court below as to this interest against the present plaintiff in error, in the Supreme Court a new trial was awarded and the case remanded, and with that interest we have nothing to do upon this writ of error.

As to the remaining eleven-twentieths, the court rendered a final judgment against the present plaintiff in error, Yosemite Gold Mining and Milling Company, decreeing that the defendants in error F. F. Britton and Anne L. Emerson were each the owner of one undivided fourth part of the claim, and defendant in error Miller the owner of the one undivided twentieth part thereof. 149 California, 50. To this judgment the present writ of error is prosecuted.

We proceed to examine the questions which are now in this court. The mining claim of the Yosemite Gold Mining and Milling Company, plaintiff in error, is based upon the attempted location thereof within the same limits as the original Slap Jack Mine, made by McWhirter on January 1, 1899, shortly after midnight. McWhirter undertook to "jump" the former claim upon the theory that the assessment work for the year

1898 required by § 2324, Rev. Stat., as amended in 1880, 21 Stat. 61, 2 U. S. Comp. Stat. 1426, had not been done.

The first contention made by the plaintiff in error is that one Coyle, under whom the defendants in error claim title, never made a valid location of the mining claim, because he posted but one notice of location upon the claim. Under the authority of § 2324, Rev. Stat., *supra*, the miners of every mining district are given authority to make regulations not in conflict with the laws of the United States or any State or Territory in which the district is situated. 2 Comp. Stat. 1426. Section 3 of the Mining Rules and Regulations of Tuolumne Mining District of Tuolumne County, California, provides:

"SEC. 3. Mining claims hereafter located in said district upon veins or lodes of quartz, or other rock, or veins of metal, or its ores, shall be located in the following manner, to wit: By posting thereon two notices, written or printed upon paper, or some metallic or other substance, each to be posted in such manner as to expose to view the full contents of the notice, one of which shall be posted in a conspicuous place at each end of the claim. Said notices shall contain the name or names of locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument as will identify the claim. Said notice may be in the following form, to wit:

"'Notice is hereby given that the undersigned have taken up — hundred feet of this vein or lode, and that the claim so taken up is described as follows: (Here insert description.) Dated — day of ——, 18—.

"'A. B.

"'C. D.'"

The Supreme Court of California held that its decision in the present case upon this question was concluded by the ruling made upon the first appeal, which decision continued to be the law of the case. Upon the first appeal (133 California, 510) it was held that the failure to comply with the mining

rules in this respect would not work a forfeiture of title, inasmuch as there was nothing in the rules which made noncompliance a cause of forfeiture; that unless the rule so provided, the failure to comply with its requirements would not work a forfeiture. The court cited other California cases to the same point and cases from the Supreme Court of Arizona, *Rush* v. *French*, 1 Arizona, 99; *Johnson* v. *McLaughlin*, 1 Arizona, 493; also the decision of Judge Sawyer in *Jupiter Mining Company* v. *Bodie Consolidated Mining Company*, 11 Fed. Rep. 666. There seems to be a conflict in state decisions upon this subject. The Supreme Court of Montana differs with the Supreme Court of California. *King* v. *Edwards*, 1 Montana, 235, 241. As does also the Supreme Court of Nevada. *Mallett* v. *Uncle Sam G. & S. M. Company*, 1 Nevada, 188. Lindley, in his work on Mines, seems to prefer the California rule as a "safe and conservative rule of decision, tending to the permanency and security of mining titles." 1 Lindley on Mines (2d ed.), § 274. But in view of the facts of this case we do not deem it necessary to decide whether a forfeiture will arise simply from a violation of this mining regulation.

It appears in this record that McWhirter's location was made about three years after the Coyle location, and after the record of the notice and the marking of the claim on the grounds so that the boundaries could be readily seen. Furthermore it appears from the testimony of McWhirter:

"I knew the Jim Blaine Mine, formerly the Slap Jack Mine. I went on the property first on Saturday, December 31st, 1898. I went with James Paul. I looked over the ground. Mr. Paul showed me the boundaries of the claim. I ascertained the different points of the claim and the monuments. . . . When I attempted to locate the claim known as the Jim Blaine Mine I was attempting to 'jump' or relocate the Slap Jack Mine. The ground embraced within the exterior boundaries of the Jim Blaine Mine was the same ground included within the exterior boundaries of the Slap Jack Mine. When I was on the ground on December 31, 1898, I knew the boundaries of

the Slap Jack Mine. They were pointed out to me by Mr. Paul on December 31, 1898."

In further course of examination he testifies that he was sent up by another party to jump the Slap Jack Mine. McWhirter was not undertaking to take advantage of the want of notice, but was "jumping" the claim on the theory that the required amount of assessment work for 1898 had not been done. To hold that the want of notice under such circumstances would work a forfeiture would be to permit the rule to work gross injustice and to subvert the very purpose for which it was enacted. The object of posting the preliminary notice of the claim is to make known the purpose of the discoverer to claim title to the same to the extent described and to warn others of the prior appropriation. Lindley on Mines (2d ed.), § 350. In this case the locator had gone beyond this preliminary notice; the outlines of the claim had been marked, and the extent of the claim was fully known to McWhirter when he attempted his location. He knew all about the location and boundaries of the claim that any notice could have given him. He undertook to locate his new claim precisely within the boundaries of the old one, and was seeking to take advantage of the want of compliance with the statutory requirement as to the amount of annual assessment work to be done. Having this knowledge, we hold that McWhirter, and those claiming under him, could not claim a forfeiture of title for want of preliminary notice under the former location. We thus dispose of the only question which could be held to raise a Federal question. Upon the other points made as to the McWhirter interest, we think this case presents no Federal question.

The contention is made that the assessment work required by § 2324, Rev. Stat., was not done for the year 1898. As pointed out by the Supreme Court of California, § 2324 provides: The mine "shall be open to relocation in the same manner as if no location of the same had ever been made, provided the original locators, their heirs, assigns or legal

representatives, have not resumed work upon the claim after failure and before such location." The trial court found that the work had been resumed before the attempted adverse location. After reciting the conflict of testimony in the trial court as to whether the work had been resumed within the meaning of the statute, so as to prevent such adverse location, the Supreme Court said: "It was for the trial court to determine this conflict, which it has done by the finding in question, and its determination is conclusive upon this appeal."

In thus deciding the Supreme Court of the State did not, within the meaning of § 709, Rev. Stat., decide any right of Federal origin adversely to the plaintiffs in error. It simply held that there was a conflict of testimony in the record upon this subject, and that the conclusion of the court below upon this matter of fact was conclusive upon the appellate court. This does not amount to a denial of a Federal right, concerning which the plaintiff in error had especially set up his claim so as to give the right of review of the decision of the state Supreme Court in this court. *Dower* v. *Richards*, 151 U. S. 658, and cases therein cited.

The judgment of the Supreme Court of California is

Affirmed.

UNITED STATES *v.* MILLER.

APPEAL FROM THE COURT OF CLAIMS.

No. 90. Submitted December 16, 1907.—Decided January 6, 1908.

Under §§ 1098 and 1261, Rev. Stat., and the opening clause of the Navy Personnel Act of March 13, 1899, 30 Stat. 1004, a naval officer assigned to duty on the personal staff of an admiral as flag lieutenant, without any other designation, is an aid to such admiral and entitled to the additional pay of $200 allowed to an aid of a major general in the Army.

41 C. Cl. 400, affirmed on this point.

Under § 1262 and the act of June 30, 1882, 22 Stat. 118, an aid to an admiral is not entitled to have his longevity pay calculated upon the additional pay which he receives as aid, that being under § 1261, Rev. Stat., an allowance in addition to, and not a part of, the pay of his rank.
41 C. Cl. 400, reversed on this point.

THE facts, which involve the construction of §§ 1098 and 1261 of the Revised Statutes, and the opening clause of the Navy Personnel Act of March 13, 1899, are stated in the opinion.

Mr. Assistant Attorney General Van Orsdel and *Mr. John Q. Thompson*, Special Attorney, for appellant.

Mr. George A. King and *Mr. William B. King*, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This case is an action in the Court of Claims brought by William G. Miller, a lieutenant in the Navy, and who served as flag lieutenant on the personal staff of Rear Admiral Kautz from July 1, 1899, to March 2, 1900, for which period he claims that he is entitled to recover pay at the additional rate of $200 a year, as an aid to the rear admiral, and, secondly, an additional sum for longevity increase, based upon this additional allowance. The facts were found by the Court of Claims and judgment rendered in favor of the claimant upon both branches of his claim. 41 C. Cl. 400. From this judgment the United States appeals.

It is the contention of counsel for the appellee, claimant below, that this case is ruled by the decision of this court in *United States* v. *Crosley*, 196 U. S. 327, upon both branches.

From the findings of fact it appears that the claimant was a lieutenant in the Navy from July 1, 1899, to March 2, 1900, of more than fifteen years' service. On October 15, 1898, he reported, by order of the Secretary of the Navy, to Rear Admiral Kautz, commander-in-chief of the Pacific Division.

for such duty as might be assigned him on the flagship. On that day he was assigned to duty on the personal staff of the commander-in-chief as flag lieutenant, where he continued to serve until March 2, 1900. During that time the personal staff of Rear Admiral Kautz consisted of two officers, one, the claimant, Miller, designated as flag lieutenant, and the other flag secretary or clerk.

In the findings of fact the duties of the officers constituting the personal staff are set forth in a letter from the Secretary of the Navy, which we shall have occasion to notice later.

The claim for additional pay, as aid to Rear Admiral Kautz, was predicated upon §§ 1098 and 1261 of the Revised Statutes, providing aids to major generals, and fixing an allowance of $200 a year in addition to the pay of the rank of such aid, and the opening clause of the Navy Personnel Act of March 13, 1899, c. 413, 30 Stat. 1004, giving to commissioned officers of the line of the Navy and of the Medical and Pay Corps the same pay and allowances, except forage, as are or may be provided for officers of corresponding rank in the Army. These sections of the statutes were considered in *United States* v. *Crosley, supra,* and it was held that the allowance of extra pay was due to the aid of the rear admiral, corresponding to the extra pay allowed to the aid of the major general in the Army. The difference in this respect between the *Crosley case* and the one now under consideration is, that the claimant in that case was designated as an aid, while in the present case the claimant was assigned to duty on the personal staff of the commander-in-chief as flag lieutenant, it is therefore claimed that he is not entitled to the extra compensation due only to an aid to the rear admiral. This argument is predicated on §§ 343, 344 and 345 of the Regulations for the Government of the Navy, 1896, which are as follows:

"SEC. 343. The chief of staff, flag lieutenant, clerk, and aids shall constitute the personal staff of a flag officer.

"SEC. 344. (1) A flag officer, when ordered to a command afloat, may, at his discretion, nominate to the Secretary of the

Navy a line officer not above the rank of lieutenant to serve on his staff as flag lieutenant, and a line officer not above the rank of lieutenant, junior grade, to serve as clerk.

"(2) The flag lieutenant, in addition to his other duties, shall be the fleet signal officer.

"SEC. 345. (1) A flag officer may select any officer of his command to serve as flag lieutenant or clerk, provided his grade accords with the rules laid down in article 344.

"(2) He may also, when necessary, select other line officers junior to the flag lieutenant, to serve on his personal staff as aids, but shall not assign naval cadets to such duty." (Regulations for the Government of the Navy of the United States, 1896–1897.)

It is the contention of the counsel for the Government that this language clearly indicates that a flag lieutenant on the staff of a rear admiral, designated in paragraph 1, § 345, is to be distinguished from aids junior to the flag lieutenant designated in paragraph 2 of the section. But we think it would be giving a too narrow interpretation of the purpose of Congress to give naval officers the same pay as officers of corresponding rank in the Army to construe this regulation to deny such pay to a flag lieutenant because he may not have been technically designated as an aid. And taking the regulation literally, it does not necessarily follow that because the rear admiral may select a junior to the flag lieutenant to serve on his personal staff as aid, that the one designated as flag lieutenant or clerk might not also be regarded as an aid. Be this as it may, we think the statute should be construed so as to effect the purpose of Congress, and that a determination of who are aids should be arrived at by a consideration of the nature and character of the duties of the officers constituting the personal staff of a flag officer. Referring to the letter of the Secretary of the Navy, embodied in the finding of facts we find:

"As in the case of a general officer of the Army, these officers, including the flag lieutenant, are, in every acceptation of the

word, aids for assisting the commander-in-chief in the performance of his duties. The number of officers thus assigned is limited only by the actual necessities of the case. In very large fleets, where the staff work is especially heavy, two or three so-called aids may be necessary in addition to the flag lieutenant and the secretary. They are all, from flag lieutenant to the lowest aid in point of rank, aids in every sense of the term to the flag officer. The senior aid of the flag officer is, in ninety-nine cases out of a hundred, chosen by the flag officer personally as a flag lieutenant. The term 'flag lieutenant' in itself by no means indicates all the duties which the officer so appointed performs. Different flag officers distribute their duties among the members of the personal staff in different ways. Some have charge of one thing, or set of things, another has charge of other things; but, from time immemorial, in other naval services as well as our own, it has been customary to term the senior aid of the flag officer the 'flag lieutenant' because, from time immemorial also, that aid has been placed in charge, as one of his duties only, of the signal work of the fleet or squadron in which he may happen to be serving.

* * * * * * * *

"It will be seen from this that the flag lieutenant is in every respect the aid, peculiarly, of the flag officer, and his duties, in comparison with those of an aid to a general officer, more nearly conform to those performed by a military aid than do those of any other officer on the personal staff of a flag officer."

In view of the character of the duties thus required of a flag lieutenant, who is to all intents an aid to the rear admiral, we are of opinion that the Court of Claims did not err in its decision on this branch of the case, that the claimant was entitled to the increased pay awarded to the aid of a major general, at the rate of $200 a year.

As to the contention that longevity pay should be computed on the whole amount of the claimant's pay, including this allowance as aid, we think the Court of Claims was in error. Indeed, there is a strong indication in the opinion of the learned

judge delivering the opinion in that court that this allowance would not have been made but for the supposed ruling in *United States* v. *Crosley, supra.* It is true that in Crosley's case the longevity pay, as computed, was based upon the $200 additional allowance on account of services as aid, but the correctness of this method of computation was not disputed. Two questions were made in that case, first as to the right of the claimant to the extra $200 allowed to the aid of a major general in the Army; second, as to whether he was entitled to "mounted pay" allowance to major generals' aids. Upon well-settled principles the case could not be authority for a point neither made nor discussed nor directly decided and only incidentally involved therein.

Considering the question as one of first impression, we think the statute makes it perfectly plain that longevity pay is not to be based upon the increased allowance to an aid. The Revised Statutes, § 1262, provides:

"There shall be allowed and paid to each commissioned officer below the rank of brigadier general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service."

In the case of *United States* v. *Tyler,* 105 U. S. 244, this court held that current yearly pay upon which longevity increase was to be computed should include previous longevity increases, and in *United States* v. *Mills,* 197 U. S. 223, it was held that the ten per cent increase upon "pay proper" of the compensation of officers serving beyond the continental limits should be computed upon the total amount which the officer was entitled to receive at the time of such service, both for longevity pay and the pay provided by § 1261 of the Revised Statutes. But we have to deal in this case with the statute of June 30, 1882, c, 254, 22 Stat. 117, 118, which provides:

"That from and after the first day of July, eighteen hundred and eighty-two, the ten per centum increase for length of service allowed to certain officers by section twelve hundred

and sixty-two of the Revised Statutes shall be computed on the yearly pay of the grade fixed by sections twelve hundred and sixty-one and twelve hundred and seventy-four of the Revised Statutes."

This statute was doubtless passed to prevent the computation of longevity pay by compounding previous pay for that purpose, which had the effect to give the increase on the pay of the grade, and also on the previous longevity increase. This amendatory act distinctly limits the computation of increase pay for length of service to yearly pay of the grade or rank of the officer entitled thereto. The allowance of $200 a year under § 1261, Rev. Stat., in "addition to the pay of his rank," is manifestly not the yearly pay of the grade. The purpose of the additional allowance is to compensate the officer during the time he is designated for a special service as aid. His longevity pay is to be computed on the yearly pay affixed by law to the grade or rank to which the officer belongs.

The judgment of the Court of Claims, based upon computation of longevity pay upon the additional allowance for pay as aid, cannot be sustained, in view of the statutory provision, and to that extent the judgment of the Court of Claims must be modified, and, as so modified,

Affirmed.

WABASH RAILROAD COMPANY *v.* ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 40. Argued November 6, 7, 1907.—Decided January 6, 1908.

Where the Federal questions are clearly presented by the answer in the state court, and the decree rendered could not have been made without adversely deciding them, and, as in this case, they are substantial as involving the jurisdiction of the Circuit Court over property in its possession and the effect to be given to its decree, this court has jurisdiction and the writ of error will not be dismissed.

The taking possession by a court of competent jurisdiction of property through its officers withdraws that property from the jurisdiction of all other courts, and the latter, though of concurrent jurisdiction, cannot disturb that possession, during the continuance whereof the court originally acquiring jurisdiction is competent to hear and determine all questions respecting the title, possession and control of the property. Under this general rule ancillary jurisdiction of the Federal courts exists over subordinate suits affecting property in their possession although the diversity of citizenship necessary to confer jurisdiction in an independent suit does not exist.

The possession of property in the Circuit Court carries with it the exclusive jurisdiction to determine all judicial questions concerning it, and that jurisdiction continues after the property has passed out of its possession by a sale under its decree to the extent of ascertaining the rights of, and extent of liens asserted by, parties to the suit and which are expressly reserved by the decree and subject to which the purchaser takes title; and any one asserting any of such reserved matters as against the property must pursue his remedy in the Circuit Court and the state court is without jurisdiction.

It will be presumed that the Circuit Court, in determining the validity of liens affecting property in its possession, will consider the decisions of the courts of the State in which the property is situated with that respect which the decisions of this court require.

A suit brought by the holder of some of a series of bonds, the complaint in which alleges that the suit is brought on complainant's behalf and also on behalf of all others of like interest joining therein and contributing to the expenses, and of which no other notice of its pendency is given to the other bondholders, is not a representative or class suit the judgment in which binds those not joining therein or not privies to those who do. *Compton* v. *Jesup*, 68 Fed. Rep. 263, concurred in.

See also p. 609, *post.*

THIS is a writ of error directed to the Supreme Court of the State of Ohio. In that court the defendants in error obtained a decree declaring that certain negotiable notes held by them, which had been made by the Toledo and Wabash Railroad Company, were entitled to a lien on property once owned by that company and now owned by the plaintiff in error, and ordering a sale in satisfaction of that lien. The Federal questions presented and such facts as are deemed material to their decision are stated in the opinion.

Mr. Rush Taggart for plaintiff in error:

The Wabash Railroad Company claims that the prior and

exclusive jurisdiction of all the property involved in this case was in the Federal court from the time of the appointment of the receivers in May, 1884, and that as the Federal court has never relinquished such jurisdiction, the state court could have no jurisdiction to determine the questions presented in this case; also that the state court completely failed to give due force and effect to the decree of foreclosure entered in the Federal court on March 23, 1889.

The provisions of the decree of March 23, 1889, indicate a clear intention on the part of the Federal court to retain the final adjudication of all existing questions respecting this property, and there can be no question as to the power of the court to render a decree with such reservations. *Julian* v. *Central Trust Company*, 193 U. S. 93.

Under the reservations in the decree relating to the claim of James Compton, in view of the facts, it is perfectly clear that this property is still within the exclusive jurisdiction of the Federal court, and that while there, no state court could take jurisdiction for the purpose of ascertaining claims against it. *Hagan* v. *Lucas*, 10 Pet. 400; *Williams* v. *Benedict*, 8 How. 107, 112; *Peale* v. *Phipps*, 14 How. 375; *Yonley* v. *Lavender*, 21 Wall. 276; *Barton* v. *Barbour*, 104 U. S. 126; *Wiswall* v. *Simpson*, 14 How. 126; *Pulliam* v. *Osborne*, 17 How. 471; *Freeman* v. *Howe*, 24 How. 450; *People's Bank* v. *Calhoun*, 102 U. S. 256; *Porter* v. *Sabin*, 149 U. S. 473; Bispham's Equity, § 413; *French, Trustee*, v. *Hay*, 22 Wall. 250.

The Wabash Railroad Company, the plaintiff in error, has fully preserved all the questions under the decree by its pleadings in this cause. The Federal questions of the prior and exclusive jurisdiction of the Federal courts, resulting from the litigations in the Federal courts, and the decree of March 23, 1889, were presented upon the pleadings at every stage of the case to the state court, and were by the state court denied, and therefore the questions are fully presented upon the record justifying their consideration by this court.

The state court failed to give due force to the decree of the

Circuit Court for the District of Indiana in the case of *Ham* v. *Wabash, St. Louis and Pacific Railway,* which decree was a final and conclusive adjudication of all the issues in this case.

This Ham suit in Indiana, in July, 1880, whatever may have been its character prior to that time, became, in view of the allegations of the amended and supplemental bill then filed, distinctively a class suit on behalf of all the holders of equipment bonds.

The decree of the Circuit Court in the Ham suit, entered in accordance with the mandate of this court, was not a voluntary dismissal of the bill without prejudice on complainant's motion, nor is it an involuntary non-suit simply, but is a decree upon the merits of the contention, a decree in favor of the defendants against the complainant in that suit, finding authoritatively the absence of equity in the complainant's case, and concluding the complainants, and all of the class represented by them as to the merits of the questions involved in that litigation. Such is the proper form of a final decree in equity. It finds the equity of the case with the defendants, and dismisses the plaintiff's bill with costs to the defendants. 3 Daniel, Chy. Pldgs. (5th ed.), 2355, 2356; Ordinances of Lord Bacon, No. 13; Barton's Suit in Equity (p. 207); *Swan Land & Cattle Co.* v. *Frank,* 148 U. S. 603; *Kendig* v. *Dean,* 97 U. S. 423, 426.

Mr. John W. Warrington, with whom *Mr. John C. F. Gardner, Mr. Thomas B. Paxton, Junior,* and *Mr. Murray Seasongood* were on the brief, for defendants in error:

Since this case is brought here upon a writ of error to the Supreme Court of a State, "there must be some fair ground for asserting the existence of a Federal question." It is not enough to show that the claim of a Federal question was set up. *New Orleans Water Works Co.* v. *Louisiana,* 185 U. S. 336.

The Federal question asserted must have merit. *Swafford* v. *Templeton,* 185 U. S. 487.

No question was made by the lienors as to the validity of

the foreclosure decree or the deed made in pursuance of it, or as to the regularity of the proceedings under which the order and deed were made, and it is admitted that the purchasers took all the title that the defendants in the foreclosure suit possessed. The judgments of the Ohio courts go no further than the claim made by defendants in error. The most that was claimed or decided in Ohio, was that the Federal court decree could not be so made as to impair or affect the lien of defendants in error, because they were not parties to the suit. *Avery* v. *Popper*, 179 U. S. 305, 314.

The reference to Compton's claim in the decree did not show a purpose to retain jurisdiction for all purposes. This court has decided that Compton's claim was really disposed of in the above mentioned decree. *Compton* v. *Jesup*, 167 U. S. 1, 31, at p. 31; *Julian* v. *Central Trust Co.*, 193 U. S. 93, discussed and distinguished.

As to the contention that a Federal question arises because the Ohio courts did not, as alleged, give due effect to the judgment of the Circuit Court of the United States in the Ham suit it need only be said that before any question could arise here as to what effect the Ohio courts in this cause gave to the judgment of dismissal in the Ham case, this court would have to determine whether the Ham suit was a class case. It is a question of general law, not a Federal matter, whether the Ham case was a class suit. If it was not, then the defendants in error could not be bound by it at all; nor were the courts of Ohio obliged to acquiesce in the judgment of dismissal of the Federal court in Indiana. *Winona & St. Peter Railroad* v. *Plainview*, 143 U. S. 371, at 390.

The receivership and foreclosure proceedings in the Federal courts from 1884 to July, 1889, have no effect upon the case at bar, which was begun in the Ohio courts prior thereto, and the issues were not finally made up or trial had of the case in the state court until after the receivership and foreclosure proceedings had ended and the property been conveyed and delivered to the plaintiff in error. *Farmers' Loan &c. Co.* v. *Lake*

Street &c. Co., 177 U. S. 51, 61; *Louisville Trust Co.* v. *Knott* (1904), 130 Fed. Rep. 820, at p. 824, per Lurton, Severens and Richards, JJ.; *Zimmerman* v. *So Relle* (1897), 80 Fed. Rep. 417, at p. 420, per Sanborn, Thayer and Lochren, JJ.

The possession and exclusive control of the Wabash property ended in the United States courts when the property was conveyed by the master commissioners to the purchasing committee and the receivers were discharged.

The Adelbert College and the cross-petitioners, defendants in error, were not parties to the Ham suit; said suit was never a representative suit, and the result of said suit is not a bar to the assertion and validity of the claims of defendants in error.

MR. JUSTICE MOODY delivered the opinion of the court.

In 1862 the Toledo and Wabash Railway Company owned and operated a railroad in Ohio and Indiana, and was incorporated under the laws of both States. That part of the property situated in Ohio was then incumbered by two mortgages, one to the Farmers' Loan and Trust Company for $900,000, and one to Edwin D. Morgan, Trustee, for $1,000,000. That part of the property situated in Indiana was then incumbered by two mortgages, one to the Farmers' Loan and Trust Company for $2,500,000, and one to Edwin D. Morgan, Trustee, for $1,500,000. In that year the company issued and sold unsecured sealed negotiable notes to the amount of $600,000, called equipment bonds. In 1865 this company consolidated with certain Illinois railroad corporations, thus creating the Toledo, Wabash and Western Railway Company. This consolidation was authorized by and in part effected under a statute of Ohio. The holders of the equipment bonds have contended that the result of this consolidation was to give to these hitherto unsecured obligations an equitable lien upon the property of the corporation which issued them, and that the equity of redemption of that property went into the hands of the consolidated corporation incumbered by that lien. Upon this

question this court and the Supreme Court of Ohio have, in the past, arrived at opposite conclusions; this court holding (*Wabash, St. Louis & Pac. Ry.* v. *Ham*, 114 U. S. 587), that the equipment bonds remained unsecured, and the Ohio court holding (*Compton* v. *Railway Co.*, 45 Ohio St. 592), that the effect of the consolidation was to create the lien claimed. This suit was brought by the defendants in error, holders of some of the equipment bonds, in the courts of Ohio for the purpose of enforcing the lien stated. They prevailed by the judgment of the Supreme Court of the State, which affirmed a decree of a lower court establishing the indebtedness upon the bonds, declaring a lien to secure the payment of that indebtedness upon the property owned, subject to the mortgages hereinbefore stated, by the Toledo and Wabash Railway Company in 1865, and directing a sale of such of that property as was within the State of Ohio in satisfaction of the lien.

The case is here upon a writ of error to the Supreme Court of Ohio to review this judgment. There are two Federal questions, it is contended, which were erroneously decided in the court below. The plaintiff in error insists: First, that the Ohio court had no jurisdiction to render the decree entered in the case, because the property affected by that decree was in the possession of a Circuit Court of the United States, and the questions litigated in this case were within the exclusive jurisdiction of the latter court. Second, that the decree of the Circuit Court of the United States for the District of Indiana in the case of *Ham* v. *Wabash, St. Louis & Pacific Railway Company* was a final adjudication of the issues in the case at bar, binding upon the defendants in error, and conclusive against their right to maintain this suit. The defendants in error contend that these questions were not properly raised in the court below, or, if properly raised, that they are so unsubstantial as to be frivolous, and therefore move that the writ of error be dismissed. But the questions were clearly presented by the answer in the Ohio courts, the decree rendered could not have been made without deciding them against the contention of the railroad

company, and we think that they are substantial and important. The motion to dismiss is therefore overruled, and we proceed to the discussion of the merits of the questions.

1. The first question is whether a Circuit Court of the United States had exclusive jurisdiction of the issues determined by the Ohio court in the case at bar. Before beginning the discussion of that question it is necessary to state the facts out of which it arises. The Toledo, Wabash and Western Railway Company, whose property was incumbered, as we have seen, by mortgages of the Toledo and Wabash, for $5,900,000, and by the claim of lien of the equipment bonds, and by other mortgages upon the property of other corporations which entered into the consolidation, itself executed two mortgages upon all its property. By the foreclosure of one of these mortgages the property became vested in the Wabash Railroad Company. This company, after executing a mortgage on its property, consolidated with another railway company, creating the Wabash, St. Louis and Pacific Railway Company. This company executed in 1880 a mortgage on its property to the Central Trust Company of New York and James Cheney for $50,000,000. On May 27, 1884, the Wabash, St. Louis and Pacific Railway Company, having fallen into financial difficulties, filed a bill in the Federal courts in six States, alleging its insolvency and asking the appointment of receivers. Thereupon receivers were appointed, qualified and took possession of the property. Thereafter the Central Trust Company and Cheney began proceedings in several state courts for the foreclosure of their mortgage of $50,000,000. These proceedings were removed to the Federal courts, and upon them a sale, under the direction of those courts, was made in 1886 to a purchasing committee. Before this sale, however, on October 17, 1884, the Circuit Court of the United States for the Western Division of the Northern District of Ohio dismissed the bills for receivership and for the foreclosure of the Cheney mortgage as to all parties who claimed liens prior to that mortgage. After the sale upon the foreclosure of the Cheney mortgage,

proceedings for foreclosure of several other mortgages prior to it were begun in the Circuit Courts of the United States, consolidated, and resulted in decrees for foreclosure and sale under all the mortgages. These decrees were entered in the various Circuit Courts on March 23, 1889. In the meantime the property remained in the possession of the Circuit Courts through its receivers. The sale under these decrees was made to a purchasing committee, by whom it was conveyed to a new corporation, the Wabash Railroad Company, the plaintiff in error. By order of the Circuit Court for the Northern District of Ohio, made on June 18, 1889, possession of the property was delivered by the receiver to the purchasing committee, and he was discharged. Since August, 1889, the plaintiff in error, the Wabash Railroad Company, has been in possession of the property under the terms of the decrees of March 23, which presently will be stated. None of the defendants in error were parties to the proceedings in the Circuit Courts of the United States, and an attempt to remove this case from the Ohio courts to the Circuit Court of the United States, resisted by the defendants in error, failed. *Joy* v. *Adelbert College,* 146 U. S. 355.

It appears from this statement that the railroad property affected by this controversy was in the actual possession, through receivers, of Circuit Courts of the United States from the date of the appointment of receivers, May 27, 1884, to the date of their discharge and the delivery of the property to the purchasing committee, which was ordered on June 18, 1889, and was accomplished about July 1, 1889. It cannot be and apparently is not disputed that, during that period, the property was in the possession of the Circuit Courts of the United States, and that that possession carried with it the exclusive jurisdiction to determine all judicial questions concerning the property. But it is earnestly contended that, when the property passed out of the actual possession of the United States courts, in conformity with their decrees, into the hands of the purchasers under the decrees, the exclusive

jurisdiction of the United States courts came to an end. The applicability of this contention to the case at bar will appear upon a fuller statement of the origin and progress of the case at bar in the courts of Ohio. The suit was begun on April 28, 1883, by Adelbert College alone, which was the owner of two of the equipment bonds, each of the par value of $500, and prayed for the decree, which, with some variations, not material to be stated, was finally given. Nothing of moment, beyond the service of process and the filing of pleadings, occurred until 1889, when several other holders of the equipment bonds joined in the suit as co-plaintiffs, by filing, with leave of court, what is denominated an answer and cross petition, in which they prayed relief similar to that sought by the original plaintiff. This petition was verified on January 2, 1889, but the date of its filing does not appear in the record. Later other similar cross petitions were filed by leave of court. Pleadings continued to be filed from time to time by the different parties to the suit, the last appearing in the record being one verified March 9, 1896, thirteen years after the beginning of the suit and seven years after the discharge of the receiver by the Federal court. The cause was then heard by the Court of Common Pleas and judgment was rendered for the bondholders in July, 1897, which, after affirmance by an intermediate court, was affirmed by the Supreme Court of the State. It appears, therefore, that the trial and judgment in the state courts were long after the Federal courts had transferred the railroad property to the purchasers under the decrees for foreclosure, and had discharged the receiver. Since the Federal courts had parted with the physical possession of the property, they obviously could no longer exercise an exclusive jurisdiction respecting it, unless there was something in the decrees under which the property was sold and conveyed, which preserved to the courts the control of the property for the purpose of giving full effect to its judgments. We are brought then to the consideration of the terms of those decrees. Upon their proper interpretation and true effect our

decision must rest. For the correct understanding of the decrees, and especially of the reservations contained in them, it is necessary to ascertain the progress and present status of still another litigation. James Compton, an owner of some of the equipment bonds, in a suit brought upon them in the Ohio courts in 1880, obtained a decree by the judgment of the Supreme Court of the State, ascertaining the amount due him in respect of the bonds and accrued interest, declaring that he was entitled to an equitable lien on the property owned by the Toledo and Wabash Railway Company at the time of the consolidation of 1865, subject to the mortgages upon that property then existing, and ordering, in default of payment of the sum found due, a sale of that part of the property which was within the State of Ohio. *Compton* v. *Railway Company*, 45 Ohio St. 592. The entry of judgment on the mandate of the Supreme Court was made in the Court of Common Pleas in October, 1888. Thereupon the Circuit Court for the Northern District of Ohio, Western Division, made Compton a party to the consolidated foreclosure suit, and ordered him to appear and plead, answer or demur. Compton appeared specially and set up his Ohio judgment. Various proceedings have been had with respect to his claim, including a judgment in this court in May, 1897, *Compton* v. *Jesup*, 167 U. S. 1, affirming Compton's lien and right to a sale in satisfaction of it. After the decision of this court, Compton's claim was sent to a master, who, after some ten years, made a report, which is now pending on exceptions in the Circuit Court. At the time of the decrees of foreclosure of March, 1889, the questions concerning Compton's claim were, of course, undecided, and account of them had to be taken in these decrees.

The decree of March 23, 1889, is very elaborate. The parts of it material here may be stated with comparative brevity. It ordered the foreclosure of all the mortgages upon the railroad property in the possession of the court, and the sale of the property, and the disposition of the proceeds among those adjudged to be rightfully entitled to it. After reciting that

the property is in the possession of the court through its receiver, the decree directs that, in default of payment within ten days of mortgage bonds and their coupons, scrip certificates, funded debt bonds and their coupons, amounting altogether to some fourteen millions of dollars, the property should be sold at public auction to the highest bidder. It was ordered that the separate divisions should first be offered for sale separately, that afterward the whole property should be offered for sale as a unit, and that the method of sale which resulted in the better price should stand. The special masters appointed to conduct the sale were directed, on confirmation of the sale and payment of the purchase price, to execute a deed or deeds which "shall vest in the grantee or grantees all the right, title, estate, interest, property and equity of redemption, *except as hereby reserved,* of, in and to" the property in fee simple. The decree then proceeds to define what is "hereby reserved." The part of the decree which expresses the reservation is so vital in the determination of the case that it is printed in full in the margin.[1] In ascertaining its true

[1] All other questions arising under the pleadings or proceedings herein not hereby disposed of or determined are hereby reserved for future adjudication; including the claim for unearned interest on bonds not yet due.

And the defendant James Compton having in open court on the final hearing herein objected to the rendering or entry of any decree in this cause at this time on the ground that the issues raised by the amendment to the complainants' amended and supplemental ancillary bill and to the cross-bill of the cross-complainants Solon Humphreys and Daniel A. Lindley, trustees, and the answers of the defendant James Compton to be filed herein have not been tried and determined, the court overrules such objection and the defendant James Compton duly excepts to such ruling and the entry of this decree. But it is adjudged and decreed in the premises that the rendering and entry of this decree in advance of the trial and determination of such issues is upon and subject to the following conditions, to wit:

If upon the determination of such issues it shall be adjudged by this court that the decree rendered by the Supreme Court of the State of Ohio in the suit brought by said James Compton against the Wabash, St. Louis and Pacific Railway Company and others, referred to in the pleadings herein, and the lien thereby declared and adjudicated in his favor continue in full force and effect, then the purchaser or purchasers at any sale or sales had hereunder of that portion of the property sold, covered and affected by the

meaning and effect the whole situation, as it could be and doubtless was seen by the court, must be kept in view. The property had been in the possession of the court and managed

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said lien, or the successors in the title of said purchaser or purchasers shall pay to said James Compton or his solicitors herein, within ten days after the entry of the decree herein in favor of said James Compton, the sum of three hundred and thirty-nine thousand nine hundred and twenty dollars and forty cents, with interest thereon at six per cent per annum from May 1, 1888, being the amount found due on the equipment bonds by him owned, by the Supreme Court of Ohio, in his said suit, upon the surrender by him of the bonds and coupons owned by him, referred to in his petition in such suit; and in default of such payment this court shall resume possession of the property covered and affected by the said lien of the defendant James Compton, and enforce such decree as it may render herein in his favor by a resale of such property or otherwise, as this court may direct.

And it is further ordered and adjudged, that notwithstanding the entry of this decree the said issue concerning the claim and interest of said Compton shall proceed to a final determination and decree in accordance with the rules and practice of this court, and any decree rendered thereupon shall bind the purchaser or purchasers at any sale or sales had hereunder, and all persons and corporations deriving any title to or interest in said property affected by such lien from or through them or any of them, and nothing in this decree contained shall be construed as an adjudication of any matter or thing as against the said James Compton, or to prejudice, annul or abridge any right, claim, interest or lien which the said James Compton may have in, to or upon the premises hereby directed to be sold or any part thereof, or in, to or upon any property whatsoever embraced in this decree; it being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mortgagees parties hereto.

Any sale, conveyance or assignment of the railway and property hereinabove described made under this decree shall not have the effect of discharging any part of said property from the payment or contribution to the payment of claims or demands chargeable against the same, whether for costs and expenses, the expenses of the receivership of said property and the full payment of all the debts and liabilities of the receivers of the Wabash, St. Louis and Pacific Railway Company, namely, Solon Humphreys and Thomas E. Tutt, Thomas M. Cooley and Gen. John McNulta, or upon intervening claims allowed or to be allowed, or upon any other claims or allowances that have been or may hereafter be charged against the property of the Wabash, St. Louis and Pacific Railway Company, or any part thereof, or said receivers or either of them, or the adjustment of any equities arising out of the same between the parties hereto, or their successors, either by this court or by the Circuit Court of the United States for the Eastern District of Missouri, or by any United States Circuit Court exercising either original or ancillary jurisdiction over said property of the Wabash, St. Louis

through its receiver for five years. It was desirable that it should pass into the hands of responsible owners, freed, as far

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and Pacific Railway Company, or any part thereof, or by any United States Circuit Court to which any of the parties in the consolidated cause of the Central Trust Company of New York and others against the Wabash, St. Louis and Pacific Railway Company and others in the Circuit Court of the United States for the Eastern District of Missouri, including the receivers, have been by the said Circuit Court of the United States remitted in proceedings or actions ancillary to the jurisdiction of said last-named court or otherwise.

Nor shall any such sale, conveyance, transfer or assignment made under and pursuant to this decree withdraw any of said railroad property or interests to be sold under this decree as hereinbefore directed from the jurisdiction of this and the other courts aforesaid, but the same shall remain in the custody of the receiver until such time as the court shall on motion direct said property in whole or from time to time in part to be released to the purchaser or purchasers thereof or any of them, and shall afterwards be subject to be retaken and, if necessary, resold if the sum so charged or to be charged against said property or any part thereof or said receivers as aforesaid shall not be paid within a reasonable time after being required by order of this or said other courts.

The conveyance and transfer of said property sold under this decree shall be subject to the powers and jurisdiction of the said courts and the purchasers of the property sold under this decree or any part thereof, and the parties hereto or their successors shall thereby become and remain subject to said jurisdiction of said courts so far as necessary to the enforcement of this provision of this decree, and such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property of the Wabash, St. Louis and Pacific Railway Company or any part thereof, or said receivers, by order of said courts shall be fully paid and discharged.

The provisions aforesaid shall apply to the purchasers of the same under this decree, and all persons taking such property through or under them, but the foregoing provisions shall not nor shall any reservation in this decree contained have the effect or be construed, nor are they or any of them intended to give to any claims that may exist any validity, character or status superior to what they now have, nor to decide or imply that any such claims exist.

The effect of said provisions and reservations shall be to prevent this decree operating as an additional defense to claims, if any there are, prior in right to the liens of the mortgages upon said property heretofore and hereby foreclosed and to preserve the prior right and lien of such claims and all allowances if found and decreed to exist.

And the court reserves the right to make such further order and direction at the foot of this decree as may seem proper.

as possible, from all prior liens and incumbrances. The question whether Compton had a lien and right of sale to satisfy it was unsettled, and would naturally be so for some time to come. He was a party to the suit. Many other holders of the equipment bonds, whose primary rights were like his, were seeking in the Ohio courts to obtain the same judgment which had there been awarded to him. None of them were parties to the suit in the United States courts, but their claims and the relief which the state court might give them could not be overlooked by a discerning court or a prudent purchaser. These facts and the considerations which arose out of them called upon the court to continue its grasp upon the property and its control of exclusive jurisdiction over it, both for the sake of those who had just claims upon it and for the sake of those who might purchase under the decree. A sale could not properly or safely be made upon any other conditions. The decree reserves: 1. All questions arising under the pleadings and proceedings for further adjudications. 2. The rights of Compton, which, when determined, may be enforced, after a resumption of possession by the court, by a resale of the property or otherwise. 3. The costs, expenses, debts and liabilities of the receivers, which are made a charge upon the property, to be enforced by a retaking and sale of the property. All the foregoing reservations are clearly and unmistakably made, the purchasers are warned that they must take title subject to the rights thereafter to be ascertained, to which the reservations relate, and the jurisdiction of the court over the questions and the right of the court to retake and resell the property is in terms preserved. Moreover, we are of the opinion that the decree, fairly interpreted in the light of the circumstances, made a still broader reservation. It is ordered that "any sale . . . of the railway and property . . . shall not have the effect of discharging any part of said property from the payment, or contribution to the payment, . . . upon intervening claims allowed, or to be allowed, or upon any other claims or allowances that have been, or may hereafter

be, charged against the property;" and that the "jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property . . . shall be fully paid;" and that the reservations shall not have the effect "to give to any claims that may exist any validity, character or status superior to what they now have, nor to decide or imply that any such claims exist;" and that "The effect of said provisions and reservations shall be to prevent this decree operating as an additional defense to claims, if any there are, prior in right to the liens of the mortgages upon said property heretofore and hereby foreclosed, and to preserve the prior right and lien of such claims and all allowances if found and decreed to exist." This sweeping language, colored as it is by the last paragraph quoted, with its reference to claims which are liens prior in right to the mortgages, must be held to include claims under the equipment bonds. Such a reservation would be natural, in view of the facts that the rights under the equipment bonds were uncertain, and their holders not parties to the suit, and therefore not affected by the foreclosure. *Wiswall* v. *Sampson*, 14 How. 52, 67; *United Lines Tel. Co.* v. *Boston Trust Co.*, 147 U. S. 431, 448; *Pittsburg &c. Railway* v. *Loan & Trust Co.*, 172 U. S. 493, 515. The effect of the decree is to say to any purchaser under it, you must take this property subject to all claims which this court shall hereafter adjudge to be lawful, and you may be assured that you will be held to pay none other, and for the purpose of making this statement good the court reserves jurisdiction over the property and claims in respect to it, and the right to take it again into possession and exercise again the power of sale. It is obvious, therefore, that the court has parted with the possession of the property only conditionally, and that it has preserved complete control over it, and full jurisdiction over the claims which might be made against it. We may now consider the question whether the state court had the jurisdiction to render the judgment in the case at bar, as and when it was rendered.

When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application and not peculiar to the relations of the courts of the United States to the courts of the States; they are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons, and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the States and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the States of the Union. *Hagan* v *Lucas*, 10 Pet. 400; *Williams* v. *Benedict*, 8 How. 107; *Wiswall* v. *Sampson*, 14 How. 52; *Peale* v. *Phipps*, 14 How. 368; *Pulliam* v. *Osborne*, 17 How. 471; *Taylor* v. *Carryl*, 20 How. 583; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Yonley* v. *Lavender*, 21 Wall. 276; *People's Bank* v. *Calhoun*, 102 U. S. 256; *Barton* v. *Barbour*, 104 U. S. 126; *Krippen-*

dorf v. *Hyde*, 110 U. S. 276; *Pacific R. R. of Missouri* v. *Missouri Pacific Railway*, 111 U. S. 505; *Covell* v. *Heyman*, 111 U. S. 176; *Heidritter* v. *Elizabeth Oil Cloth Company*, 112 U. S. 294; *Gumbel* v. *Pitkin*, 124 U. S. 131; *Johnson* v. *Christian*, 125 U. S. 642; *Morgan's Co.* v. *Texas Central Railway*, 137 U. S. 171; *Porter* v. *Sabin*, 149 U. S. 473.

The state courts in the case at bar, in deference, it is said by counsel, to these well-established principles, deferred action until after the property had been conveyed to the purchasers under the decree of foreclosure and the receiver discharged. Upon the termination of the receivership, it is urged, the exclusive jurisdiction of the Circuit Court ended, and the right of the state court to resume its normal jurisdiction revived. As this suit was begun before the property was taken into the possession of the Circuit Court, and when therefore the state court had jurisdiction over it, and remained dormant, except for the addition of parties and the filing of pleadings and service of process, until after the receivers had been discharged and the property conveyed to the purchaser, this would be true, if, as in *Shields* v. *Coleman*, 157 U. S. 168, the possession of the Circuit Court and its relation to the *res* had come to an end. But the Circuit Court attempted, in the decree of March 23, to prolong its control of the property, beyond the conveyance to the purchasers and the discharge of the receivers, up to the point of time when the claims therein stated should be ascertained and the just remedy for them applied, and to reserve the right to retake the property for those purposes. The effect of reservations in a decree of foreclosure, which to say the least were no broader than those in this decree, was before the court in *Julian* v. *Central Trust Co.*, 193 U. S. 93. The reservations in that case are stated on page 110, and of them the court said, p. 111: "It is obvious that by this decree of sale and confirmation it was the intention and purpose of the Federal court to retain jurisdiction over the cause so far as was necessary to determine all liens and demands to be paid by the purchaser;" and again, p. 112:

"The Federal court by its decree, reserved the right to determine what liens or claims should be charged upon the title conveyed by the court;" and again, p. 113: "the Circuit Court by the order made retained jurisdiction of the case to settle all claims against the property and to determine what burdens should be borne by the purchaser as a condition of holding the title conveyed." Here was a clear determination by this court that the exclusive jurisdiction of claims against a *res*, which had arisen out of the possession of the *res* in judicial proceedings for foreclosure of mortgages, might be continued after sale and conveyance of the property for the purpose of deciding what claims were legally chargeable against it. This is precisely what the Circuit Court attempted to do with respect to the property now before us, and its right to do it is clearly supported by the decision in the *Julian case*. Under the reservations in that case the Circuit Court was held to have power to protect the property sold by its order from sale on an execution issued by a state court. The state court was thought to be without power to direct such a sale, even though its judgment was based upon a claim arising after the conveyance of the property, because, under the peculiar facts of the case, the judgment and execution in effect annulled the Federal decree. The principle underlying that case, however, which is material here, is that the jurisdiction over the *res* could be continued by reservations, after the physical possession of the property had been abandoned. This court there said, p. 112: "The Federal court, in protecting the purchaser under such circumstances, was acting in pursuance of the jurisdiction acquired when the foreclosure proceedings were begun." It needs but a moment's consideration of the facts in the case at bar to convince that if the exclusive jurisdiction of the Federal court were denied every evil, which that doctrine was designed to avert, would be let in. Some time, it is to be supposed, there will be a sale by order of the Federal court to satisfy Compton's lien. If the sale by the state court of the same property to satisfy other lienholders of equal rank with

Compton is allowed to proceed, which sale will convey the better title? Who would be bold enough to determine for himself that question? How much longer would the litigation with respect to this property continue if two persons could be found to purchase at the two sales? It is no answer to these questions that Compton has been made a party to this suit in the state court. He is still a party to the proceedings in the Federal court, and he must find satisfaction for his claim there. We are of the opinion that by the effect of the reservation in the decree of March 23, 1889, the exclusive jurisdiction of the Federal court over the property therein dealt with has continued, notwithstanding the conditional conveyance and that it still exists. The defendants in error must pursue their remedy in that court, which doubtless will consider the decisions of the state courts on questions of state law with the respect which the decisions of this court require. It follows, therefore, that the state court was without power to decree a sale of the property, and its judgment must be reversed.

2. There remains for decision the question whether the court below erred in declining to hold that the case of *Ham* v. *Wabash, St. Louis & Pacific Railway Company* conclusively adjudicated the merits of the claims of the defendants in error.

The record in that case must now be examined. A suit brought in a state court in 1878 by David J. Tysen, a holder of equipment bonds, against the Wabash Railway Company, then the owner of this railroad property, was removed to the Circuit Court of the United States for the District of Indiana. The suit was heard on a supplemental bill filed by Benjamin F. Ham and several other persons, who together owned equipment bonds of the par value of $113,500. The complainants alleged that the suit was brought "on their own behalf, as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of this suit." No notice of the pendency of the suit was given to the other holders of the bonds other than by this allegation in the bill. The Circuit Court, after due hearing, entered a

decree declaring that the bonds were entitled to a lien on the property, owned by the Toledo and Wabash Railroad Company at the time of the consolidation of 1865, to secure the payment of principal and interest, and ordering, in default of payment, a sale of the property in satisfaction of the lien. This decree was reversed by this court. *Wabash &c. Railway* v. *Ham*, 114 U. S. 587. Thereafter the bill was dismissed for want of equity by the Circuit Court. It is contended that the judgment in this case is a bar to the claim for lien of all the holders of the equipment bonds, whether they were parties or privies to that suit or not. Accordingly the judgment in the Ham case was pleaded in the state court in this case as a bar to the suit. The theory of the plea in bar is that the Ham suit was a representative or class suit, and that the judgment in it bound all of the class, even if they were not parties or privies to it. It was held otherwise by the Circuit Court of Appeals with respect to this very judgment, *Compton* v. *Jesup*, 68 Fed. Rep. 263, and in that opinion we concur. We do not deem it necessary to follow the learned counsel for the plaintiff in error in his elaborate discussion of the nature of representative suits, and the effect of judgments in them upon those who are not parties or privies. Nor is it necessary to go beyond the facts of this case, or to consider what suits may be of such a nature and effect. In this suit Ham might have proceeded alone, as Compton did, or with others who chose to join with him. The allegation that the suit is brought in behalf of all who should join and share in the expense cannot make the judgment binding on those who do not join. Some may have preferred another jurisdiction, some perhaps could not join without destroying the diversity of citizenship, upon which alone the jurisdiction was based, or some possibly had never heard of the pendency of the suit. It is clear if such suits in the Circuit Courts of the United States could have the effect here claimed for them, and the judgments in them were binding in all courts against all other persons of the same class, that injustice might result, and even collusive suits might be encouraged. We find

no controlling authority which leads us to such a conclusion. We think that the Ham suit was not a representative suit in the sense that the judgment in it bound the defendants in error who were not parties to it. But for the reasons already given the judgment must be *Reversed.*[1]

MR. JUSTICE HARLAN and MR. JUSTICE PECKHAM dissent from that part of the judgment which decides that the jurisdiction of the Federal court was exclusive after the delivery of the property to the purchaser under the foreclosure decree, and the discharge of the receiver.

WINSLOW *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 59. Argued December 9, 10, 1907.—Decided January 6, 1908.

The objection, taken by a property owner in a condemnation proceeding for a part of his property, that, under the statute, his entire property must be condemned, is waived and cannot be maintained on appeal, if he accepts the award made by the commissioners in the condemnation proceeding and paid in by the condemnors for the parcel actually condemned. After an award has been made and accepted the proceeding is *functus officio.*

28 App. D. C. 126, affirmed.

THE facts are stated in the opinion.

Mr. William G. Johnson for plaintiffs in error:

The acceptance of the fund allowed for the land actually taken is not inconsistent with the claims of the obligation of the company also to acquire and pay for the residue.

The proceedings are informal and no form of pleadings are provided. See §§ 648, 663, Rev. Stats., relating to District of

[1] For opinion of the court on motion for rehearing and modification of the decree, see *post*, p. 609.

Columbia. The objection was distinctly made in the answer to the claimed right of the company to acquire a part only of the land, and its obligation to acquire all was also insisted upon. The award was in distinct parts; a specific sum, $35,392.50, for the land taken, and $10,000 for damages to the residue, and the plaintiffs in error only accepted the former sum, the $10,000 remaining in the registry of the court, and the order of the court directing payment recognized this segregation of the fund and treated the part of the fund directed to be paid as "the amount of the appraised value of the land."

Mr. George E. Hamilton and *Mr. John W. Yerkes*, with whom *Mr. Michael J. Colbert* and *Mr. John J. Hamilton* were on the brief, for defendant in error.

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 case under review is a proceeding for the condemnation of land needed for the approach to the Union Station in Washington. The plaintiffs in error were the owners of a lot of unimproved land containing ninety acres. It was of irregular shape and one of its shorter boundary lines was a public highway called Brentwood road. The construction of a union station and the approaches to it of all the steam railroads entering Washington was provided for by two acts of Congress approved February 12, 1901, 31 Stat. 774, and an act approved February 28, 1903, 32 Stat. 912.

Section 3 of the first of the two acts of 1901, 31 Stat. 775, directed that certain streets should be "completely vacated and abandoned by the public and closed to public use." Among them was Brentwood road between S street and Florida avenue. The part of Brentwood road which bounded the plaintiffs in error's land was included in the part thus directed to be closed. Section 5 of the act of 1903, 32 Stat. 912, "vacated, abandoned and closed" certain other streets, including a further portion of Brentwood road, and enacted that "no streets or avenues shall

be closed or abandoned under the provisions of this act or of the acts relating to the Baltimore and Ohio Railroad Company and the Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one, until all of the property abutting on the streets or avenues, or portions thereof, provided to be closed in said acts, shall have been acquired by said railroad company or companies or the terminal company referred to herein, either by condemnation or purchase."

In 1904 the defendant in error filed an "Instrument of Appropriation," in which it sought to condemn about six-tenths of an acre of the land of the plaintiffs in error, to carry out the purposes of the act of 1903. This land was a small part of the land of the plaintiffs in error which abutted on Brentwood road, and part of it was desired, according to the allegation of the Instrument of Appropriation, "to be used for relocating and changing" a part of Brentwood road which had been closed by the act of Congress. The plaintiffs in error filed an answer, alleging in substance that the railroad company was without power to condemn part of their land abutting on Brentwood road, but must, in obedience to the act of Congress, condemn the whole, and that the company had no authority to lay out streets or reopen or relocate a street which Congress had directed to be closed, and therefore could not condemn land for that purpose. The answer concluded by asking a dismissal of the proceeding. The objections raised by the answer were heard by a justice of the Supreme Court of the District and, on October 18, 1904, overrruled by him. To this ruling there was an exception duly taken. There were thus raised upon the record two questions, in the decision of which, it is earnestly and forcibly argued by counsel, there was error. The two questions are: first, whether the statute, under the provisions of which the condemnation proceedings were had, required the taking of all the land in a single ownership, which abutted on a street closed by the act, irrespective of its shape or extent; and, second, whether the railroad company had any authority to change or relocate a street declared by the act of Congress

to be closed and abandoned. We do not think it necessary to decide either of these questions for reasons which will now be stated.

After the ruling just stated three persons were appointed by the court to appraise the damages sustained by the plaintiffs in error by the condemnation proposed. They, having heard the parties, reported that the value of the six-tenths of an acre taken was $35,392.50 and the damage to the remaining part of the lot was $10,000.00. On April 20, 1905, the court confirmed the award. On the same day the railroad company, having paid the sum awarded into court, the court, on motion of the plaintiffs in error, directed the payment to them of the sum fixed as the value of the land taken. After having asked and accepted the payment of this sum of money, the plaintiffs in error noted an appeal to the Court of Appeals "from so much of the decree confirming the return and award of the appraisers as fails to require the petitioner, the Baltimore and Ohio Railroad Company, to acquire the entire tract of land described in the answer of the respondents herein and as permits the said petitioner to limit its acquisition to the portion of the said land described in the petition or instrument of appropriation."

If the company was without right to take a part of the land of the plaintiffs in error, unless it took more or all, or if the purpose for which the land was sought to be taken was unlawful, the proper course would be to dismiss the petition. This is what the plaintiffs in error originally asked. But by accepting the sum awarded for the land actually taken, they have lost the right to insist that the petition was not maintainable. They cannot ratify the condemnation by receiving the appraised value of the land condemned and then ask to have the condemnation set aside and annulled; nor do they now wish or seek to do this. They wish to have the condemnation stand and to receive its fruits. What they seek to accomplish appears clearly in the notice of appeal. It is to compel the railroad to acquire the remaining eighty-nine acres of their land. What the plaintiffs in error wish is stated in other words

in the closing sentence of their brief, where it is said that the case ought to be remanded to the Supreme Court of the District with instructions "there to proceed to the condemnation of the remainder of the land." It is therefore obvious that the plaintiffs in error abide by the logical consequences of their request for and acceptance of the sum found to be the value of the land taken and waive and abandon the objections to the maintenance of the petition, which they originally interposed. We think that the position which they now occupy, in place of that which they have abandoned, is untenable. This proceeding has been allowed to reach its end. The condemnation which the petition sought to have made has been made. The land described in the petition has been appraised, the compensation to be paid has been deposited with the court and received by the owners. We do not regard the failure to ask and receive the $10,000.00 as important. The title to the land has vested in the railroad company. The objections to the maintenance of the petition have been waived. The counsel for the plaintiffs in error asks that the case be remanded to the Supreme Court of the District with instructions to proceed to the condemnation of the remainder of the land. But he does not disclose how in this proceeding that can be done. This proceeding is *functus officio*. Everything which it asked has been done. The defendant in error is satisfied and will not amend the petition. The court is without power to compel its amendment, and certainly cannot of its own motion file a new petition in the name and behalf of the railroad company. Even if we were of the opinion that the railroad company had taken less land than the statute required to be taken, or had taken land for unlawful uses, it would be useless now to express the opinion and idle to remand this case, which by the act of the plaintiffs in error has been put in such a position that our opinion could not be made effective.

These were in substance the views of the court below, and its

Judgment is affirmed.

BLUTHENTHAL *v.* JONES.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 94. Submitted December 18, 1907.—Decided January 6, 1908.

Courts are not bound to search the records of other courts and give effect to their judgments, and one who relies upon a former adjudication in another court must properly present it to the court in which he seeks to enforce it.

While an adjudication in bankruptcy, refusing a discharge, finally determines for all time and in all courts, as between the parties and their privies, the facts upon which the refusal is based, it must be proved in a second proceeding brought by the bankrupt in another district, and of which the creditor has notice, in order to bar the bankrupt's discharge therefrom, if the debt is provable under the statute as amended at the time of the second proceeding although it may not have been such under the statute at the time of the first proceeding.

THE facts, which involve the effect of a discharge under the bankruptcy act of 1898 as amended by the act of February 5, 1903, are stated in the opinion.

Mr. Benjamin Z. Phillips and *Mr. John M. Slaton* for plaintiffs in error.

Mr. Solon G. Wilson for defendant in error.

MR. JUSTICE MOODY delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Florida. The plaintiffs in error were judgment creditors of Miles C. Jones, the intestate of the defendant in error. The creditors sought to enforce the judgment by a levy of execution. The question in the case is whether Jones was discharged from the debt by a discharge in bankruptcy granted to him on November 7, 1903, by the District Court for the Southern District of Florida, on proceedings which were begun

on August 3, 1903. The debt was one provable in the bankruptcy proceeding and, it is conceded, would be barred by the discharge were it not that there had been a prior proceeding in bankruptcy in another District Court, which, it is contended, had the effect of exempting the debt from the operation of the discharge. In the year 1900 Jones filed his petition in bankruptcy in the District Court for the Southern District of Georgia. Bluthenthal & Bickart, the plaintiffs in error, objected to the discharge in that proceeding, and it was refused on December 3, 1900. Bluthenthal & Bickart, at the time of the first proceeding, were creditors of Jones in respect of what may be assumed, for the purposes of this case, to be the same indebtedness now in question. The ground of the refusal does not appear. It may be assumed to have been, however, one of the two grounds specified in § 14 of the bankruptcy act before it was amended by the act of February 5, 1903; that is to say, either that the bankrupt has committed an offense punishable by imprisonment or, with fraudulent intent and in contemplation of bankruptcy, destroyed, concealed or failed to keep books of accounts. Though Bluthenthal & Bickart were notified of the proceedings on the second petition in bankruptcy and their debt was scheduled, they did not prove their claim or participate in any way in those proceedings. They now claim that their debt was not affected by the discharge on account of the adjudication in the previous proceedings.

Section 1 of the bankruptcy act defines a discharge as "the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act." Section 14 of the amended act, which was applicable to the second proceedings, provides that after due hearing the court shall discharge the bankrupt, unless he has committed one of the six acts specified in that section. Section 17 of the amended act provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, with four specified exceptions, which do not cover this case. The discharge ap-

pears to have been regularly granted, and as the debt due to Bluthenthal & Bickart is not one of the debts which, by the terms of the statute, are excepted from its operation, on the face of the statute the bankrupt was discharged from the debt due to them. There is no reason shown in this record why the discharge did not have the effect which it purported to have. Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy, finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced. Plaintiffs in error failed to do this. When an application was made by the bankrupt in the District Court for the Southern District of Florida, the judge of that court was, by the terms of the statute, bound to grant it, unless upon investigation it appeared that the bankrupt had committed one of the six offenses which are specified in § 14 of the bankruptcy act as amended. An objecting creditor might have proved upon that application that the bankrupt had committed one of the acts which barred his discharge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved it would have taken the place of other evidence and have been final upon the parties to it. But nothing of this kind took place. Bluthenthal & Bickart intentionally remained away from the court and allowed the discharge to be granted without objection.

Since the debt due to the plaintiffs in error was a debt provable in the proceedings before the District Court of Florida and was not one of the debts exempted by the statute from

the operation of the discharge, it was barred by that discharge. The Supreme Court of the State of Florida so held, and its judgment must be

Affirmed.

PROSSER *v.* FINN.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 64. Submitted December 4, 1907.—Decided January 13, 1908.

If an entryman's entry is good when made and the Land Department, by error of law, adjudges the land to belong to another, a court of equity will convert the latter into a trustee for the former and compel him to convey the legal title.

Continued occupation of public land by one not entitled to enter after the disability has been removed is not equivalent to a new entry. The entryman's rights are determined by the validity of the original entry when made.

An erroneous interpretation of a statute by the Commissioner of the Department to which it applies, does not confer any legal rights on one acting in conformity with such interpretation, in opposition to the express terms of the statute.

Congress having said without qualification, by § 452, Rev. Stat., that employés in the General Land Office shall not, while in the service of that office, purchase, or become interested directly or indirectly in the purchase of, public lands, this prohibition applies to special agents of that office and renders an entry made by a special agent under the Timber Culture Act void, leaving the land open to entry, notwithstanding that such agent made the same in good faith when there was a ruling of the Commissioner that § 452 did not apply to special agents, and that he complied with the requirements of the act and continued in occupation after he had ceased to be a special agent.

41 Washington, 604, affirmed.

FINN, the defendant in error, holds a patent from the United States for certain lands in Yakima County, State of Washington, for which Prosser, the plaintiff in error, had previously made an entry under what is known as the timber-culture statutes.

Asserting that in virtue of such entry he was entitled, under the acts of Congress, to a patent from the United States, Prosser brought the present suit against Finn in one of the courts of Washington, the relief asked being a decree declaring his right to the lands and requiring the defendant to convey the legal title to him.

The court of original jurisdiction sustained a demurrer to the complaint, and dismissed the suit; and that decree was affirmed by the Supreme Court of Washington.

The plaintiff in error contends, as he did in the state courts, that the decision that he was not entitled under the statutes of the United States to a patent denied to him a right given by those statutes. The defendant contends that in view of his official relations to the General Land Office at the time of his entry Prosser could not legally acquire an interest in these lands.

The case made by the complaint is substantially as follows:

On the eighteenth day of October, 1882, Prosser made a timber-culture entry at the proper local land office for the lands in question, and thereafter duly planted trees and by cultivation in good faith improved the lands at great labor and expense. His entry complied in all respects with the statutes. 17 Stat. 605, c. 277; 18 Stat. 21, c. 55.

More than five years after that entry, on August 30, 1888, one Grandy filed an affidavit of contest on the ground of non-compliance with the statute. But the contestant failed to prosecute his claim, and at the hearing that contest was dismissed.

Subsequently, October 28, 1889, one Walker filed against Prosser's entry an affidavit of contest. In that affidavit various grounds of contest were specified, each of which alleged non-compliance with the provisions of the statute in respect of the planting of trees. The affidavit was afterwards amended December 1, 1889, so as to embrace the charge that Prosser, at the time of his entry, was an acting United States Timber Inspector, and that as such inspector he was prohibited by

law from making said entry; also, that the land was then settled upon and cultivated as required by law. The relief sought by the contestant Walker was the cancellation of Prosser's entry and its forfeiture to the United States.

The local land office sustained Walker's contest and gave a decision against Prosser's entry, based upon his incompetency as inspector to make it. In the opinion of the Register it was said: "It appears from the testimony adduced at the hearing that Mr. Prosser was appointed special agent of the General Land Office, July 26, 1880, and was performing the duties as such agent at the time of initiating the entry. He was charged with the duty of caring for and protecting the interests of the Government in the disposal of its public lands. His duties afforded an opportunity of gaining information of the public domain not extended to the ordinary settler. As a result of this superior advantage he selected a very desirable tract bordering upon the Yakima River at a point where there are falls well adapted to the production of power for running machinery, etc., which rendered the land more valuable than ordinary agricultural tracts. Bad faith cannot in any wise be imputed to the entryman, for it appears that he has expended considerable time and money attempting to grow timber on the land, but with meager results. It is situated in a dry, arid section of country, where little or no vegetation will grow without irrigation. The repeated efforts to grow trees evince good faith in an honest endeavor to faithfully comply with the law." Referring, however, to a letter addressed by the Commissioner to the local land officers, under date of July 22, 1882, and which directed that Prosser be allowed to make payment for the lands entered by him—in which letter the Commissioner held that a special agent did not come within the inhibition contained in § 452, Rev. Stat.—the Register (the Receiver concurring), said: "We are inclined to the opinion that the Commissioner erred in stating that a special agent does not come within the prohibition of the statute prohibiting employés of the Land Department from entering lands within

the public domain. Of all the officers and employés connected with the General Land Office, special agents, from their peculiar duties, have the best opportunities for gaining information of lands, and we consider it a wise policy to exclude such officers from the privilege of entering lands. A great hardship has been done the contestee in this case, because we have no doubt he was led to make this entry upon the authority of the letter before referred to; but holding to the doctrine that special agents come within the inhibition of § 452, Rev. Stat., we are unable to afford him the relief we would desire to give. We therefore hold that said timber-culture entry was void in its inception and recommend its cancellation."

The section of the Revised Statutes just referred to is in these words: "The officers, clerks, and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

On appeal to the Commissioner of the General Land Office that decision was affirmed March 30, 1892, upon the ground that the statute made it illegal for Prosser to make his entry, he being, at the time, a special agent of the General Land Office. Upon appeal to the Department of the Interior, its First Assistant Secretary, on July 7, 1893, reversed the decision of the Commissioner and dismissed the contest of Walker, upon the authority of *Grandy* v. *Bedell*, 2 L. D. 314.

At a later day, April 16, 1894, upon Walker's petition for a rehearing of the case by the Interior Department, Secretary Smith reversed the decision made by the First Assistant Secretary and affirmed the decision of the Commissioner and local land office.

The complaint alleged that the decision of Secretary Smith was erroneous in law; that resting on the construction of the statute by the Interior Department at the time of his entry and upon the special advice of the Commissioner of the Land Office, he made his filing in good faith, diligently, and at great

expense and labor planted trees on and cultivated said lands, and intended in all respects to comply with the statute; that long prior to the initiation of said contests he ceased to be a special agent of the General Land Office or to have any connection whatever with the Land Department, all of which was well known to contestant; that, in pursuance of the erroneous decisions of the Interior Department, Walker was permitted to enter the lands, he having at the time full knowledge of plaintiff's entries and rights; that, subsequently, a patent was issued to Finn, the present defendant in error.

Mr. James H. Hayden, *Mr. Robert C. Hayden* and *Mr. James B. Reavis* for plaintiff in error:

The plaintiff's entry upon the land in dispute was valid in its inception. Special timber agents or inspectors are not officers, clerks, or employés in the General Land Office within the meaning of § 452, Rev. Stat., and are not thereby prohibited from entering public land. As interpreted and administered by the Land Department when the plaintiff's entry was made, the prohibition contained in § 452 did not extend to special timber agents. This cause must be determined in conformity with the contemporaneous interpretation of the law by the Land Department. If the prohibition contained in § 452 had extended to special timber agents, it would not have rendered the plaintiff's entry void or liable to cancellation, but merely rendered plaintiff liable to removal from his office. *Grandy* v. *Bedell*, 2 L. D. 314; *Lock Lode Claim*, 6 L. D. 105; *Winans* v. *Beidler*, 15 L. D. 266; *James* v. *Germania Iron Co.*, 107 Fed. Rep. 597; *United States* v. *Alabama &c. R. R. Co.*, 142 U. S. 615, 621; *Leffingwell's Case*, 30 L. D. 139.

If the plaintiff had been disqualified by law from entering public land when he made his entry upon the land in dispute, the entry would have been validated by the removal of his disability, which occurred four years before the date of the contest wherein his entry was canceled. The removal of his disability, coupled with the fact that he made his entry in

good faith and in conformity with a decision of the Land Department, and for a period of seven years subsequent to his entry and prior to the contest, had done and performed all things requisite for the acquisition of the land under the land laws of the United States, would have been sufficient to cure the defect in his entry if it had been defective originally. *Mann* v. *Huk*, 3 L. D. 452; *Case of Krogstad*, 4 L. D. 564; *Case of Jacob A. Edens*, 7 L. D. 229; *Phillip* v. *Sero*, 14 L. D. 568; *Case of Bright*, 6 L. D. 602; *St. Paul &c. R. R. Co.* v. *Forseth*, 3 L. D. 446; *Case of Baird*, 2 L. D. 817.

The defendant entered upon the land in dispute with full notice of all proceedings had with respect to the entry made and work done by the plaintiff, and therefore the defendant, having obtained legal title to same by patent from the United States in consequence of errors of law committed by the Land Department in canceling plaintiff's entry, should be decreed to hold the title for the benefit of the plaintiff.

Mr. B. S. Grosscup for defendant in error.

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

This case depends upon the construction to be given to § 452, Rev. Stat. If Prosser's original entry was forbidden by the above statute, then nothing stood in the way of that entry being canceled by order of the Secretary of the Interior in a proceeding that directly involved its validity. On the other hand, if he acquired any right by virtue of his entry, the judgment to the contrary by the Land Department was an error of law which could be corrected by a decree declaring that the title was held in trust for him by the defendant. The principle is well settled that "where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title." *Stark* v. *Starrs*, 6 Wall.

402, 419; *Silver* v. *Ladd*, 7 Wall. 219; *Cornelius* v. *Kessels*, 128 U. S. 456, 461; *Bernier* v. *Bernier*, 147 U. S. 242; *In re Emblem*, 161 U. S. 52.

The difficulty in the way of any relief being granted to the plaintiff arises from the statute prohibiting any officer, clerk or employé in the General Land Office, directly or indirectly, from purchasing or becoming interested in the purchase of any of the public land. That a special agent of the General Land Office is an employé in that office is, we think, too clear to admit of serious doubt. Referring to the timber-culture statute, Secretary Smith well said: "When the object of the act is considered, it will be seen that it applied with special force to such parties as the defendant in the cause at issue. As a special agent of the Commissioner of the General Land Office, he was in a position peculiarly adapted to secure such knowledge, the use of which it was the intention of the act to prevent. It follows from what has herein been set out that the decision of this Department of date July 7, 1893, was in error, and the same is hereby set aside, and the decision of your office is affirmed."

It is not clear from any document or decision to which our attention has been called, what is the scope of the duties of a special agent of the Land Office, but the existence of that office or position has long been recognized. Suffice it to say that they have official connection with the General Land Office and are under its supervision and control with respect to the administration of the public lands. *Wells* v. *Nickles*, 104 U. S. 444; *S. C.*, 1 L. D. 608, 620, 696; Instructions to Special Timber Agents, 2 L. D. 814, 819, 820, 821, 822, 827, 828, 832; Circular of Instructions, 12 L. D. 499. They are in every substantial sense employés in the General Land Office. They are none the less so, even if it be true, as suggested by the learned counsel for the plaintiff, that they have nothing to do with the survey and sale of the public lands or with the investigation of applications for patents or with hearings before registers and receivers. Being employés in the General Land Office, it

is not for the court, in defiance of the explicit words of the statute, to exempt them from its prohibition. Congress has said, without qualification, that employés in the General Land Office shall not, while in the service of that office, purchase or become interested in the purchase, directly or indirectly, of public lands. The provision in question had its origin in the acts of April 25, 1812, c. 68, 2 Stat. 716, and of July 4, 1836, c. 352, 5 Stat. 107. The first of those acts established a General Land Office, while the last one reorganized that office. Each of those acts made provision for the appointment of certain officers, and each limited the prohibition against the purchasing or becoming interested in the purchasing of public lands to the officers or employés named in them, respectively. But the prohibition in the existing statute is not restricted to any particular officers or particular employés of the Land Office, but embraces "employés in the General Land Office," without excepting any of them.

In the eye of the law his case is not advanced by the fact that he acted in conformity with the opinion of the Commissioner of the General Land Office, who stated, in a letter, that § 452, Rev. Stat., did not apply to special agents. That view, so far from being approved, was reversed, upon formal hearing, by the Secretary of the Interior. Besides, an erroneous interpretation of the statute by the Commissioner would not change the statute or confer any legal right upon Prosser in opposition to the express prohibition against his purchasing or becoming interested in the purchasing of public lands while he was an employé in the General Land Office. The law, as we now recognize it to be, was the law when the plaintiff entered the lands in question, and, being at the time an employé in the Land Office, he could not acquire an interest in the lands that would prevent the Government, by its proper officer or department, from canceling his entry and treating the lands as public lands which could be patented to others. It may be well to add that the plaintiff's continuing in possession after he ceased to be special agent was not equivalent

to a new entry. His rights must be determined by the validity of the original entry at the time it was made.

These views dispose of the case adversely to the plaintiff, and require an affirmance of the judgment without reference to other questions discussed by counsel.

Affirmed.

BLACKLOCK, EXECUTOR OF RINALDO P. SMITH *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 65. Argued December 10, 1907.—Decided January 13, 1908.

A mere recital in an act, whether of fact or of law, is not conclusive unless it be clear that the legislature intended that it be accepted as a fact in the case. *Kinkead* v. *United States*, 150 U. S. 433.

The Court of Claims was not precluded by the recitals in the act of May, 1902, 32 Stat. 207, 243, referring this case to it, from examining into the facts and determining whether the claimant's lien referred to in the act as a prior lien was or was not a prior lien and basing its decision upon the actual facts found.

Section 106 of the act of July 20, 1868, 15 Stat. 125, 167, providing for an action in equity by the collector of internal revenue to enforce a lien of the United States for unpaid revenue taxes, did not supersede the provisions of the act of July 13, 1866, 14 Stat. 107, giving the remedy of distraint so that such lien could only be enforced by suit in equity, but it gave another and cumulative remedy in cases where, as expressed in the act, the collector deemed it expedient. *Mansfield* v. *Excelsior Refining Co.*, 135 U. S. 326.

In this case, *held*, that the lien of the Government for unpaid revenue taxes on land of the delinquent was prior to that of the mortgagee bringing this action, and that the sale of the land by distraint proceedings, and not by foreclosure suit in equity, was in conformity with the act of July 13, 1866, then in force, and vested the title in the purchasers at the sale and their grantees, subject to the right of redemption given by the statute to the owners of the land and of holders of liens thereon.

41 C. Cl. 89, affirmed.

THIS appeal brings up for review a judgment of the Court

of Claims dismissing a petition filed in that court against the United States.

So far as it is necessary to state the facts, the case is substantially as follows:

Smith, Ellett & Co., a firm composed of Rinaldo P. Smith and Francis M. Ellett, were engaged in business as leather and commission merchants in Baltimore from some time in 1867 or 1868 to January 1, 1870.

On the twenty-sixth of October, 1869, George J. Stephens, a distiller and tanner in Virginia, was indebted to Smith, Ellett & Co., in the sum of $7,000, already due, and in the further sum of $2,000 to become due in the course of future dealings. On the same day a certain deed was executed between Stephens of the first part, Beazley, trustee, of the second part, and Smith and Ellett, doing business as Smith, Ellett & Co., of the third part. It recited that Stephens was indebted to Smith, Ellett & Co. in the sum of $4,000, evidenced by the bond or demand note of Stephens dated October 26, 1869, and that Smith, Ellett & Co. had accepted, for the accommodation of Stephens, a draft for $3,000, and had agreed to accept a further accommodation draft for $2,000. In order that said acceptances in addition to the note for $4,000 might be secured, Stephens, by deed dated October 26, 1869, conveyed to Beazley a tract of land containing about 400 acres, more or less, in Greene County, Virginia, upon which Stephens then resided, with the mansion house and all buildings thereon, including a tannery and distillery, and all things appurtenant thereto "in trust to secure the said bond of four thousand dollars and all the acceptances already made and given as aforesaid, now current and to become payable, and all acceptances to be hereafter made and given as aforesaid, and all of which may be made and given for renewal of former ones, or to replace the money paid by the party of the first part in taking up former ones as aforesaid, or in any other manner as stated in the premises, so as the same shall not exceed the sum of five thousand dollars."

The property conveyed was worth more than $3,000. The

deed was duly acknowledged and recorded on the thirtieth day of October, 1869.

When that deed of trust was executed and recorded there was due from Stephens to the United States Government internal revenue taxes, which had accrued from July, 1867, to October 26, 1869, amounting to $4,000.

On the twenty-fifth of January, 1870, Smith and Ellett executed the following instrument of writing: "Baltimore, January 25, '70. We hereby give our consent to the use of the distillery premises of Geo. J. Stephens, situated on the Harrisonburg turnpike, about four miles from Stannardsville, and which premises contain about three acres of land, more or less, immediately surrounding the distillery building, and which building is contained thereon or comprised therein by said Geo. J. Stephens, subject to the provisions of the internal rev. law, and that the lien of the United States for taxes and penalties hereafter incurred shall have priority to the extent of the above-mentioned premises of a certain deed of trust executed by said Geo. J. Stephens for our benefit, and whereof Wyatt S. Beazley is trustee, and that in case of the forfeiture of the said distillery premises, or any part thereof, the title of the same shall vest in the United States, discharged from said deed of trust."

In order to satisfy the above taxes, and the penalties authorized by law, the Collector of Internal Revenue for Virginia, by his deputy, Lawson, during December, 1870, distrained the distillery building and about three acres (of the 400-acre tract) upon which the distillery stood, and advertised the property for sale. Prior to any sale the distillery buildings and contents, including a quantity of whiskey, were destroyed by fire. The collector thereupon, before the day of sale, extended his distraint so as to include the balance of Stephens' land, amounting in all to about 525 acres, which included the land embraced by the trust deed to Smith, Ellett & Co., and advertised all of said land for sale. Pursuant to the advertisement, the deputy collector, on January 12, 1871, offered the whole of Stephens' land for sale at public auction. Smith, being present

as a member of Smith, Ellett & Co., gave formal notice of the above deed of trust, asserting a prior lien under it to that of the Government and protesting against the sale of the land except subject to that lien. The deputy collector proceeded with the sale and the property was bid in for the Government for $4,239.50, that being the amount of delinquent taxes, penalties for non-payment thereof, and costs of distraint and sale. One year thereafter, January 12, 1872, that officer executed a deed to the United States, which was duly acknowledged and recorded on November 25, 1873.

Under the authority conferred upon the Commissioner of Internal Revenue by § 3208 of the Revised Statutes, as amended by the act of March 1, 1879, and with the approval of the Secretary of the Treasury, the lands so purchased were sold, at public auction, by order of the Commissioner on the twelfth day of June, 1888, and Miss Stephens became the purchaser at the price of $500. She died after the sale, and on October 6, 1888, the United States, by the Commissioner of Internal Revenue, executed a quitclaim deed to the devisees of the purchaser, conveying to them "all right, title and interest of the United States at the time of said last named sale in the premises aforesaid, and free from any claim on the part of the United States."

By an act of Congress of May 27, 1902, 32 Stat. 207, 243, c. 887, it was provided: "That jurisdiction is hereby conferred on the Court of Claims to hear and determine the claim of Rinaldo P. Smith, of Baltimore, Maryland, against the Government of the United States on the account of the sale, purchase, or occupation by the Government, through its internal revenue officers or others, of certain real estate of one George J. Stephens in Greene County, Virginia, upon which the late firm of Smith, Ellett & Company, now represented by Rinaldo P. Smith, had a prior lien, and the right of the Government to plead the statute of limitations in bar of said claim is hereby waived: *Provided*, That said claimant file his petition within sixty days from the passage of this act in said Court of Claims, either at

law or in equity as he may deem the rights of his case shall require; and the Government shall, upon notice served according to the rules and practice of said court, appear and defend against said suit, and the same shall proceed to final hearing and judgment, with the right of appeal to the Supreme Court of the United States by either party, as provided by law."

The present action was brought in 1904 by the executor of Smith under the authority of that act.

The petition sets forth certain facts connected with the claim, and, among other things, it alleged the following: "9. The petitioner is advised and believes, and so charges, that the proceeding and sale above recited, whereby the United States acquired the title to said land and defeated the lien of said firm was in open violation of § 3207 of the Revised Statutes, which was then in full force and should have governed the proceeding of the United States in the premises; and that the officers of the United States having abundant notice of the prior lien of the said Smith, Ellett & Company, should have commenced a proceeding in the United States District Court for said district in conformity with the provisions of the statute above cited, to which proceeding the said Smith, Ellett & Company should have been made parties, and whereby their prior lien should have been audited, adjusted and paid out of the proceeds of such sale in preference to the claim of the United States, as provided by such statute; and that, by adopting the summary proceeding which was resorted to in the sale of said land, being the same authorized by §§ 3197 and 3198, Rev. Stat., in cases where no prior liens exist, the United States practically proclaimed to the whole world, just as its agent who made the sale actually did, that there was no valid prior lien on said land and that a clear title was passed by the sale. 10. That the United States accepted the conveyance so made and held the property by virtue thereof for many years, collecting the rents and profits, and that the first notice this petitioner had of its relinquishment of its holdings was through an official letter from Acting Commissioner of Internal Revenue Wilson,

bearing date January 7, 1895, in which it was stated that by a conveyance made in October, 1888, the United States had divested itself of its title to said land. 11. That, after the sale and conveyance aforesaid, the said Smith did, as the representative of his said firm, make every effort to collect the said debt from the said George J. Stephens in said Greene County, and to that end, at considerable expense, retained counsel learned in the law; but he was advised that the United States, by its summary proceeding, had taken over the title to the mortgaged land and defeated his lien thereon, and the said Stephens, having no other property against which he could proceed, his only recourse lay, first, in redeeming the property within one year under the provision of § 3202, Rev. Stat., by paying to the deputy collector the full amount of $4,229.50 claimed to be due from said Stephens to the United States, or, second, in a demand of indemnity from the United States; but the said firm, being wholly unable pecuniarily to advance that large sum of money and having serious doubts whether the mortgaged property was at that time fairly worth that amount in addition to their mortgage lien, and they were, therefore, unable to redeem said property, and neither the said firms nor this petitioner has ever directly or indirectly received any portion of said debt so due from the said Stephens as aforesaid, but the same is still due and unpaid in the full amount above stated. 12. That at the time of said sale and conveyance to the United States, the land of said Stephens, to which the said lien of the said Smith, Ellett & Company attached, was amply worth the amount of their said lien and would have brought that amount and more at any fair and regular sale thereof at auction or otherwise. 13. That on the first day of January, A. D. 1875, the partnership existing between the said Rinaldo P. Smith and the said Francis M. Ellett and a certain William F. Larrabee, who had in the meantime become a partner, expired by limitation in the articles of copartnership and was dissolved by mutual consent, and thereupon all the partnership assets of the old firm, including the debt due from Stephens, as aforesaid,

passed to this petitioner by authority of the firm as settling partner, with the exclusive right to collect the same and sign valid acquittance therefor; and although this petitioner has repeatedly made demand upon the proper officers of the Treasury Department for payment of his said claim, the same has never been paid, or any part thereof, but, on the contrary, allowance and payment thereof has been refused."

The relief sought was a judgment against the United States for $8,666.44 with interest thereon from January 12, 1871.

The Government answered, denying all the allegations of the petition and asking for judgment dismissing the suit.

Mr. Francis M. Cox and *Mr. John M. Thurston*, with whom *Mr. Charles C. Lancaster* was on the brief, for appellant:

The Federal Government, since the passage of the act of July 20, 1868, c. 186, § 106, cannot enforce a lien for internal revenue taxes against real estate (however clear may be its priority) in derogation of a duly recorded mortgage lien, through the summary process of distraint; and sale by such summary process can only convey the then existing interest of the delinquent taxpayer in the real estate so sold. *Mansfield* v. *Excelsior Refining Co.*, 135 U. S. 326; *Supervisors* v. *United States*, 4 Wall. 435; *Galena* v. *Amy*, 5 Wall. 705.

The Court of Claims was in error in holding that this case is governed by the case of *Alkan* v. *Bean*, 8 Bissell, 89. That case is clearly distinguishable.

The Government never acquired any lien at all on the land in controversy, but only on the distillery premises; and, even if it had acquired such lien, it lost its priority to that of appellant through its long-continued negligence in not collecting its taxes monthly in conformity to its own mandatory laws, and in not enforcing its rights under the warehousing and official bonds of the distiller.

A reference to the jurisdictional act apparently shows that Congress had considered the several points set forth in this branch of the argument, and had itself determined the priority

of appellant's lien, for it is therein distinctly stated that Smith, Ellett & Co., "had a prior lien" on the land in controversy. It appears, therefore, that the question of the priority of appellant's lien was not submitted to the Court of Claims, since it was clearly within the power of Congress to determine that question for itself.

The Lawson deed would not have been a valid conveyance of the property before the passage of the act of July 20, 1868, directing a proceeding in equity, because of its failure to set forth in its recitals the essential fact of a demand of the tax prior to October 26, 1869, when appellant's lien attached; and this fatal omission cannot be cured by any presumption that the officer discharged his duty.

Mr. Charles F. Kincheloe, Special Attorney, with whom *Mr. Assistant Attorney General Van Orsdel* was on the brief, for appellee.

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

We have seen that before the execution of the deed of trust, under which the plaintiff claims, taxes to the amount of $4,000 had accrued to the United States against the distiller Stephens, which he neglected, upon demand, to pay. What were the rights of the United States after such demand and failure to pay? This question depends upon the scope and effect of certain statutory provisions, as follows:

1. That part of §§ 28 and 30 of the act of June 30, 1864, 13 Stat. 232–234, as amended by the ninth section of the internal revenue act of July 13, 1866, 14 Stat. 98, 107, 108, c. 184, which declares that "if any person, bank, association, company, or corporation liable to pay any tax shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with interest, penalties, and costs that may accrue in addition

thereto, upon all property and rights to property belonging to such person, bank, association, company, or corporation; and the collector, after demand, may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property belonging to such person, bank, association, company, or corporation, or on which the said lien exists, for the payment of the sum due as aforesaid, with interest and penalty for non-payment, and also of such further sum as shall be sufficient for the fees, costs and expenses of such levy . . . (p. 108). That in any case where goods, chattels, or effects sufficient to satisfy the taxes imposed by law upon any person liable to pay the same shall not be found by the collector or deputy collector whose duty it may be to collect the same, he is hereby authorized to collect the same by seizure and sale of real estate," etc.

2. That part of § 32, p. 157, of the same act, which provides: "That there shall be levied, collected, and paid on all distilled spirits upon which no tax has been paid according to law, a tax of two dollars on each and every proof gallon [reduced to 50 cents by act of July 20th, 1868, ch. 186], to be paid by the distiller, owner, or any person having possession thereof; and the tax shall be a lien on the spirits distilled, on the distillery used for distilling the same, with the stills, vessels, fixtures, and tools therein, and on the interest of said distiller in the lot or tract of land whereon the said distillery is situated, from the time said spirts are distilled, until the said tax shall be paid."

3. That part of § 106 of the act of July 20, 1868, c. 186, 15 Stat. 125, 167, which provides that "In any case where there has been a refusal or neglect to pay any tax imposed by the internal revenue laws, and where it is lawful and has become necessary to seize and sell real estate to satisfy the tax, the Commissioner of Internal Revenue may, if he deems it expedient, direct that a bill in chancery be filed in a District or Circuit Court of the United States, to enforce the lien of the United States for tax upon any real estate, or to subject any

real estate owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax. And all persons having liens upon the real estate sought to be subjected to the payment of any tax as aforesaid, or claiming any ownership or interest therein, shall be made parties to such proceedings, and shall be brought into court as provided in other suits in chancery in said courts. And the said courts shall have, and are hereby given, jurisdiction in all such cases, and shall at the term next after such time as the parties shall be duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjudicate all matters involved therein, and to pass upon and finally determine the merits of all claims to and liens upon the real estate in question, and shall, in all cases where a claim or interest of the United States therein shall be established, decree a sale, by the proper officer of the court, of such real estate, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States." This section is substantially preserved in § 3207 of the Revised Statutes, except that the latter omits the words "if he deems it expedient," found in the above section of the act of 1868.

Before considering these statutory provisions it is proper to refer to one point. The plaintiff insists that in view of the words of the act under which this suit was brought, it must be taken that the lien created by the trust deed of October 26, 1869 was prior to any then existing in behalf of the Government. This contention rests entirely on the statement in that act that the late firm of Smith, Ellett & Co., represented by Smith, "had a prior lien." But, plainly, from the context and the admitted facts, that was merely by way of recital and as showing what that firm or Smith claimed. It could not have been intended as an admission by Congress that no lien existed in favor of the United States at the time that deed of trust was executed. The findings expressly state that when the deed was executed taxes had accrued against the distiller in favor of the United States from July, 1867, to August, 1869, amount-

ing to $4,000, and that a demand was made for their payment prior to the execution of the deed of trust under which the plaintiff claims. By the statute of 1866 it is provided that if any delinquent, liable to taxes, shall neglect or refuse to pay them after demand, there shall be a lien in favor of the United States from the time it was due "upon all property and rights to property" belonging to the delinquent. In *Kinkead* v. *United States*, 150 U. S. 483, 497, the court said it was well settled "that a mere recital in an act, whether of fact or of law, is not conclusive unless it be clear that the legislature intended that the recital should be accepted as a fact in the case." No such intention is to be imputed in this case to Congress. On the contrary, it is manifest that Congress intended that the claim of the parties was to be judicially investigated and determined according to all the facts as disclosed by the evidence adduced. We are clear that whatever the legal effect of the fact, it must be taken that the lien of the United States for its unpaid taxes attached before the trust deed was executed and recorded. That the Government acquired a lien on the property in question after the failure of the distiller to pay, upon demand, the taxes due to the United States, is too manifest, under the words of the statute, to admit of doubt. And this lien, we have seen, attached before the execution of the deed of trust of October 26, 1869.

It is to be observed that the statute gave to the Government, in order to secure its taxes, not only a sweeping lien "upon all property or rights to property" belonging to the delinquent, but a specific or special lien on spirits for the gallon taxes. It was, therefore, said by Solicitor General Phillips, 16 Opp. A. G. 634, 636: "It may be true that because of the *greater definiteness* of the special provision for a lien for the tax upon spirits there is rarely occasion for calling in the provision for a lien for taxes in general, but there is nothing to forbid that general policy to apply in all cases where there is nothing in the special policy to contradict."

The plaintiff contends that the act of 1868 superseded the

provisions of the previous law giving the remedy of distraint and that after the passage of that act the United States could only proceed in case of conflicting liens, by a regular suit in equity in a Federal court. On the part of the Government it is contended that the remedy given by that act is not exclusive, but can be used by the United States whenever it sees proper to pursue that remedy rather than the remedy of distraint.

We are of opinion that the Government correctly interprets the act of 1868. If Congress had intended to prescribe a formal suit in equity as the only mode by which the Government could sell real estate upon which it had a lien for internal revenue taxes, and upon which private parties also had liens by mortgage or deed of trust, it would have done so in clear words, particularly as Congress knew at the time of the then existing remedy by distraint. The words used do not show that Congress intended a suit in equity as exclusive of all other methods in such cases. It seems to have taken care not to so prescribe. The two remedies could well coexist. The act of 1868 declared that the Commissioner of Internal Revenue *may*, "if he deems it expedient," proceed by bill in chancery, without using any words implying a purpose to withdraw from the Government the right then existing to resort to distraint and sale. Congress, we assume, doubtless thought that cases might arise in which it would be desirable that all questions of title to property to be sold for taxes should be cleared up before a sale took place. Hence the provision which authorized, but did not require, a suit in equity, and which left untouched the right of the Government to proceed by distraint. We must not be understood as saying that if the words "if he deems it expedient" had not been in the statute, that the result would have been different. But those words are significant as tending to remove all doubt as to the correct interpretation of the statute and make it evident that Congress did not intend to take away the remedy by distraint and make the remedy by suit exclusive, but only to give another and cumulative remedy for the enforcement of liens and taxes.

This was the view taken of the statute by the Circuit Court of the United States for the Eastern District of Wisconsin in *Alkan* v. *Bean*, 8 Biss. 83, 89. Judge Dyer, delivering the judgment of the court in that case, held that the remedy given by the act of 1868, Rev. Stat. § 3207, and that given by distraint were concurrent, neither remedy being exclusive.

It is said that these views are inconsistent with the judgment of this court in *Mansfield* v. *Excelsior Refining Co.*, 135 U. S. 326. We do not think so. In that case the principal question was, what title passed by a collector's sale for delinquent taxes due from a distiller who held at the time of sale only a leasehold interest in the property seized? It was held that the collector could only sell by distraint the interest of the distiller, and that his deed to the purchaser should be regarded as conveying only such interest as the collector was entitled to sell—the court, in that case, recognizing the right of the Government to enforce by distraint whatever lien it had for unpaid taxes, subject to the rights of other lienholders. It said (p. 339): "But in what mode may the Government enforce its prior lien? In order to collect the taxes due from Hinds, the distiller, it might have instituted a suit in equity, to which not only the distiller, who had simply a leasehold interest, but all persons having liens upon, or claiming any interest in, the premises could be made parties; in which suit, it would have been the duty of the court to determine finally the merits of all claims to and liens upon the property, and to order a sale distributing the proceeds among the parties according to their respective interests. Of course, the United States having, by stipulation, priority of lien, would have been first paid out of the proceeds. But no such course was pursued. The officers of the Government preferred to adopt the summary method of sale by the collector upon notice and publication, as provided for in § 3197. It may be conceded that if the distiller had been the owner of the fee, a sale in that mode would have passed *his* interest subject to the rights of any prior incumbrancer, and subject to the right of any subsequent

incumbrancer to redeem the premises. But the delinquent distiller had no interest except a leasehold interest, and that expired, as we have seen, on May 1, 1877. We are of opinion that the collector's sale in the summary mode prescribed in § 3197 passed, and under the statute could have passed, nothing more than the interest of the delinquent distiller. When the collector distrains and sells personal property for taxes, his certificate, by the express words of the statute (§ 3194), transfers to the purchaser the right, title and interest of the *delinquent* in the property sold. When he sells real estate for taxes, the statute, in terms equally explicit (§ 3199), declares that his certificate of purchase shall be considered and operate as a conveyance of the right, title and interest the *party delinquent* had in the real estate so sold. Now, if Congress intended to invest the collector with authority to sell, by the summary process of notice and publication, the interest of any other person than the delinquent distiller, the statute would have described a certificate that would pass the interest of such person in the property sold. The provision that the certificate of purchase shall pass the interest of the delinquent in the property sold by the collector excludes, by necessary implication, the interest of any other person. This is made clear by the fact that the statute, in the case of a sale by the collector, requires notice to 'the person whose estate it is proposed to sell' (§ 3197), which person is, of course, the one who is delinquent in the matter of taxes. Any other construction would impute to Congress the purpose, in order that the taxes against the delinquent distiller, having only a leasehold interest, might be collected, to seize and sell the interest of the owner of the fee, and to destroy the lien of an incumbrancer, without giving either an opportunity to be heard."

While the *Mansfield case* recognized the right of the Government to proceed by a regular suit in equity, it also distinctly recognized its right to proceed, by distraint, and to sell the interest of the delinquent taxpayer, whatever such interest was, saving, of course, the rights of incumbrancers. In the

present case the distiller was the owner of the fee when the lien of the Government for taxes accrued—a fact which distinguishes this from the *Mansfield case*. When that lien accrued there was on the property no incumbrance whatever. The incumbrance arising from the deed of trust of 1869 arose after the lien of the Government attached. Therefore the Government had the right, by distraint, to sell such interest in the lands as the delinquent distiller owned at the time its lien attached—which was the fee—just as the collector had the right, in the *Mansfield case*, to sell the leasehold interest of the distiller. As the leasehold interest of the distiller passed by the sale in the *Mansfield case*, so the interest which the distiller in this case had when the Government's lien attached passed by the sale of the collector, subject, of course, to the right of the holder of the subsequent incumbrance created by the deed of trust of 1869, to redeem the property from the sale. By the statute, under which the sale took place, it was provided: "Any person, whose estate may be proceeded against as aforesaid, shall have the right to pay the amount due, together with the costs and charges thereon, to the collector or the deputy collector at any time prior to the sale thereof, and all further proceedings shall cease from the time of such payment. The owners of any real estate sold as aforesaid, their heirs, executors, or administrators, or *any person having any interest therein, or a lien thereon*, or any person in their behalf, shall be permitted to redeem the land sold as aforesaid, or any particular tract thereof, at any time within one year after the sale thereof, upon payment to the purchaser, or, in case he cannot be found in the county in which the land to be redeemed is situate, then to the collector of the district in which the land is situate, for the use of the purchaser, his heirs or assigns, the amount paid by the said purchaser and interest thereon at the rate of twenty per centum per annum." So that neither the distiller nor the holder of the lien created by the deed of trust of 1869 was without remedy. The lienholder, under the deed of trust of 1869, could have prevented the sale

by paying the amount of taxes due the United States, with costs and charges; or, after sale, could have redeemed the land in the mode prescribed by the statute. But neither of those courses was pursued, because, as the petition states, the firm represented by Smith was pecuniarily unable to pay the amount necessary for the redemption of the land from the sale. But that was the misfortune of the parties concerned. The fact could not affect the right of the United States to have the interest of the distiller, whatever that was at the time its lien attached, sold for the taxes.

These views dispose of the case; for, it cannot be that any liability rests upon the United States to pay the debt secured by the deed of trust of 1869, if it be true, and we hold it to be true, that whatever the Government did in the collection of the taxes due to it, was in pursuance of its rights under the law. We are unable to perceive that either the distiller Stephens or any one asserting rights under the above deed of trust had or has any ground of action against the Government.

Passing, as unnecessary to decide, many of the questions discussed by counsel, we affirm the judgment.

Affirmed.

Re METROPOLITAN RAILWAY RECEIVERSHIP.[1]

PETITIONS FOR WRITS OF MANDAMUS.

Nos. 11, 12, Original. Argued December 9, 1907.—Decided January 13, 1908.

An unsatisfied, justiciable claim of some right involving the jurisdictional amount made by a citizen of one State against a citizen of another State is a controversy or dispute between the parties within the meaning of

[1] The Docket Titles were, in No. 11, Matter of Reisenberg and another, and in No. 12, Matter of Konrad and another. The petition in each case was for a Writ of Mandamus against the Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit and against the Circuit Court of the United States for the Southern District of New York.

the statutes defining the jurisdiction of the Circuit Court (acts of March 3, 1875, c. 137, § 1, 18 Stat. 470; March 3, 1887, c. 373, § 1, 24 Stat. 552; August 13, 1888, c. 866, § 1, 25 Stat. 433), and such jurisdiction does not depend upon the denial by the defendant of the existence of the claim or of its amount or validity.

In this case there being such a claim, and the requisite diversity of citizenship, the Circuit Court had jurisdiction although the defendant admitted the facts and the liability, waived the objection that the complainants were not entitled to equitable relief, and joined in the request for appointment of receivers.

The mere fact that the defendant is engaged in interstate commerce does not give the Circuit Court jurisdiction; in cases in which this court has sustained the jurisdiction of the Circuit Court in the appointment of receivers, jurisdiction existed by reason of diversity of citizenship and not merely because the defendants were engaged in interstate commerce.

The defense in an equity suit that the complainant has not exhausted his remedy at law, or is not a judgment creditor, may be waived by defendant, and when waived—as it may be by consenting to the appointment of receivers—the case stands as though the objection never existed.

Where the averments of the bill are true, and there is no question as to the diversity of citizenship, or any evidence that a case was fraudulently created to give jurisdiction to the Federal court, the case will not be regarded as collusive merely because the parties preferred to resort to the Federal court instead of to a state court; in the absence of any improper act, the motive for bringing the suit is unimportant.

After the Federal court has properly obtained jurisdiction over a corporation and has appointed receivers thereof, an order permitting other parties closely identified therewith to intervene and extending their receivership over them is not of a jurisdictional nature, and in this case the discretion was, in view of all the facts, properly exercised.

A receivership of a railroad as a going concern, although at times necessary and proper—as in this case, where the refusal to appoint a receiver would have led to sacrifice of property, confusion among the creditors, and great inconvenience to the travelling public—should not be unnecessarily prolonged, and in case of unnecessary delay the court should listen to the application of any creditor upon due notice to the receiver for the prompt termination of the trust or vacation of the order appointing receivers.

THESE are original applications to this court for leave to file a petition for a mandamus, or, in the alternative, for a prohibition, addressed to the Honorable E. Henry Lacombe, one of the Circuit Judges of the Second Circuit, commanding him and the Circuit Court to dismiss the bill of complaint against the railroad companies hereinafter mentioned, and all pro-

ceedings therein, and to vacate injunctions therein issued by such judge, and also to vacate the orders appointing the receivers of such railroads, and to desist from exercising any further jurisdiction over such roads in such suit, or, in the alternative, commanding the judge to allow petitioners intervention, or that a writ of prohibition might issue to obtain the same relief.

It is alleged in the petition in No. 11 that the petitioners are creditors of the Metropolitan Street Railway Company on account of injuries alleged to have been received by each, through the negligence of the company's servants—in one case some time prior to June 27, 1895, and in the other on or about June 13, 1892. Actions had been brought by each, and are still pending at the time of this application.

In No. 12 it is alleged that the petitioner is the administrator of one Paul Planovsky, deceased, and as such he recovered a judgment for damages for the death of the decedent against the New York City Street Railway Company for over eight thousand dollars, which is still unpaid, the company having appealed from the judgment to the Appellate Division of the Supreme Court of the State of New York, and the appeal is still pending. The petitioner also alleged a cause of action in his own behalf, arising out of the refusal of the company to give him tickets entitling him to transfers, by which he was, as he alleged, damaged by the payment of additional fares to the amount of at least two hundred dollars.

The further facts set up in each of the petitions are substantially identical.

Upon reading the petitions orders were made allowing them to be filed, and rules to show cause why the petitions should not be granted were thereupon entered, returnable before this court on the ninth of December, 1907.

On that day there was duly filed a return of the Circuit Judge in each proceeding, who gave therein a short history of the litigation culminating in the appointment of receivers of the railroads mentioned, and stating the then condition of such

litigation. There were filed, as a part of such returns, copies of the bill of complaint under which the receivers were appointed, and of the answer of the New York City Railway Company, and also copies of certain affidavits made in behalf of complainants and defendant in the suit.

It is upon the case made by the petition for a mandamus and the return of the Circuit Judge that the questions arise for the decision of this court.

It appears from such record that in September, 1907, the New York City Railway Company and the Metropolitan Railway Company were corporations organized under the laws of the State of New York, and that the New York City Railway Company was operating a system of surface street railroads in New York County, as the owner of some and the lessee of others. The Metropolitan Railway Company was interested, either as owner or as lessee of some eighteen separate and independent railroads, all of which it had leased to the New York City Railway Company, by lease dated February 14, 1902, for 999 years.

While the New York City Railway Company was operating these various railways a bill against it was filed September 24, 1907, in the United States Circuit Court for the Southern District of New York, by the Pennsylvania Steel Company, a citizen of Pennsylvania, and by the Degnon Contracting Company, a citizen of New Jersey, as complainants, in which the complainants alleged an indebtedness due from the railway company of over $30,000 to the steel company and over $11,000 to the Degnon Company, for rails and other track material and for labor done for the company, at its request, and that payment of the debts had been demanded of the railway company by each of the complainants, and refused. It also appeared that the defendant was insolvent; that it was operating—as owner of some and lessee of other portions—a system of some five hundred miles of track, covering substantially all the surface railroads in New York, comprising many different companies, which owned many different rail-

roads, which had been leased to the Metropolitan Railway Company and by it leased to the defendant company; that all the roads which had been leased to the defendant company were covered by many separate and independent mortgages for different sums, maturing at different times; the New York City Railway Company was under obligations to pay the interest on the funded debt of its lessor, by reason of the lease from the Metropolitan Railway Company under which it was operating these various roads. Failure to meet the interest on the funded indebtedness as it matured would operate as a default and would render the mortgages enforceable.

One of these mortgages was for over twelve and another for over sixteen millions of dollars, and other mortgages increased the whole mortgage debt, on all the lines, to about one hundred millions of dollars. The New York City Railway Company, as lessee, had expended more than twenty millions of dollars in improvements, and was also indebted in other large sums, aggregating between five and ten millions of dollars more, by reason of expenditures for equipment and for repairs; also for taxes, and also for a large amount of floating indebtedness, besides which there were a great number of suits pending against it to recover damages for alleged injuries sustained through alleged negligence of its servants, and which were on the calendars of the New York courts, and the plaintiffs therein were pressing for trial. If judgment were obtained in any of these cases, or in any other of the cases where creditors were pressing their demands, it would result in disastrous consequence to the public, by a possible sale and dismemberment of the system under which the railroads were then operated, and might result in sales of portions of the roads to different individuals or corporations, by reason of which it would be impossible to continue the transfer of passengers from one road to another for one fare, such as was then in operation; and a sale of the roads would probably be for a sum greatly beneath their value, and thus the security for all the creditors for the ultimate payment of their claims would be impaired and very

greatly injured. The defendant was, as it is stated, unable to pay these various obligations as they matured.

For these, and other reasons stated with great detail in the bill, it was asked that the court would take the road into its possession, and that the creditors of the defendant might be ascertained and the court fully administer the fund, consisting of the entire railroad system and other assets of the defendant; that the assets should be marshalled and the respective liens and priorities existing therein should be ascertained, and that the court should enforce and decree the rights, liens and equities of all the creditors of the defendant, as the same might be finally ascertained by the court; that, for the purpose of preserving the unity of the system, a receiver might be appointed, with power to collect all the assets of the company, and with authority to run and operate the railroads and collect and receive all the rents due and apply the income thereof, under the direction of the court, for such period as the court should order; and for the purpose of protecting and preserving the railroads and assets and property, real and personal, from being sacrificed under proceedings liable to be taken, which might prejudice the same; and that, temporarily and pending the suit, an injunction might issue against the defendant and all persons claiming to act by, through or under it, and all other persons, restraining them from interfering with the receiver taking possession of the property, and that complainants might have such further relief as was proper.

Upon the filing of this bill a subpœna was duly issued and served upon the defendant, the New York City Railway Company, and an answer was put in by that company, which admitted all the allegations of the bill, and it joined in the prayer of the bill that the court should take possession, by receiver, of the system of railroads operated by the defendant, and that the receiver should, after taking possession of the entire property, preserve, manage, operate and control the same, and should pay all the indebtedness due or to become due, and

otherwise discharge all the duties imposed by courts upon receivers in similar cases.

Upon this bill and answer an application was made to the Circuit Judge for the appointment of a receiver and such application was granted, and receivers were duly appointed, with directions to operate the road. They were given power to borrow money, if needful in their judgment, in order to comply with the order, and make appropriate payments on account of accruing rent and other necessary charges, so far as might be necessary to pay off current expenses for labor and supplies, but for no other purpose without the order of the court. The defendant and its officers, and all persons claiming to act under the defendant, and all other persons, were enjoined from interfering in any way with the possession and management of the property by the receivers; and it was ordered that the defendant should show cause on the seventh of October, 1907, why the receivership should not be continued during the pendency of the suit; and upon the hearing thereon, it was ordered that any other creditors of the defendant, or any other party in interest, might be heard.

Prior to the seventh of October, 1907, the Metropolitan Railway Company presented a petition to the Circuit Court, wherein it asked to be made a party to the original suit of the steel company and others against the New York City Railway Company, and that the receivership under the bill might be extended so as to expressly embrace the interests of the Metropolitan Railway Company in the property. The petition showed the foregoing facts in relation to the lease of the property to the New York City Railway Company, and it averred that, by reason of these leases and the various mortgages upon portions of the property, and the operation of all the miles of railroad as one system, and because of the fact that the property of the Metropolitan Railway Company was all of it so leased to the New York City Railway Company that it had to depend on the solvency of the latter company in order that payment might be made on the various mortgages on the

various roads for which the Metropolitan Railway Company was responsible as lessee, and which it had also leased to the New York City Railway Company, the two companies were so inextricably bound together that if the New York City Railway Company went into the hands of a receiver and all its property were taken possession of by that officer it was necessary, in the interest of all concerned, that the Metropolitan Railway Company should also be made a party to the suit and the receivership extended to it. Under this petition the court granted an order making the Metropolitan Railway Company a party defendant and extending the receivership to it, and the injunction was also extended so as to enjoin that company from interfering with the possession of the receivers.

In October, 1907, an application was made to the Circuit Court on the part of those who are now petitioners in this court, in which application, it was alleged that the bill of complaint in the above-mentioned suit, and the answer consenting to the appointment of receivers and admitting the allegations in the bill, were filed collusively for the purpose of avoiding the jurisdiction of the courts of the State, and for the purpose of creating a case cognizable under the judiciary act of the United States by the United States courts. And it was averred that the suit in which the bill and answer were filed did not and does not really and substantially involve any dispute between the parties, nor did it involve any real or substantial controversy between them, or any dispute between them which was within the jurisdiction of the court. (All these averments were reiterated in the petitions presented to this court.) Various other facts were included in the petition to the Circuit Court, and it was prayed that an order might be made dismissing the bill in equity for fraud, collusion and want of jurisdiction and setting aside the order appointing a receiver, or, in case that application was denied, then that the order appointing a receiver should be amended by providing that liabilities for personal injuries and for causing the death of individuals should have the preference over other claims on

the distribution of the assets. The petition was subsequently amended so as to add a further prayer that the petitioner, individually and as administrator, might be allowed to intervene in the suit on behalf of himself individually and as administrator and on behalf of all other judgment creditors of the defendant who might come in and contribute to the defense of the suit.

In opposition to this application affidavits were presented by the persons who had verified the original bill of complaint in behalf of the two companies against the New York City Railway Company (and copies of these affidavits are made part of the returns of the Circuit Judge), denying that the purpose of the suit or of the application for the receivership was for stock jobbing or other improper purposes, and each admitted that the suit was brought in the Circuit Court of the United States for the purpose of having that court take jurisdiction, and denied that there was any impropriety or collusion or anything else wrongful in the conduct of the complainants. Each affidavit contained an averment that as non-residents of the State of New York, complainants had an absolute right to decide whether to bring the suit in the courts of the United States or in the courts of the State of New York; and it was denied that the object of the suit was anything else than appears on the face of the bill, namely, the administration of the assets of the defendant in a proper court having jurisdiction thereof. All charges of collusion and suppression of facts and of wrongdoing were denied absolutely. And a similar affidavit was made by the officers of the New York City Railway Company who had verified the answer to the bill of complaint, and copies thereof are also made part of the returns of the Circuit Judge. The application was denied.

On October 25, 1907, a decree was entered adjudging the New York City Railway Company to be insolvent and ordering a reference to a master to take proof of claims and report to the court, providing that all claims should be presented to the master on or before November 30, 1907, and that the

master should give public notice accordingly, the notice to contain a statement of the time and place of first hearing before the master.

On the ninth of November, 1907, the court made a similar order, adjudging the Metropolitan Railway Company insolvent, and adjudging that its assets should be marshalled, and appointing a master as in the other case.

The order continuing the appointment of the receivers permitted all pending suits against the New York City Railway Company and the Metropolitan Railway Company, which were begun before the receivers were appointed, to be prosecuted to judgment. In regard to claims for damages resulting from accidents before the receivers had been appointed, but in which suit had not been commenced at the time of such appointment, it was provided that they might be filed with the receivers and might go to a master for adjustment, and, in any case, it was ordered that if the plaintiff wished a jury trial he might have it, and the claim, if judgment were obtained, would thereby be liquidated, and would rank with claims already in suit.

As a reason for commencing these proceedings petitioners averred that they could not appeal from the order of the Circuit Court denying their application for leave to intervene in the suit commenced by the Pennsylvania Steel Company, and others, nor could they take any steps in that suit, and, as they were enjoined from taking any proceeding in regard to the possession by the receivers of the property of the two railway companies, they were without any remedy looking toward a review of the orders and decrees of the Circuit Court, other than by the application to this court in the manner they are proceeding.

In the course of his decision on the application to make the receivers permanent the Circuit Judge said, in relation to the allegations of collusion, as follows:

"There is no collusion apparent in any legal sense. It is of course manifest that complainants and defendants were en-

tirely in accord and arranged together that the suit should be brought in the Federal court and that the averments of the bill should be admitted by the answer. But there was no colorable assignment of some claim to a citizen of another State, nor any misrepresentation or distortion of facts to mislead the court. On the contrary, examination of the books shows that the financial situation is precisely such as was averred in the complaint."

And in relation to extending the receivership to the Metropolitan Railway Company and allowing that company to be made a party defendant, the court said:

"Having taken its entire property into possession of the court under conditions which left it powerless to recover the same for a year, the receivership left it wholly without means to meet its obligations and it seems to be clearly the duty of the court which has thus deprived it of its resources to protect it against execution while receivers handle and distribute those resources."

Mr. Roger Foster for petitioners:

The petitioners are entitled to the remedy by mandamus. Otherwise, they will be enjoined from proceeding in their suits and collecting their claims without a hearing upon a motion to dissolve the injunction, and without any right to review the injunction order and the subsequent order continuing the same.

There are two fundamentals of the common law, which are essentials of that due process of law which is guaranteed by the Constitution. Where there is a right there is a remedy. *Ashby* v. *White*, 1 Salkeld, 19. No person can be denied a hearing before he is prevented from asserting a claim of right. *Pennoyer* v. *Neff*, 95 U. S. 734.

Intervenors have no right of appeal, except possibly in the case of an intervention after judgment upon an application to share in a fund in court; and they never have a right to appeal from an order denying their right to intervene and defend a

suit. *Ex parte Cutting*, 94 U. S. 14; *Jones & Laughlins L'd* v. *Sands*, 79 Fed. Rep. 913; *Credits Commutation Co.* v. *United States*, 91 Fed. Rep. 570, 573; *S. C.*, 177 U. S. 311; *Toledo, St. L. & K. C. R. Co.* v. *Continental Tr. Co* (C. C. A.), 95 Fed. Rep. 497, 536.

If they attack this judgment collaterally, they cannot object because of a failure of the requisite difference of citizenship between parties to a controversy in the same. *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 173, 185; *Skillern's Ex'rs* v. *May's Ex'rs*, 6 Cranch, 267; *Cameron* v. *McRoberts*, 3 Wheat. 591; *Des Moines Nav. Co.* v. *Iowa H. Co.*, 123 U. S. 552, 557, 559; *Dowell* v. *Applegate*, 152 U. S. 327, 337–341; *Pullman's P. C. Co.* v. *Washburn*, 66 Fed. Rep. 790. See also *Ex parte Richards*, 117 Fed. Rep. 658; *In re Lennon*, 166 U. S. 548; *Conkling Co.* v. *Russell*, 111 Fed. Rep. 417; *Hollins* v. *Brierfield Coal Co.*, 150 U. S. 371.

The duty to dismiss the proceedings is statutory. The facts showing that there is no controversy and consequently no jurisdiction, have been found by the judge and are not disputed. There is no room for the exercise by the Circuit Court of judicial judgment or discretion. This court has jurisdiction to issue the appropriate writ in a case like this. *Ex parte Wisner*, 203 U. S. 449; *United States* v. *Severens*, 71 Fed. Rep. 768; *S. C.*, 18 C. C. A. 314.

The entire proceedings are void for want of jurisdiction, and it was the duty of the Circuit Judge to dismiss the same as soon as that matter was called to his attention. Act of March 3, 1875, c. 137, § 5, 18 Stat. 472. It is the duty of the court to dismiss such a case upon its own motion as soon as it discovers its want of jurisdiction or the improper or collusive joinder. *Williams* v. *Nottawa*, 104 U. S. 209; *Hartog* v. *Memory*, 116 U. S. 588. In this case it clearly appeared that there was no controversy between citizens of different States. There was no controversy of any sort. The complainants did not pray the payment of their respective claims. They merely prayed a receivership, coupled with a

general administration of the assets, which general administration they have refused to enter a decree directing.

There can be no controversy between the parties when the defendant has requested the plaintiff to bring the case.

There can be no matter in dispute when there is no dispute between the parties. The proceeding was not an action at common law; but a bill in equity for the appointment of a receiver. Not having reduced their claims to judgment, they are not entitled to the relief prayed except by defendant's consent. *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 181.

There is a distinction between "matter in dispute" and "matter in demand." *Hilton* v. *Dickinson*, 108 U. S. 165, 174; *May* v. *Trust Co.*, 128 Missouri, 447, 449; *Lozano* v. *Wehmer*, 22 Fed. Rep. 755, 757; *Gudger* v. *Western R. Co.*, 21 Fed. Rep. 81, 84; *Keith* v. *Levi*, 2 Fed. Rep. 743, 745.

There was collusion between the parties. Collusion does not necessarily imply fraud, but the derivation of the word implies coöperation or playing together. See *Louisville Trust Co.* v. *Louisville, New Albany & Chicago Ry. Co.*, 174 U. S. 674, 677, 687, 689; *Texas & Pacific Ry. Co.* v. *Gay*, 26 S. W. Rep. 599, 612; *S. C.*, 86 Texas, 571; *Balch* v. *Beach*, 95 N. W. Rep. 132, 137. The learned judge who granted these orders was misled by the analogy of certain decisions by the inferior Federal courts upon applications for the appointment of receivers of railway companies engaged in interstate commerce which would be impeded unless receivers were appointed. Such were cases of "property constituting a link in a great continental railway," and manifestly arose under the Constitution and laws of the United States. *Mercantile Tr. Co.* v. *Atlantic & P. R. Co.*, 70 Fed. Rep. 518, 524; *In re Lennon*, 166 U. S. 548, 553.

There was not the slightest justification for the extension of the receivership so as to reinclude the assets of the Metropolitan Street Railway Company; nor for the joinder of that company as a party to the suit. All the assets of that corporation, except its causes of action against its lessee, the directors of both companies and the other persons, who had misappro-

priated and wasted its property, were transferred by the lease to the New York City Railway Company. Those assets were, consequently, already under the protection of the court. The only object of the order extending the receivership over the property of the Metropolitan Street Railway Company was to head off all actions by the state attorney general, the stockholders and creditors of the lessors, that might be brought to compel the lessee and the officers and directors of both parties to the lease to account for the waste of the lessor's property.

In cases where trustees represented conflicting interests, the courts have always been accustomed to allow interventions. *Farmers' L. & Tr. Co.* v. *Nor. Pac. R. Co.*, 66 Fed. Rep. 169; *Farmers' L. & Tr. Co.* v. *Cape Fear & Y. V. Ry. Co.*, 71 Fed. Rep. 38; *Grand Tr. Ry. Co.* v. *Central Vt. Ry. Co.*, 88 Fed. Rep. 622; *Fowler* v. *Jarvis-Conklin M. Tr. Co.*, 64 Fed. Rep. 279; *Hamlin* v. *Toledo, St. L. & K. C. R. Co.*, 78 Fed. Rep. 664, 672; Jones on Corporate Bonds, § 338.

Mr. J. Parker Kirlin for the respondent in No. 11, Original:

Granting the order allowing the Metropolitan Street Railway Company to intervene in the original suit, for the protection of its own interests, and those of its creditors in its railway lines which were in the custody of the court, under the prior receivership, was a legitimate exercise of judicial discretion.

The jurisdiction of the Circuit Court to entertain the application of the Metropolitan Company for leave to intervene seems plain. It rests on two facts: first, that the subject matter of the controversy was in the actual possession of receivers appointed by the court, *Freeman* v. *Howe*, 24 How. 450; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Gumbel* v. *Pitkin*, 124 U. S. 131; *Morgan's Company* v. *Texas Central Ry.*, 137 U. S. 171; *In re Tyler*, 149 U. S. 164; *Rouse* v. *Letcher*, 156 U. S. 47; *Carey* v. *Houston & Texas Ry.*, 161 U. S. 115; *White* v. *Ewing*, 159 U. S. 36; *Pope* v. *Louisville &c. Ry.*, 173 U. S. 573; *Porter* v. *Sabin*, 149 U. S. 473, 479; *Byers* v. *McAuley*, 149 U. S. 608, 618; *Price* v. *Abbott*, 17 Fed. Rep. 506; *Armstrong* v. *Trautman*,

36 Fed. Rep. 275; *Compton* v. *Jesup*, 68 Fed. Rep. 263; *S. C.*, 15 C. C. A. 397; *Lanning* v. *Osborne*, 79 Fed. Rep. 657, 662; *Toledo &c. R. Co.* v. *Continental Trust Co.*, 95 Fed. Rep. 497, 505; *S. C.*, 36 C. C. A. 155; *Davis* v. *Martin*, 113 Fed. Rep. 6, 9; *S. C.*, 51 C. C. A. 27; and, second, that the administration of the assets of an insolvent corporation is within the functions of a court of equity, and, the parties being before the court, it has power to proceed with such administration. *Hollins* v. *Brierfield Coal Co.*, 150 U. S. 371, 380; see also *Quincy* v. *Humphreys*, 145 U. S. 82, 95.

The right of the court to permit intervention by a party claiming an interest in the property in the hands of a receiver is not affected by the question of citizenship. *Compton* v. *Jesup*, 68 Fed. Rep. 263; *Continental Trust Co.* v. *Toledo Ry.*, 82 Fed. Rep. 642; *Toledo, St. Louis & K. C. R. Co.* v. *Continental Trust Co.*, 95 Fed. Rep. 497.

The propriety of making lessors of railways parties defendant in a suit, either by a creditor, stockholder or mortgagee, to secure the administration of the assets of an insolvent railway system, where such system includes leased railways, has been repeatedly recognized in the Federal courts. *Central Trust Company* v. *Wabash Railway Company*, 29 Fed. Rep. 618; *Central Trust Company* v. *Wabash Railway Company*, 34 Fed. Rep. 259, 260, 261; *Quincy &c. Ry. Co.* v. *Humphreys*, 145 U. S. 82, 85–89; *St. Joseph &c. Railway Company* v. *Humphreys*, 145 U. S. 105, 106; *Ames* v. *Union Pacific Company*, 60 Fed. Rep. 966–968; *Central Railroad & Banking Company of Georgia* v. *Farmers' Loan & Trust Company*, 79 Fed. Rep. 158–160; *Mercantile Trust Company* v. *St. Louis & San Francisco Ry. Co.*, 71 Fed. Rep. 601, 602; *Mercantile Trust Co.* v. *Farmers' Loan & Trust Co.*, 81 Fed. Rep. 254, 255–258.

Mr. James Byrne for the respondent in No. 12, Original:

The claim that the decree appointing a receiver is void because made on the application of a simple contract creditor is without merit. While it is true that a court of equity, on

the application of a simple contract creditor, will not appoint a receiver if objection is made by the defendant that the creditor has not obtained a judgment on which execution has been issued and returned unsatisfied, it is equally true that the defense is one which may be waived either expressly or by failure to take the objection and that if it is waived the court has jurisdiction of the parties and its decree appointing the receiver is valid. *Hollins* v. *Brierfield C. & I. Co.*, 150 U. S. 371; *West. Electric Co.* v. *Reedy*, 66 Fed. Rep. 163, 164; *Park* v. *N. Y., Lake Erie & West. R. R. Co.*, 70 Fed. Rep. 641, 642; *Waite* v. *O'Neill*, 72 Fed. Rep. 348, 353; *Ross-Meehan Co.* v. *Iron Co.*, 72 Fed. Rep. 957, 959; *Temple* v. *Glasgow*, 80 Fed. Rep. 441, 444; *Schoolfield* v. *Rhodes*, 82 Fed. Rep. 153, 157; *Enos* v. *N. Y. & O. R. Co.*, 103 Fed. Rep. 47; *Horn* v. *Pere Marquette R. R. Co.*, 151 Fed. Rep. 626. See also *Searight* v. *Bank*, 162 Pa. St. 504; *People's Bank* v. *Loeffert*, 184 Pa. St. 164; *Penna. R. R. Co.* v. *Bogert*, 209 Pa. St. 589; *Mut. Life Ins. Co.* v. *Wilkinson*, 100 Maryland, 31; *Clark* v. *Flint*, 22 Pickering, 231; *First Congregational Society* v. *Trustees*, 23 Pickering, 148.

In this case there was absolutely no collusion, no positive action was taken to found a jurisdiction which otherwise would not exist, and the action is genuine and not merely colorable. The suit does, in the words of § 5 of the act of March 3, 1875, "really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court."

In every case that the court has held to be collusive some positive action had been taken to found a jurisdiction which otherwise would not exist, and the action had been merely colorable and not genuine. *Williams* v. *Nottawa*, 104 U. S. 209; *Rosenbaum* v. *Bauer*, 120 U. S. 450; *Lake County* v. *Dudley*, 173 U. S. 243; *Waite* v. *Santa Cruz*, 184 U. S. 302; *Morris* v. *Gilmer*, 129 U. S. 315; *Lehigh Mining &c. Co.* v. *Kelley*, 160 U. S. 327; *Detroit* v. *Dean*, 106 U. S. 537; *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178. In this case there is absolutely nothing of the sort. The jurisdiction always existed from the time the indebtednesses arose down to the present moment. See also

Blair v. *Chicago*, 201 U. S. 400; *Dickerman* v. *Trust Co.*, 176 U. S. 181.

Mr. Frederic R. Coudert submitted petitions of Paul Fuller, J. Hampden Dougherty and Melvin G. Palliser, stating that they had been appointed receivers of the New York City Railway Company, and the Metropolitan Street Railway Company by the Supreme Court of the State of New York on November 29, 1907, in actions brought by the Attorney General of that State for the dissolution of such companies, on the ground that they had been insolvent for more than one year.

These petitioners, while not appearing or intervening in this proceeding and in no manner conceding the jurisdiction of the Circuit Court of the United States to appoint receivers, as stated in the return herein, and without waiving any objection, respectfully advise this court that some of the matters purporting to be presented by the petition and the question of the jurisdiction of the Circuit Court and of alleged collusion between the parties in the action therein brought for the purpose of creating a case cognizable in the Federal courts may hereafter be presented to this court on behalf of the petitioners as such receivers appointed by the Supreme Court of the State of New York, and they also prayed that any action herein may be without prejudice to their rights in the premises.

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

The petitioners base their application for relief in this court upon the contention that the Circuit Court had no jurisdiction in the case brought by the Pennsylvania Steel Company, and others, against the New York City Railway Company, to appoint receivers, or to grant any relief asked for in the bill of complaint in that suit. And, as they have been denied leave to intervene therein, and they cannot appeal from the order denying such request, *Ex parte Cutting*, 94 U. S. 14; *Credits Commutation Co.* v. *United States*, 177 U. S. 311, they assert

they are without any remedy, unless it be granted on this application. The basis of their contention, that the Circuit Court was without jurisdiction, rests upon the assertion that there was no controversy or dispute between the parties to that suit. The counsel for the parties favoring the jurisdiction insist that these petitioners are not entitled to the remedy sought by them in this court, either by mandamus or prohibition, because the case made by them is not such as to authorize the court to issue either writ, as prayed for.

Without going into the question of the right of this court to grant the remedy sought, we prefer to place our decision upon the ground that the Circuit Court had jurisdiction, and that its action in exercising it was, therefore, valid.

The statutes defining the jurisdiction of the Circuit Court (1 Comp. Stat. 507, 508; Act March 3, 1875, c. 137, § 1, 18 Stat. 470; Act March 3, 1887, c. 373, § 1, 24 Stat. 552; Act August 13, 1888, c. 866, § 1, 25 Stat. 433), confer it, among other cases, where "there shall be a controversy between citizens of different States in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid," ($2,000).

Although the amount involved in the suit in the Circuit Court was sufficient, it is insisted now that there was no dispute or controversy in that case within the meaning of the statute, because the defendant admitted the indebtedness and the other allegations of the bill of complaint, and consented to and united in the application for the appointment of receivers. Notwithstanding this objection, we think there was such a controversy between these parties as is contemplated by the statute. In the bill filed there was the allegation that a demand of payment of the debt due each of complainants had been made and refused. This was not denied and has not been. There was therefore an unsatisfied demand made by complainants and refused by defendant at the time of the filing of the bill. We think that where there is a justiciable claim of some right made by a citizen of one State against a citizen of another State, involving an amount equal to the amount named in the

statute, which claim is not satisfied by the party against whom it is made, there is a controversy, or dispute, between the parties within the meaning of the statute. It is not necessary that the defendant should controvert or dispute the claim. It is sufficient that he does not satisfy it. It might be that he could not truthfully dispute it, and yet, if from inability, or, mayhap, from indisposition, he fails to satisfy it, it cannot be that because the claim is not controverted the Federal court has no jurisdiction of an action brought to enforce it. Jurisdiction does not depend upon the fact that the defendant denies the existence of the claim made, or its amount or validity. If it were otherwise, then the Circuit Court would have no jurisdiction if the defendant simply admitted his liability and the amount thereof as claimed, although not paying or satisfying the debt. This would involve the contention that the Federal court might be without jurisdiction in many cases where, upon bill filed, it was taken *pro confesso*, or whenever a judgment was entered by default. These are propositions which, it seems to us, need only to be stated to be condemned. The cases are numerous in which judgments have been entered by consent or default where the other requisites to the jurisdiction of the Federal court existed. *Hefner* v. *Northwestern Life Insurance Company*, 123 U. S. 747, 756; *Pacific Railroad* v. *Ketchum*, 101 U. S. 289, 296. In the latter case the proceeding was "by the consent of all the parties to the suit through their solicitors of record." It was stated in the opinion by Chief Justice Waite that the defendant had filed an answer under its corporate seal, in which every material allegation of the bill was confessed, and it was stated that the bonds sued for were in all respects valid obligations of the company, and the mortgage a subsisting lien. No doubt was expressed as to the jurisdiction of the court, because of the admission of the facts by the defendant and its consent to the judgment. We do not doubt the jurisdiction of the Circuit Court, although the facts were admitted, and the defendant joined with the complainants in a request that receivers should be appointed.

It is, however, argued, that although there may be jurisdiction in the case of railroads engaged in interstate commerce, yet they are exceptions, because in such a case they arise under the Constitution, although there may not have been an actual controversy between the parties. Such cases, it is said, cannot properly be regarded as precedents for claiming jurisdiction in the case of railroads wholly within the State, and doing no interstate business.

A case under the Constitution or laws of the United States does not arise against a railroad engaged in interstate commerce from that mere fact. It only arises under the Constitution, or laws or treaties of the United States, when it substantially involves a controversy as to the effect or construction of the Constitution or on the determination of which the result depends. *Defiance Water Co.* v. *Defiance*, 191 U. S. 184; *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561; *Bonin* v. *Gulf Company*, 198 U. S. 115; *Devine* v. *Los Angeles*, 202 U. S. 313. The appointment of a receiver in the case of a railroad engaged in interstate commerce does not necessarily involve any such controversy. Jurisdiction to appoint a receiver by a Circuit Court of the United States in cases of railroads engaged in interstate commerce has existed by reason of diversity of citizenship in the various cases between the parties to the litigation, and not because the railroads were engaged in interstate commerce. The necessary diversity of citizenship is alleged to exist in the case before the Circuit Court, and there is no suspicion as to the truth of the averment.

It is also objected that the Circuit Court had no jurisdiction because the complainants were not judgment creditors, but were simply creditors at large of the defendant railways. The objection was not taken before the Circuit Court by any of the parties to the suit, but was waived by the defendant consenting to the appointment of the receivers, and admitting all the facts averred in the bill. *Hollins* v. *Brierfield Coal & Iron Company*, 150 U. S. 371, 380. That the complainant has not exhausted its remedy at law—for example, not having

obtained any judgment or issued any execution thereon—is a defense in an equity suit which may be waived, as is stated in the opinion in the above case, and when waived the case stands as though the objection never existed.

In the case in the Circuit Court the consent of the defendant to the appointment of receivers, without setting up the defense that the complainants were not judgment creditors who had issued an execution which was returned unsatisfied, in whole or in part, amounted to a waiver of that defense. *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530; *Town of Mentz* v. *Cook*, 108 N. Y. 504, 508; *Horn* v. *Pere Marquette R. R. Co.*, 151 Fed. Rep. 626, 633.

It is asserted also, that there was collusion between the complainants and the street railway companies, on account of which the court had no jurisdiction to proceed, and therefore the suit should have been dismissed by the Circuit Court under § 5 of the act of 1875, already cited. By that section it must appear to the satisfaction of the Circuit Court that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of that court, or that the parties to that suit have been improperly or collusively made or joined for the purpose of creating a case cognizable under that act, in which case the Circuit Court is directed to proceed no further therein, but to dismiss the suit on that ground. Whether the suit involved a substantial controversy we have already discussed, and the only question which is left under that act is as to collusion.

In this case we can find no evidence of collusion, and the Circuit Court found there was none. It does appear that the parties to the suit desired that the administration of the railway affairs should be taken in hand by the Circuit Court of the United States, and to that end, when the suit was brought, the defendant admitted the averments in the bill and united in the request for the appointment of receivers. This fact is stated by the Circuit Judge; but there is no claim made that the averments in the bill were untrue, or that the debts, named

in the bill as owing to the complainants, did not in fact exist; nor is there any question made as to the citizenship of the complainants, and there is not the slightest evidence of any fraud practiced for the purpose of thereby creating a case to give jurisdiction to the Federal court. That the parties preferred to take the subject matter of the litigation into the Federal courts, instead of proceeding in one of the courts of the State, is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal court attached, the motive for bringing the suit there is unimportant. *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 190; *South Dakota* v. *North Carolina*, 192 U. S. 286, 311; *Blair* v. *City of Chicago*, 201 U. S. 400, 448; *Smithers* v. *Smith*, 204 U. S. 632, 644.

The objection to the order permitting the Metropolitan Railway Company to intervene and making it a party defendant in the Circuit Court suit is not of a jurisdictional nature, and the granting of the order was within the discretion of the court. *United States* v. *Phillips*, 107 Fed. Rep. 824; *Credits &c. Co.* v. *United States*, 177 U. S. 311. Having jurisdiction over the New York City Railway Company, and receivers having been appointed for it, there was every reason for extending the receivership to the Metropolitan Railway Company. The facts showed that it was so tied up with the New York company that a receivership for the latter ought to be extended to the former. The Circuit Court Judge so held, and we think very properly, upon the peculiar facts of the case. See *Quincy &c. R. R. Co.* v. *Humphreys*, 145 U. S. 82, 95; *Krippendorf* v. *Hyde*, 110 U. S. 276, 283, 284.

From this review of the various questions presented to us it appears that the Circuit Court had jurisdiction in the suit brought before it, and therefore the application of the petitioners for a mandamus or for a prohibition must be denied.

While so holding we are not unmindful of the fact that a court is a very unsatisfactory body to administer the affairs of a railroad as a going concern, and we feel that the possession of such property by the court through its receivers should not

be unnecessarily prolonged. There are cases—and the one in question seems a very strong instance—where, in order to preserve the property for all interests, it is a necessity to resort to such a remedy. A refusal to appoint a receiver would have led in this instance almost inevitably to a very large and useless sacrifice in value of a great property, operated as one system through the various streets of a populous city, and such a refusal would also have led to endless confusion among the various creditors in their efforts to enforce their claims, and to very great inconvenience to the many thousands of people who necessarily use the road every day of their lives.

The orders appointing the receivers and giving them instructions are most conservative and well calculated to bring about the earliest possible resumption of normal conditions when those who may be the owners of the property shall be in possession of and operate it. We have no doubt, if unnecessary delays should take place, the court would listen to an application by any creditor, upon due notice to the receivers, for orders requiring the closing of the trust as soon as might be reasonably proper, or else vacating the orders appointing the receivers.

The rules are discharged and the petitions

Dismissed.

I. M. DARNELL & SON COMPANY *v.* CITY OF MEMPHIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 75. Argued December 16, 1907.—Decided January 20, 1908.

While a State may tax property which has moved in the channels of interstate commerce after it is at rest within the State and has become commingled with the mass of property therein, it may not discriminate against such property by imposing upon it a burden of taxation greater than that imposed upon similar domestic property.

The exemption from taxation in ch. 258 of the acts of Tennessee of 1903, of growing crops and manufactured articles from the produce of the State, in the hands of the manufacturer, is a discrimination against similar property, the product of the soil of other States, brought into that State, and is therefore a direct burden upon interstate commerce and repugnant to the commerce clause of the Constitution of the United States.

Quære, and not decided, whether such provision of exemption is valid under the equal protection clause of the Fourteenth Amendment.

116 Tennessee, 424, reversed.

THE facts are stated in the opinion.

Mr. Dent Minor, with whom *Mr. C. W. Metcalf*, *Mr. C. H. Trimble* and *Mr. H. B. Anderson* were on the brief, for plaintiffs in error:

Logs in the hands of a manufacturer awaiting conversion into lumber and the lumber made therefrom in the hands of the same manufacturer are within the exemptions of the Tennessee constitution, when cut from Tennessee soil. *Benedict* v. *Davidson Co.*, 110 Tennessee, 191.

By exempting from taxation such property when taken from its own soil, the State has precluded itself from taxing similar property taken from the soil of other States, as a State may not, under the Federal Constitution, so discriminate in favor of the products of its own soil as against the products or against citizens of other States. *Welton* v. *Missouri*, 91 U. S. 275; *Walling* v. *Michigan*, 116 U. S. 446.

A Tennessee corporation or citizen is as much entitled to complain of the discrimination just mentioned as a foreign corporation or a non-resident. The evil complained of is the discrimination against persons handling property from other States and affects domestic and foreign corporations alike.

The complainant, a corporation, while not a citizen, is a "person" within the meaning of the state and Federal Constitutions and is entitled to the protection guaranteed to persons by the Fourteenth Amendment. *Dugger* v. *Ins. Co.*, 95 Tennessee, 250; *Railway Co.* v. *Mackay*, 127 U. S. 205; *Santa Clara* v. *Railway*, 118 U. S. 394.

Mr. Marion G. Evans, with whom *Mr. William H. Carroll* and *Mr. Thomas H. Jackson* were on the brief, for defendants in error:

The property is not protected by the interstate commerce clause, as it was not in transit, but had arrived at its destination. It had been manufactured, or was in process of manufacture into articles of various kinds, and had become a part of the general property in the State. *American Steel Wire Co.* v. *Speed*, 110 Tennessee, 546; *Austin* v. *Tennessee*, 179 U. S. 343; *Brown* v. *Houston*, 114 U. S. 622; *May* v. *New Orleans*, 178 U. S. 496; *Woodman* v. *The State*, 2 Swan, 354; *Machine Co.* v. *Cage*, 9 Baxter, 519; *Naff* v. *Russell*, 2 Cold. 36.

It will be observed that most of the cases cited by plaintiff in error are cases where a license tax had been charged against a non-resident, or where foreign products had been specifically taxed as such. See *Walling* v. *Michigan*, 116 U. S. 446; *Weber* v. *Virginia*, 103 U. S. 344; *Welton* v. *Missouri*, 91 U. S. 275, where these questions are discussed.

The question here is not a tax, but an exemption from taxation. The property in question has become amalgamated with the general property in the State in the hands of a resident Tennessee corporation. This is not a complaint by a non-resident, whose rights have been denied, or whose property has been unequally taxed.

MR. JUSTICE WHITE delivered the opinion of the court.

Article 2 of the Tennessee constitution of 1870 provides:

"SEC. 28. All property, real, personal or mixed, shall be taxed, but the legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held or used for purposes purely religious, charitable, scientific, literary or educational, and shall except one thousand dollars' worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer and his immediate vendee.

* * * * * * * *

"SEC. 30. No article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees."

By chapter 258, p. 632, of the acts of Tennessee for 1903 it was, among other things, provided:

"SEC. 1. That all property, real, personal and mixed, shall be assessed for taxation for State, county and municipal purposes, except such as is declared exempt in the next section.

"SEC. 2. That the property herein enumerated, and none other, shall be exempt from taxation. . . . Sub-sec. 5. All growing crops of whatever nature and kind, the direct product of the soil of this State in the hands of the producer and his immediate vendee, and manufactured articles from the produce of the State in the hands of the manufacturer."

In the recent case of *Benedict* v. *Davidson County*, 110 Tennessee, 183, 191, the Supreme Court of Tennessee held as follows:

"We are of opinion that, under the facts in this record, the logs upon the yard, in the hands of the mill-operating manufacturer and his property, and lumber, rough and smooth, cut by him from such logs grown on Tennessee soil, are articles manufactured from the produce of the State, and exempt under the provisions of section 30, article 2, of the constitution; and the demurrer was therefore properly overruled, and complainants, under the allegations of their bill, are entitled

to recover back the taxes paid the State, and to perpetually enjoin the taxes assessed by the county and city."

For more than three years prior to January 30, 1905, the I. M. Darnell & Son Company, a corporation of Tennessee, was domiciled in Memphis, in that State, and there owned and operated a lumber mill. Shortly prior to the date just named, pursuant to chapter 366 of the acts of Tennessee for 1903 (Acts Tenn., 1903, pp. 1097–1101), the value of the personalty of the Darnell Company was assessed for taxation by the city of Memphis at $44,000. Of this amount $19,325 was the value of logs cut from the soil of States other than Tennessee, which the company had brought into Tennessee from other States and were held by the company as the immediate purchaser or vendee awaiting manufacture into lumber, or consisted of lumber already manufactured by the company from logs which had been acquired and brought into the State from other States, as above mentioned, and all of which lumber was lying in the mill yard of the company awaiting sale. The Darnell Company protested against this assessment, asserting that it was not liable to be taxed on said sum of $19,325, the value of the property owned by it as the immediate purchaser of logs brought from other States, or lumber, the product thereof. The ground of the protest was that the property represented by the valuation in question could not be taxed without discriminating against it, as like property, the product of the soil of Tennessee, was exempt from taxation under the constitution and laws of that State, and therefore to tax its said property would violate the commerce clause, section 8, Article I, of the Constitution and the equal protection clause of the Fourteenth Amendment.

The protest was overruled. Thereupon threat of distress and sale was made by the collecting officer, unless the taxes on all the property were paid. On January 30, 1905, the Darnell Company filed in the Chancery Court of Shelby County its bill against the city of Memphis and the collecting officer to enjoin the enforcement of the tax as to the logs brought in from other

States, and the lumber, the product thereof as above stated, on the ground of the repugnancy of the tax to the commerce clause and the Fourteenth Amendment, because of the foregoing alleged discrimination. At the same time it paid into court the amount of the taxes which were not in dispute. The sufficiency of the bill was challenged by demurrer, asserting in substance that the assessment complained of did not constitute an unlawful discrimination and was not repugnant either to the constitution of Tennessee or of the United States. Subsequently, by leave of court, an additional demurrer was filed, which, in effect, asserted that, as the plaintiff company was a citizen of Tennessee, it could not be heard to complain of the tax, and that the enforcement of the same was not repugnant to the Fourteenth Amendment, and that as the property sought to be taxed was not in transit or awaiting shipment out of the State, but on the contrary had reached its destination and was in the hands of the consignee and owner, who was a citizen of Tennessee, and had become a part of the general property of the State, the assessing of the same for taxation was not an interference with commerce between the States. The chancellor overruled the demurrer and decided the case in favor of the Darnell Company, because the court, as stated in the decree, was of the opinion "that the tax in controversy is in contravention of the rights of complainant as guaranteed by the Constitution of the United States, and particularly the interstate commerce clause thereof, and the Fourteenth Amendment thereof, as set out in the complainant's original bill."

On appeal the Supreme Court of Tennessee, in considering the demurrer, held the disputed tax not to be repugnant to the Constitution of the United States, and reversed the decree of the Chancery Court. 116 Tennessee, 424. The court entered a decree against the Darnell Company and H. D. Minor, the surety on the appeal bond, for the amount of the disputed tax, penalty and interest. The company and Minor prosecute this writ of error.

As all the assignments of error relied on for reversal are but the counterpart of the reasons which led the court below to the conclusion that the tax was not repugnant to the Constitution of the United States, we come at once to consider the affirmative conceptions on that subject expressed in the opinion of the court below, as affording the most direct method of disposing of the issues for decision. Those conceptions are of a twofold character, one relating to the commerce clause and the other to the equal protection clause of the Fourteenth Amendment.

The court in its opinion conceded that the property embraced in the assessment complained of was purchased by the complainant in and brought from other States, or consisted of lumber produced from logs so brought into Tennessee, and that property of like character would not be subject to taxation under the state law if it had been produced from the soil of Tennessee. But the levy of the tax was held not to be a direct burden upon interstate commerce, and hence not repugnant to the commerce clause of the Constitution of the United States, as a result of the interpretation which the court affixed to previous decisions of this court concerning the operation of the commerce clause of the Constitution and the right of a State to impose a tax, even if discriminatory in character, upon property coming from other States, after such property had come at rest within a State and been commingled with the mass of property therein. The court, after stating that the provision of the state constitution which authorized the exemption of property produced from the soil of Tennessee had its inception in the "first constitution of this State, adopted on February 6, 1796, and hence formed a part of the fundamental law of the State, when it was admitted by the act of Congress, approved June 1, 1796, ch. 67, 1 Stat. 491," proceeded to state its reasons for holding that the discriminatory tax was not repugnant to the commerce clause, as follows (p. 429):

"1. Upon the averments of the bill it is manifest that, although the property sought to be taxed was purchased by

complainant in and brought from another State, nevertheless it had become divested of any connection with commerce between the States and was at rest, commingled with and merged into the general mass of property of this State, awaiting sale to purchasers.

"Although the origin of property may be in another State, nevertheless, when it is brought into this State and here merged into the mass of general property, it at once becomes subject to the tax laws of this State. *American Steel & Wire Co.* v. *Speed*, 110 Tennessee, 524–546, 75 S. W. Rep. 1037, 100 Am. St. Rep. 814.

"This principle was recognized and the holding of this court affirmed by the Supreme Court of the United States (*American Steel & Wire Co.* v. *Speed*, 192 U. S. 500), and in harmony with other adjudications of that court. *Woodruff* v. *Parham*, 8 Wall. 123; *Brown* v. *Houston*, 114 U. S. 622; *May* v. *New Orleans*, 178 U. S. 496; *Emert* v. *Missouri*, 156 U. S. 296.

"In *Kehrer* v. *Stewart*, 197 U. S. 60, 65, the Supreme Court of the United States, in substance, declared that it can make no difference whence the property came or to whom it should be ultimately sold, because upon its arrival in the State where it is offered for sale and intermingled with the general property of the State, it becomes and is a part of the taxable property of the State."

As we are of opinion that the question for decision is clearly foreclosed by prior decisions of this court, which demonstrate that the court below misconceived the rulings of this court upon which it relied, we do not stop to analyze the reasoning of the court considered as an original proposition, but come at once to test its correctness by making a brief review of the decided cases relied upon by the court below and others not referred to which relate to the subject, and which are controlling.

As a prelude to a review of the cases referred to, we observe that while it is undoubted that it has been settled that where property which has moved in the channels of interstate com-

merce is at rest within a State and has become commingled with the mass of property therein, it may be taxed by such State without thereby imposing a direct burden upon interstate commerce, that doctrine, as expounded in the decided cases, including those relied upon by the court below, has always expressly excluded the conception that a State could, without directly burdening interstate commerce, discriminate against such property by imposing upon it a burden of taxation greater than that levied upon domestic property of a like nature.

The leading cases announcing the doctrine that a State may tax property which had moved in the channels of interstate commerce, when such property had become at rest therein, even before sale in the original package, are *Woodruff* v. *Parham*, 8 Wall. 123, and *Brown* v. *Houston*, 114 U. S. 622. But in both those cases it was sedulously pointed out that the power which was thus recognized did not, and could not, include the authority to burden the property brought from another State with a discriminating tax. In *American Steel Wire Co.* v. *Speed*, 192 U. S. 500, 519, where the doctrine of *Woodruff* v. *Parham* and *Brown* v. *Houston* was reviewed and restated, it was pointed out that to prevent the levy of a tax upon property brought from another State, even after it had come at rest within a State, from being a direct burden upon interstate commerce, property so situated must be taxed "without discrimination, like other property situated within the State."

The statements just made adequately point out the misconception as to the rulings of this court upon which the court below placed its conclusion, since the court took no heed of the express declaration concerning the nullity of any discriminating tax made in the cases which the court relied on. The importance of the subject, however, and the statement made by the court below as to the long existence in Tennessee of the tax exemption in favor of the products of the soil of Tennessee, leads us to a brief review of other decided cases in this court which have long since clearly established the want

of power in a State to discriminate by taxation in any form against property brought from other States.

In *Guy* v. *Baltimore*, 100 U. S. 434, the invalidity was adjudged of a municipal ordinance of the city of Baltimore which established rates of wharfage to be charged on vessels resorting to or lying at, "landing, depositing or transporting goods or articles other than the productions of this State, on any wharf or wharves belonging to said mayor and city council, or any public wharf in the said city, other than the wharves belonging to or rented by the State." The principle, settled by earlier decisions, which were referred to (*Woodruff* v. *Parham*, 8 Wall. 123; *Hinson* v. *Lott*, 8 Wall. 148, and *Ward* v. *Maryland*, 12 Wall. 418), was reaffirmed, the court saying (pp. 439, 442):

"In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several States be materially abridged and impaired.

* * * * * * * *

"The State, it will be admitted, could not lawfully impose upon such cargo any direct public burden or tax because it may consist, in whole or in part, of the products of other States. The concession of such a power to the States would render wholly nugatory all National control of commerce among the States, and place the trade and business of the country at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products

of particular States. But it is claimed that a State may empower one of its political agencies, a mere municipal corporation representing a portion of its civil power, to burden interstate commerce by exacting from those transporting to its wharves the products of other States wharfage fees, which it does not exact from those bringing to the same wharves the products of Maryland. The city can no more do this than it or the State could discriminate against the citizens and products of other States in the use of the public streets or other public highways."

In *Webber* v. *Virginia*, 103 U. S. 344, a license statute of the State of Virginia was held to be a regulation of commerce and invalid because the tax was made to depend upon the foreign character of the articles dealt in; that is, upon their having been manufactured without the State. The court said (p. 350):

"If by reason of their foreign character the State can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several States."

In *Walling* v. *Michigan*, 116 U. S. 446, an act of the State of Michigan, which imposed a tax or duty on persons who, not having their principal place of business within the State, engaged in the business of selling, or of soliciting the sale of certain described liquors, to be shipped into the State, was held to be repugnant to the commerce clause, as being "a discriminating tax levied against persons for selling goods brought into the State from other States or countries." The court said (p. 455):

"A discriminating tax imposed by a State operating to the

disadvantage of the products of other States when introduced into the first-mentioned State is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."

And in the course of the opinion, referring to state decisions announcing a want of authority in the several States to prescribe different regulations in relation to the commerce in certain articles, dependent upon the State from which they were brought, the court thus referred to a decision of the Supreme Court of Missouri (p. 457):

"In *State* v. *North*, 27 Missouri, 464, where an act of Missouri imposed a tax upon merchants for all goods purchased by them, except such as might be the growth, produce, or manufacture of that State, and manufactured articles, the growth or produce of other States, it was held by the Supreme Court of that State that the law was unconstitutional and void. The court says: 'From the foregoing statement of the law and facts of this case it will be seen that it presents the question of the power of the States, in the exercise of the right of taxation, to discriminate between products of this State and those manufactured in our sister States.' And after an examination of the causes which led to the adoption of the Federal Constitution, one of the principal of which was the necessity for the regulation of commerce and the laying of imposts and duties by a single government, the court says: 'But, whatever may be the motive for the tax, whether revenue, restriction, retaliation or protection of domestic manufactures, it is equally a regulation of commerce, and in effect an exercise of the power of laying duties on imposts, and its exercise by the States is entirely at war with the spirit of the Constitution, and would render vain and nugatory the power granted to Congress in relation to these subjects. Can any power more destructive to the union and harmony of the States be exercised than that of imposing discriminating taxes or duties on imports from other States? Whatever may be the motive for such

taxes, they cannot fail to beget irritation and to lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state of feeling that would seek its gratification in any measures regardless of the consequences.' "

The principle applied in the foregoing cases was also given effect in *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78, and *Voight* v. *Wright*, 141 U. S. 62, and so-called inspection laws of various States were held to be repugnant to the commerce clause of the Constitution because of their discriminating character. In *New York* v. *Roberts*, 171 U. S. 658, while the tax there considered, imposed by New York upon a corporation of another State, was sustained as a valid tax upon the franchise of doing business as a corporation in New York, the court reaffirmed the authority of its former decisions declaring the invalidity of all taxes of a discriminating character levied by a State upon the products of other States.

In this connection we excerpt from the opinion in *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, statements which directly relate to the subject in hand and which conclusively demonstrate the unsoundness of the proposition which the court below upheld, that is, that the commerce clause of the Constitution does not protect property brought from another State from being discriminated against after it has arrived and been commingled with the mass of property within the State of its destination. Commenting upon the reasoning of the opinion in *State Tax on Railway Gross Receipts*, 15 Wall. 284, the court said (122 U. S. 341):

"When the latter (imported goods) become mingled with the general mass of property in the State, they are not followed and singled out for taxation as imported goods, and by reason of their being imported. If they were, the tax would be as unconstitutional as if imposed upon them whilst in the original packages. When mingled with the general mass of property in the State they are taxed in the same manner as other prop-

erty possessed by its citizens, without discrimination or partiality. We held in *Welton* v. *Missouri*, 91 U. S. 275, that goods brought into a State for sale, though they thereby become a part of the mass of its property, cannot be taxed by reason of their being introduced into the State or because they are the products of another State. To tax them as such was expressly held to be unconstitutional. The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof (which is the same thing), for which the company is called upon to pay the tax. They are taxed not only because they are money, or its value, but because they were received for transportation. No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it and seriously affects it."

As there can be no doubt within the principles so clearly settled by the decided cases, to which we have referred, that the disputed tax, which the court below sustained, was a direct burden upon interstate commerce since the law of Tennessee in terms discriminated against property the product of the soil of other States brought into the State of Tennessee by exempting like property when produced from the soil of Tennessee, it follows that the court below erred in deciding the tax to be valid, without reference to the reasoning indulged in by it concerning the application of the equal protection clause of the

Fourteenth Amendment. The judgment below must therefore be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

SOUTHERN PINE LUMBER COMPANY *v.* WARD.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 82. Submitted December 17, 1907.—Decided January 20, 1908.

Although the record was not docketed until more than thirty days after the appeal was allowed, as it was accomplished soon afterwards and meanwhile no motion was made to docket and dismiss under Rule 9, a motion subsequently made was denied.

Jurisdiction of this court attaches upon allowance of the appeal and proceedings are to be taken here to bring in the representative of an appellee who dies after the acceptance of service of citation.

An appellee, who has not himself appealed, cannot be heard in this court to assail the judgment below.

Nat. Live Stock Bank v. *First Nat. Bank*, 203 U. S. 296, 305, followed, as to when jurisdiction of this court to review judgments of the Supreme Court of the Territory of Oklahoma is by appeal and not by writ of error.

Halsell v. *Renfrow*, 202 U. S. 287, followed, as to when this court, in reviewing a judgment of the Supreme Court of the Territory of Oklahoma, is confined to determining whether that court erred in holding that there was evidence tending to support the findings made by the trial court in a case submitted to it by stipulation, without a jury, and whether such findings sustained the judgment.

In this case this court holds that the Supreme Court of the Territory did not err in finding that there was evidence to support the findings made by the trial court and that those findings sustained the judgment.

THE facts are stated in the opinion.

Mr. Arthur A. Birney and *Mr. Henry F. Woodard* for plaintiffs in error and appellants.

Mr. John C. Moore, Mr. D. W. Buckner and *Mr. George W. Buckner,* for defendants in error and appellees.

MR. JUSTICE WHITE delivered the opinion of the court.

Not unmindful that upon this record we are bound by the findings of fact below made and are confined to determining whether the facts as found sustain the judgment, if there is evidence supporting the findings, and, without departing from that rule, we at the outset refer, in chronological order, to some facts which are alleged in the pleadings, which are either directly or by necessary implication established by the findings, and as to which there can be no dispute whatever. We do this in order, if possible, to dispel the obscurity resulting from the prolixity of the pleadings, the unnecessary volume and confusion of the record, and the want of accuracy manifested by some of the assignments of error relied upon.

Prior to June, 1891, two partnerships were located in Texas —one, Grigsby Brothers; the other, the Union Mills Lumber Company, sometimes called the Union Lumber Mills Company. The first (Grigsby Brothers) was composed of G. M. D. Grigsby and D. J. Grigsby; the second (Union Mills Lumber Company) of the two Grigsbys owning four-fifths interest and T. L. L. Temple, one-fifth. At the same time there was located in Arkansas a firm known as the Southern Pine Lumber Company, composed of T. L. L. Temple and Benjamin Whitaker. Prior to June, 1891, D. J. and G. M. D. Grigsby became the recorded owners of the following real estate situated in the city of Oklahoma and in the town of Guthrie, Oklahoma Territory, viz: 1st, an undivided four-fifths interest in five lots in block 60, Oklahoma City; 2d, an undivided four-fifths interest in one lot, in block 54 of the town of Guthrie proper; an undivided four-fifths interest in and to an undivided one-half interest in block 43 in the town of Guthrie, and a like undivided four-fifths interest in a one-half interest in two lots in block 43 and one lot in block 51, East Guthrie. A like one-fifth undivided interest in the same lots was simultaneously acquired and recorded in the name of T. L. L. Temple. In June, 1891, the National Bank of Jefferson, in Jefferson, Texas, discounted

for Grigsby Brothers a note of that firm for $5,000.00. The note was dated June 11, 1891; matured in ninety days; bore twelve per cent interest from maturity, and stipulated for a ten per cent attorney's fee in case of suit to collect. This note was secured by a deed of trust embracing the undivided interest of the Grigsbys in the lots above referred to. E. F. Pentecost, the trustee named in the deed, was empowered, in case of default in payment of the debt to the bank, to sell and apply the proceeds to the payment of the note. This deed was duly recorded in Oklahoma Territory. In August, 1891, the American Exchange Bank of St. Louis discounted for T. L. L. Temple a note of the Union Mills Lumber Company, drawn for it by D. J. Grigsby. This note was for $884.90, payable in ninety days; bore twelve per cent interest from maturity, and contained a ten per cent attorney's fee clause. It was indorsed by T. L. L. Temple individually and by the Southern Pine Lumber Company. This note not having been paid at maturity, the American Exchange Bank of St. Louis, in November, 1891, sued on the note in a state court at Dallas, Texas. The defendants were the two Grigsbys and Temple as partners in the Union Mills Lumber Company, the maker of the note, Temple and Whitaker as partners in the Southern Pine Lumber Company, the indorsers, and Temple individually because of his personal indorsement. Judgment was entered against all the defendants, as members of the two firms and individually, for $1,022.38, the principal, interest, and attorneys' fees. An execution was returned in February, 1892, satisfied "by collecting the full amount of principal and costs and interest of this execution from T. L. L. Temple." In September, 1892, a corporation called the Southern Pine Lumber Company was organized under the laws of Arkansas at Texarkana in that State. T. L. L. Temple was one of the incorporators and subscribed to 997 out of a total of 1,000 shares, and he became the president of the company. In October, 1893, at Texarkana, Texas, a corporation called the Southern Pine Lumber Company was organized under the laws of Texas. Temple was an

incorporator and became its president. In November, 1894, in the District Court for Logan County, Oklahoma Territory, a suit was commenced in the name of the American Exchange Bank of St. Louis against T. L. L. Temple and Benjamin Whitaker as partners in the Southern Pine Lumber Company; the Southern Pine Lumber Company, the Arkansas corporation, D. J. and G. M. D. Grigsby and T. L. L. Temple as partners of the Union Mills Lumber Company. The petition counted upon two causes of action: first, the judgment which had been rendered in the Texas state court at Dallas as if that judgment was still due the bank and had not been satisfied, and second, the sum of $294.56, which was an open account alleged to be due by the Union Mills Lumber Company and the partners thereof, the two Grigsbys and Temple, to the partnership known as the Southern Pine Lumber Company, composed of Temple and Whitaker. This open account, it was alleged, had been transferred by the partnership in 1893 to the Southern Pine Lumber Company, a corporation, which latter, it was averred, had transferred the account to the American Exchange Bank. The defendants, being all non-residents of Oklahoma, were summoned after affidavit by publication and upon affidavit attachments were issued. The undivided interest of the Grigsbys and Temple in the lots in Oklahoma and Guthrie were attached. Ultimately a judgment was rendered in favor of the American Exchange Bank and against the defendants for the amount of the Texas judgment plus the open account sued upon, with interest and costs. The liens of the attachments were recognized, and under execution the interest of the Grigsbys and Temple in the lots in Oklahoma and Guthrie were sold and bought in by "the Southern Pine Lumber Company, a corporation," for a sum less than the judgment debt. In the meanwhile the five thousand dollar note remained unpaid in the hands of the National Bank of Jefferson, the note having been extended from time to time. In 1896 that bank failed, and the note and trust deed were among the assets of the bank in the hands of the receiver appointed by the Comp-

troller of the Currency. In December, 1898, with the approval of the Comptroller, sanctioned by an order of the United States District Court, there was paid the receiver of the bank in settlement of the rights of the bank, $2,000, and the receiver at the time of this payment by a writing assigned and transferred in blank all the right, title and interest of the bank in and to the note and the trust deed securing the payment of the same. The $2,000 was paid by means of a check of a corporation known as the Grigsby Construction Company. With these undisputed facts in hand we now come more immediately to state the case.

This suit was commenced in May, 1900, by a petition filed on behalf of W. B. Ward in the District Court of Logan County, Oklahoma, alleging himself to be the owner of the five thousand dollar note originally held by the National Bank of Jefferson. A decree for the sum of the note, principal, interest and attorney's fees, and for the foreclosure of the trust deed, was prayed. It was alleged that although the note had been renewed from time to time, but was then past due, Pentecost, the trustee, had declined to act, and therefore he was made a defendant. It was, moreover, alleged that certain persons, who were named, asserted title to the property embraced by the trust deed in virtue of an alleged purchase made under an execution issued to enforce a judgment rendered in favor of the American Exchange Bank, and that said claim was a cloud upon the title to the property embraced by the trust deed, which the plaintiff wished to have removed; that all the proceedings in the attachment suit were without effect upon the rights of the holder of the note, because neither the trustee nor the National Bank of Jefferson were made parties to that suit, although the trustee was at the time when the suit was brought a resident of Oklahoma and the trust deed was there duly of record. It was, moreover, alleged that the judgment and sale in the attachment suit were void, because no actual or even constructive notice had been given to the defendants in the suit, and that the purchaser at the sale had knowledge

of the trust deed, of the failure to make the trustee a party and of the absence of notice, actual or constructive, to the defendants in the attachment suit. A judgment was prayed decreeing the proceedings in the attachment suit and the sale made therein to be void and for an enforcement of the trust deed by a sale of the property to which that deed related. The persons made defendants were Pentecost, the trustee; the Southern Pine Lumber Company, a corporation existing under the laws of the State of Arkansas; T. L. L. Temple and Benjamin Whitaker, partners under the name of the Southern Pine Lumber Company; G. M. D. Grigsby and D. J. Grigsby, composing the firm of Grigsby Brothers; G. W. R. Chinn and his wife, and T. L. L. Temple individually, and other persons whom it is unnecessary to name. The defendants, the Southern Pine Lumber Company, T. L. L. Temple, G. W. R. Chinn and his wife, filed a joint answer. The discount of the five thousand dollar note by the National Bank of Jefferson and the execution of the deed of trust securing the same was admitted, but the right of Ward to sue upon the note was denied, it being averred that the note had been extinguished by payment made to the receiver of the National Bank of Jefferson. The proceedings for the sale of the property in the attachment suit were also admitted, and the validity of the purchase made in virtue of the execution issued in that suit was asserted. It was alleged that the answering defendants G. W. R. Chinn and his wife have a complete and perfect title in fee simple to the lots embraced in the trust deed situated in Oklahoma City, and that "the Southern Pine Lumber Company claims and charges that it has perfect title to all the property described in said trust deed situated in the city of Guthrie, Oklahoma Territory, which they acquired by purchase." The answer admitted that although the trust deed was of record at the time of the attachment proceedings, as no notice was given to the trustee or the National Bank of Jefferson, those proceedings did not affect the rights secured by the deed, but that all such rights, if any, had ceased to exist in virtue of the payment

of the note, to secure which the trust deed had been executed. Charging that the trust deed as remaining on the record was a cloud upon their title, the prayer was not only for a dismissal of the petition of the plaintiff, but for affirmative relief in favor of the defendants by decreeing them to be the owners of the property, free from the operation of the trust deed.

The two Grigsbys answered, admitting the execution of the note and trust deed by which it was secured, and that the note was due by them to Ward, the plaintiff, who held the same, as well as the trust deed, by a valid assignment from the National Bank of Jefferson. By way of answer to the affirmative relief prayed by the other defendants, and as a cross-complaint, it was, with great elaboration, alleged that the proceedings in the attachment suit and the sale made thereunder were absolutely void. To support this averment it was charged that the attachment suit was a mere fraudulent scheme devised by Temple for the purpose of defrauding them of their undivided interest in the lots in Oklahoma City and Guthrie; that the judgment sued on in Oklahoma in the name of the American Exchange Bank of St. Louis had long prior to the bringing of the suit been satisfied, and that the suit was brought in the name of the American Exchange Bank without the knowledge of that bank or under its authority, and was therefore actually prosecuted by Temple against himself in order to accomplish the fraud which he had in view. That the alleged open account embraced in the attachment suit had never, in any way, been transferred to the American Exchange Bank, and that that bank had no knowledge of or connection with the account. It was, moreover, alleged that the proceedings in the suit were additionally void, because of the entire absence of legal notice, actual or constructive, to the parties defendant who had interests to protect in that cause. It was averred that the debt represented by the note originally sued on in Texas by the American Exchange Bank was due solely by Temple, and that in satisfying the judgment which had been rendered on the note, he, Temple, had paid his own debt, because the note had

been given in the name of the Union Mills Lumber Company to Temple as a part of the settlement of the partnership affairs, he coming under the obligation to pay the note, but if the note could be treated as a liability of the firm they (the two Grigsbys) would have paid any proportion due by them as partners of the Union Mills Lumber Company, had any notice, actual or constructive, been given them of an alleged claim on the part of Temple against them growing out of the note and the satisfaction by him of the judgment rendered upon the note in the Texas court.

A demurrer was filed by the defendants, the Southern Pine Lumber Company and Chinn and wife, to the cross-complaint of the Grigsbys, on the ground that it showed no right to relief, that it sought collaterally to attack the judgment rendered in the attachment suit, and that the facts alleged disclosed such laches as estopped from recovery. Immediately afterwards a general denial was filed by the same persons without any reservation of the demurrer. The case by stipulation was submitted upon the evidence taken to the court without a jury. The court decided in favor of Ward, the plaintiff, and in favor of the Grigsbys on their cross-complaint. Two formal judgments were entered on the journal, one relating to the claim of Ward and the other to the cross-complaint of the Grigsbys. In the judgment in favor of the plaintiff Ward the journal entry recites: "And the court, after hearing the evidence, finds that all of the allegations contained in the plaintiff's petition, filed herein, are true, and that there is due from defendants G. M. D. Grigsby and D. J. Grigsby to the plaintiff W. B. Ward, on the note and mortgage sued on in this action the sum of fifty-one hundred dollars, and that said note specifies that said indebtedness shall bear interest," etc.

Again: "The court finds that the trust deed sued upon in this action and the note which said deed was given to secure, are each legal and valid as against the defendants G. M. D. Grigsby and D. J. Grigsby; that the plaintiff is entitled to have said deed foreclosed as a mortgage in this action."

Again: "The court further finds that W. B. Ward, the plaintiff in this action, is, at this time, the owner of said note and trust deed."

In considering the proceedings in the attachment suit and the prayer of Ward's petition that the sale under said proceedings be held to be void and the cloud upon his rights created thereby be removed, the court found:

"From the evidence that the judgment in cause number 1524, entitled the American Exchange Bank of St. Louis, Mo., against the Southern Pine Lumber Co. *et al.* defendants, rendered in the District Court of Logan County, Oklahoma Territory, on the 2nd day of March, 1895, and all proceedings or transfers of property under and by virtue of said judgment and cause of action, are each null and void and of no force and effect, and that the purchasers at the sale of the property levied upon, under such judgment, took nothing by their purchase; the court finds that the trust deed sued upon in this action and the note which said deed was given to secure, are each legal and valid as against the defendants G. M. D. Grigsby and D. J. Grigsby, that the plaintiff is entitled to have said deed foreclosed as a mortgage in this action."

And in accordance with these findings a judgment was entered in favor of Ward, the plaintiff, for the amount of the note, principal and interest, directing the sale of the property embraced in the trust deed and the application of the proceeds, first, to the payment of costs; second, to the payment to Ward of the principal and interest of the note and attorney's fees, and the turning over of the residuum, if any, to the Grigsbys as the owners of the property, and barring all rights of the other defendants in the property.

The judgment disposing of the cross-petition of the Grigsbys declared, concerning the debt of Ward, as follows: "The court further finds from the evidence and the pleadings that it is admitted by the defendants G. M. D. Grigsby and D. J. Grigsby, the cross-petitioners in this action, that they are indebted to the plaintiff W. B. Ward by reason of the note and trust

deed . . . and that said debt is a legal and subsisting debt as against the defendants, and is a legal charge upon the property involved in this action." Concerning the attachment proceedings and the sale made thereunder it was expressly found from the evidence that the defendants and cross-complainants, the Grigsbys, had no knowledge of the pendency of the action in time to appear and make defense thereto, that the affidavits for publication and for attachment were wholly insufficient and did not state facts adequate to confer jurisdiction upon the court, that the petition also failed to state facts sufficient to confer jurisdiction, and that all the steps taken in the attachment suit, including the sale, were wholly void and of no effect. Concerning the averments of fraud in the bringing of the attachment suit in the name of the American Exchange Bank the court found as follows:

"The American Exchange Bank of St. Louis, Mo., the plaintiff in said action, never at any time brought said suit, or authorized any one to bring said action in its name, and had no knowledge of the pendency of said action until a long time after the rendition of the judgment therein and the property had been sold thereunder. The court further finds it a fact that the defendants in said action did not owe the plaintiff, the American Exchange Bank, any sum or sums of money; the court further finds as a fact that said action was prosecuted by one of the defendants as against himself and other defendants in the name of the American Exchange Bank, without its knowledge or consent, and for the purpose of defrauding these defendants and cross-petitioners out of their property rights involved in this action, and the court further finds that said action was a fraud and an imposition upon the court as well as on the defendants and cross-petitioners; the court further finds that the Southern Pine Lumber Co., a corporation, and T. L. L. Temple and all other persons purchasing at the sheriff's sale under the judgment in said cause number 1524 above referred to and their grantees, took nothing by their pur-

chase, by reason of said judgment and proceedings had thereunder, being without jurisdiction in the court and absolutely void."

A judgment was entered avoiding the sale made under the attachment proceedings and awarding the Grigsbys the property, subject to the enforcement of the rights of Ward under the deed of trust. After an unsuccessful attempt to obtain a new trial, error was prosecuted to the Supreme Court of the Territory. That court, after elaborately disposing of motions to dismiss, affirmed the judgment. The court held that it was unnecessary to consider the sufficiency of the affidavits for publication and attachment in the attachment suit, as the findings below concerning the fraud in bringing that suit and the absence of a party plaintiff therein sustained the action of the trial court.

"The Southern Pine Lumber Company, a corporation," T. L. L. Temple and G. W. R. Chinn and his wife, appealed and moreover prosecuted a writ of error. Our jurisdiction to review is by appeal (*Natl. Live Stock Bank* v. *First Natl. Bank*, 203 U. S. 296, 305, and cases cited), and therefore we dismiss the writ of error from consideration.

On September 15, 1907, a motion to dismiss was postponed to the merits. The grounds are that the cause was not docketed within the time required by rule of this court, because proper parties were not made in the court below, and because the court below erred in not sustaining a motion to dismiss, and moreover because the assignments of error here relied on are insufficient.

The judgment was rendered on September 7, 1905. On June 12, 1906, the appeal was allowed. While the record was deposited with the clerk of this court within thirty days, it was not docketed until after thirty days, because the counsel who originally forwarded the record were not attorneys of this court, and hence not qualified to enter their appearance. As the docketing was accomplished soon afterwards (August 10, 1906), and no motion to docket and dismiss under Rule 9 was

made, the contention is without merit. *Green* v. *Elbert*, 137 U. S. 615; *Richardson* v. *Green*, 130 U. S. 104.

Service of citation was accepted by all the appellees. The acceptance on behalf of G. M. D. Grigsby and D. J. Grigsby, late partners as Grigsby Brothers and individually, was made on June 15, 1906, by their attorney of record. On June 30, 1906, G. M. D. Grigsby died. In this court the death of G. M. D. Grigsby was suggested and the proper order for publication was made and the return thereof filed. The contention is that the proceedings to make the representatives of G. M. D. Grigsby parties should have been taken in the court below and that hence the notice of publication for that purpose had in this court was ineffective. The answer to the proposition is, that the jurisdiction of this court attached upon the allowance of the appeal. *Evans* v. *State Bank*, 134 U. S. 330, 331, and cases cited. And, although, by a subsequent failure to duly prosecute, the benefits of the appeal might have been lost (*Grigsby* v. *Purcell*, 99 U. S. 505, 508), yet, clearly, as not only had the appeal been allowed, but citation had been issued and acceptance of service thereof been made by the attorney of record of the Grigsbys during the lifetime of both, the appeal was pending in this court at the time of the death of G. M. D. Grigsby, and as the case had been docketed proceedings were rightfully taken here to make his representative a party.

The remaining grounds, viz., the failure of the court below to dismiss and the inadequacy of the assignments of error, involve no question concerning our jurisdiction. In order, however, to at once dispose of the first contention we observe that the appellees cannot be heard to assail the judgment below, since they did not appeal. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618, 621, and cases cited.

We come to the merits. Before doing so it is necessary to fix accurately the scope of our inquiry. The case was submitted to the trial court by stipulation without a jury. That court by virtue of the Code of Civil Procedure of Oklahoma was empowered to make findings of fact as the basis of its

conclusions of law. Rev. Stat. of 1903 (4477), § 279. On the writ of error which was prosecuted to the Supreme Court of the Territory that court was confined to determining whether the findings of the court below sustained the judgment if there was evidence supporting the findings and was not at liberty to consider the mere weight of the evidence upon which the findings were made by the trial court. Under these circumstances, notwithstanding the ruling in *Natl. Live Stock Bank* v. *First Natl. Bank, supra,* pointing out the difference between the method of reviewing a case coming from the Territory of Oklahoma and cases coming from the Territories generally, our review in the case before us is confined to determining whether the court below erred; that is, whether that court was mistaken in holding that there was evidence tending to support the findings and that such findings sustained the judgment. *Halsell* v. *Renfrow,* 202 U. S. 287.

1st. It is contended that the court below erred because it did not find, as a matter of fact, that the debt was due Ward, but contented itself, as did the trial court, with assuming the debt to be due, merely as a result of a collusive admission made by the Grigsbys to that effect in their answer, thus depriving the defendants of the property acquired by them in the attachment proceedings because of the weakness of their title, and not on account of the establishment of an adverse right in Ward. It being, moreover, insisted that as the failure to find affirmatively in favor of Ward's debt, irrespective of the admission made by the Grigsbys, required the rejection of Ward's demand, a like result was necessary as to the cross-petition of the Grigsbys, since that petition was purely ancillary to the original demand of Ward for relief, and therefore should have shared a like fate.

It is apparent that these contentions rest upon the proposition that no finding was made by the court below concerning the existence of the debt of Ward. The proposition is thus stated in the brief of counsel:

"In the judgment of the District Court the only finding as

to Ward's debt is that 'from the evidence and the pleadings it is admitted by the defendants G. M. D. Grigsby and D. J. Grigsby, the cross-petitioners in this action, that they are indebted to the plaintiff,' " etc.

The words thus quoted are taken from the findings and judgment of the trial court disposing of the cross-petition of the Grigsbys, but these words immediately follow the passage relied on:

"By reason of the note and trust deed sued on by the plaintiff in this action in the sum of five thousand seven hundred and ninety-seven dollars ($5,797.00) and that said debt is a legal and subsisting debt as against the defendants and is a legal charge upon the property involved in this action."

But putting this out of view, the inaccuracy of the statement that the passage referred to is "the only finding as to Ward's debt," is patent on the face of the record. We say this because the statement overlooks the explicit findings which the trial court made, as to the proof of Ward's debt, in the judgment which was entered concerning that debt which we have previously quoted. In so far as the proposition assails the sufficiency of the evidence to sustain the express findings concerning the debt of Ward, it suffices to say that we think it is beyond question that there was testimony tending to show that the note and trust deed originally held by the National Bank of Jefferson had been acquired by Ward for a valuable consideration. Indeed, that the proposition now relied upon is a mere afterthought is demonstrated by the application for a new trial made in the trial court, since such application, among others, was expressly based upon the ground that the court had erred in finding that Ward's debt had been established. And the same is substantially true of the assignments of error made for the purposes of the writ of error to the Supreme Court of the Territory. In other words, having asserted below that error was committed because the trial court had found that Ward's debt was established by the proof, it is now insisted that the court erred because no such finding was made.

While if there had been no evidence tending to sustain the claim of Ward other than the admission of the Grigsbys, such admission might not have been adequate as tending to sustain a finding in favor of Ward, clearly such admission, considered in connection with the findings below concerning the proof of the debt of Ward, is sufficient to answer the argument that relief should not have been given Ward, because the note upon which he sued was held by him as collateral security. We say this because as the note indorsed by Ward to secure his freedom from liability upon which the collateral was held by him was outstanding and past due, the right of Ward to enforce the collateral was a matter solely between himself and the Grigsbys with which the purchasers at the attachment sale were not concerned, as they had failed in establishing their plea that the collateral held by Ward had been extinguished by payment.

2d. It is insisted that the court below erred in not dismissing the action on the ground of the laches of the Grigsbys in assailing the proceedings in the attachment suit. This objection can have no relation to the claim of Ward, since the findings below exclude the conception that Ward's debt was barred by limitation, and, indeed, the case was tried upon the admission of all the defendants that the debt of Ward was due at the time of the bringing of the attachment proceedings, and upon the assertion of Temple, and those who answered with him, that that debt had been, subsequent to the attachment proceedings, extinguished by payment. True, it is, that laches on the part of the Grigsbys was made one of the grounds of the demurrer filed to their cross-petition, but the answer contained no reservation of the demurrer and the findings of the trial court, as well as the action thereon of the Supreme Court of the Territory, negate the conception that the courts below could have been of the opinion that facts sufficient to show laches had been established. Besides, the contention as to laches disregards the considerations which in the nature of things must arise, when it is borne in mind that the defendants,

who claimed title under the attachment proceedings, did not rest content with defending their alleged title, but made that title the basis of an assertion of a right to affirmative relief, since they substantially, by cross-petition, invoked such relief to maintain the validity of their title, and to obtain a cancellation of the trust deed upon which Ward relied.

3d. It is urged that the court below erred in passing upon the validity of the attachment proceedings, because there was an absence of a party whose presence was essential to a decision of that question. This is based upon the assertion that T. L. L. Temple, who testified that he was president of both the Southern Pine Lumber Company, the Arkansas corporation, and of the Texas corporation of the same name, also testified that the Arkansas corporation went into liquidation in 1893, and that the Texas corporation was the purchaser at the attachment sale, and was therefore the owner of the property involved in the suit. It is insisted that as there was no evidence tending to dispute this testimony, there was nothing justifying the conclusion that the Arkansas corporation had an interest in the property, or had the capacity to stand in judgment concerning the validity of the sale in the attachment proceedings and the title to the property held thereunder. We think the proposition is without merit. Ward, by his petition, made the Southern Pine Lumber Company, a corporation organized and existing under the laws of Arkansas, Temple and others, defendants, and did not refer to a Texas corporation, known as the Southern Pine Lumber Company, as having any rights whatever in the property. The answer filed on behalf of Temple and the Southern Pine Lumber Company, the Arkansas corporation, expressly asserted that that corporation owned the property and, in effect, implied that it was the purchaser at the attachment sale. And the same thing is, in effect, substantially true with reference to the cross-petition of the Grigsbys. As then, on the record, Temple was a party to the pleading, which expressly asserted title in the Arkansas corporation, and the whole controversy proceeded upon the truth

of that assertion, we cannot say that there was nothing justifying the trial court in treating the Arkansas corporation as the purchaser at the attachment sale and as the owner of the property, even if to reach that result the trial court may have been of the opinion that the testimony of Temple on the subject was not worthy of credit. And additional force to this view results from a consideration of the proceedings intervening subsequent to the findings and judgment of the trial court and the final judgment of the Supreme Court of the Territory. We say this because both the motion for a new trial made in the trial court on behalf of Temple and the Southern Pine Lumber Company of Arkansas and the assignments of error on behalf of the same parties, which were made for the purposes of the writ of error from the Supreme Court of the Territory, made no reference to the purchase and ownership by the Texas corporation, but in effect asserted the purchase and ownership by the Arkansas corporation. The first assertion upon the record outside of the testimony of Temple of any right on the part of the Texas corporation made its appearance in a motion for a rehearing, filed after the Supreme Court of the Territory had decided the case, and which was reiterated in the assignments of error filed on the appeal to this court. The right of the appellees to the judgment in their favor may not now be destroyed by a suggestion as to want of parties, made by the appellants after final judgment, when that suggestion conflicts with the issues as made up and upon which the case was tried, and which, if the suggestion be correct, would involve reversing the judgment at the request of the appellants because of deceit practiced by them upon the territorial courts. Because we dispose of the contention upon the reasons just stated, we must not be understood as deciding that, in view of the relations of Temple to the Texas corporation, as testified to by him, and the other circumstances disclosed by the findings below, it may not be that the judgment below was conclusive upon the Texas corporation, if it had title, although it was not technically a party to the record.

Into a consideration of that subject we do not deem it necessary to enter.

4th. It is insisted that error was committed by the trial court in its finding concerning the jurisdictional insufficiency of the affidavits for publication and attachment in the attachment suit. But the grounds upon which this is based simply go to the weight of the evidence concerning the findings made by the court on those subjects, and that is not open. Further, as we are clearly of the opinion that the conclusion of the Supreme Court of the Territory, based on the findings below, as to the fraud in bringing the attachment suit and the absence of a party plaintiff therein, are ample to sustain the judgment, irrespective of the affidavits for publication and attachment, the claim must be held to be without merit. It is, moreover, urged that the courts below erred in holding the sale void as to the Grigsbys, and in recognizing their equity in the property without condemning them to pay their proportion, as partners in the Union Mill Lumber Company, of the debt which was sued on in the attachment proceedings and in not taking into consideration improvements which it is asserted were put upon the property by the purchaser at the attachment sale. The first of these is placed in argument upon the ground that the cross-petition of the Grigsbys admitted that the debt sued on in the attachment suit was, as between them and Temple, a partnership debt, for which they were jointly liable with Temple. But this statement, as made in argument, is rested solely upon a partial consideration of the Grigsby cross-petition, and ignores the express allegation to the contrary which that petition contained. It suffices to say, however, as to both of these contentions that there is nothing in the record disclosing that they were directly or indirectly presented to the trial court by way of pleading or otherwise before final judgment, and indeed were not made the subject of complaint in the motion for a new trial, and were evidently regarded by the Supreme Court of the Territory as an afterthought and not open under the state of the record. *Affirmed.*

Ex parte SIMON.

PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI.

No. 13, Original. Argued January 6, 7, 1908.—Decided January 20, 1908.

The usual rule is that a prisoner cannot anticipate the regular course of proceedings having for their end to determine whether he shall be held or released by alleging want of jurisdiction and petitioning for a *habeas corpus;* and the same rule is applicable in the case of one committed for contempt until a small fine shall be paid for disobeying an injunction order of the Circuit Court, and who petitions for a *habeas* on the ground that the order disobeyed was void because issued in a suit which was *coram non judice.*

Notwithstanding the prohibitive provisions of § 720, Rev. Stat., the Circuit Court of the United States may have jurisdiction of a suit brought by a citizen of one State against citizens of another State to enjoin the execution of a judgment fraudulently entered against him in a state court which had no jurisdiction by reason of non-service of the summons, and this court will not determine the merits of such a case on *habeas corpus* proceedings brought by one of the defendants committed for contempt for disobeying a preliminary injunction order issued by the Circuit Court.

THE facts are stated in the opinion.

Mr. Henry L. Lazarus and *Mr. Louis Marshall* for petitioner:

The petitioner being restrained of his liberty by a United States marshal, under a judgment of the United States Circuit Court, which is claimed to be void, *habeas corpus* is the proper remedy to test the validity of the imprisonment.

The remedy of *habeas corpus* has been allowed in many instances of this nature. See *Ex parte Fisk*, 113 U. S. 713; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Wells*, 18 How. 307; *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Bain*, 121 U. S. 1; *In re Ayers*, 123 U. S. 443.

The preliminary injunction issued out of the United States Circuit Court, which restrained the proceedings of the petitioner in the Civil District Court of Louisiana, being in contravention of § 720, Rev. Stat., was a nullity, and its disregard by the petitioner does not constitute contempt. *Wayman* v. *Southard*, 10 Wheat. 1; *Leathe* v. *Thomas*, 97 Fed. Rep. 126; *Fenwick Hall Co.* v. *Old Saybrook*, 66 Fed. Rep. 389; *Haines* v. *Carpenter*, 91 U. S. 254; *Dial* v. *Reynolds*, 96 U. S. 340; *Sargent* v. *Helton*, 115 U. S. 348; *Moran* v. *Sturges*, 154 U. S. 267; *In re Chetwood*, 165 U. S. 443.

The allegations of fraud in this case are not supported by a single statement of fact and do not operate to repeal § 720 of the Revised Statutes of the United States.

The allegations are mere conclusions, a collection of epithets, and a series of *non sequiturs*. *Kent* v. *Lake Superior Ship Canal Co.*, 144 U. S. 75, 91.

A bill in chancery to set aside a judgment or decree of a court of competent jurisdiction on the ground of fraud, must state distinctly the particulars of the fraud, the names of the parties who were engaged in it, and the manner in which the court or the party was misled or imposed upon. *United States* v. *Atherton*, 102 U. S. 372; 9 Ency. Pl. & Pr. 684; *Brooks* v. *O'Hara*, 8 Fed. Rep. 532. See also *Knox County* v. *Harshman*, 133 U. S. 154; *White* v. *Crow*, 110 U. S. 184; 1 Black on Judgments, § 393; *Travelers' Association* v. *Gilbert*, 111 Fed. Rep. 269; 16 Am. & Eng. Ency. of Law (2d ed.), 374.

The *gravamen* of the bill here is that because the petitioner was willing to compromise at five thousand dollars, therefore the presentation of a larger amount through the regular legal channels constituted fraud.

Neither this fact, nor the suggestion that the petitioner's testimony was fraudulent or fictitious, is a sufficient ground for an independent suit in equity to set aside the judgment of the state court. *United States* v. *Throckmorton*, 98 U. S. 65, 69; *Steele* v. *Smelting Co.*, 106 U. S. 454; *Kimberly* v. *Arms*, 40 Fed. Rep. 558; *Kiko* v. *Cohn*, 91 California, 134; *Andes* v.

Millard, 70 Fed. Rep. 517; *Mayor of New York* v. *Brady*, 115 N. Y. 615.

Mr. Harry H. Hall for respondent:

The Circuit Court of the United States for the Eastern District of Louisiana had jurisdiction to entertain and decide the suit in equity between the Southern Railway Company and Ephraim Simon and therefore, under the authorities, the writ of *habeas corpus* must be denied. *Ex parte Yarbrough*, 110 U. S. 651; *In re Frederick*, 149 U. S. 76; *Ex parte Terry*, 128 U. S. 302.

The judgment of the state court was an absolute nullity for want of citation. *Peterson* v. *Chicago Ry.*, 205 U. S. 390; *Green* v. *Chicago St. Ry.*, 205 U. S. 530; *St. Clair* v. *Cox*, 106 U. S. 350; *Pennoyer* v. *Neff*, 95 U. S. 727; *Scott* v. *McNeal*, 154 U. S. 34.

The United States Circuit Court has jurisdiction in a suit between the parties in interest, citizens of different States, claiming that the judgment obtained by one against the other is voidable for fraud practiced in obtaining it. *Johnson* v. *Waters*, 111 U. S. 667; *Cole* v. *Cunningham*, 133 U. S. 112; *Marshall* v. *Holmes*, 141 U. S. 596; *Terre Haute & I. R. Co.* v. *Peoria & P. U. R. Co.*, 82 Fed. Rep. 945; *National Surety Co.* v. *State Bank &c.*, 120 Fed. Rep. 593.

Mr. Justice Holmes delivered the opinion of the court.

The petitioner is in custody for contempt, he having violated a preliminary injunction issued by the Circuit Court of the United States. He brings this petition on the ground that the Circuit Court had no jurisdiction, and that therefore its decree might be disobeyed.

The jurisdiction of the Circuit Court over the cause depends on the allegations of the bill upon which the injunction was granted. That bill was brought by the Southern Railway Company against the petitioner. It alleges that Simon brought

a suit against the railway in Louisiana surreptitiously and without its knowledge, and that, on the suggestion that the railway was a foreign corporation doing business in the State without having named an agent to receive service, he served the citation upon the Assistant Secretary of State, whereas the railway was not a corporation doing business in the State, and the service was void. The suit proceeded to judgment for a fraudulently exaggerated sum, while the railway had no knowledge of the proceedings until after the judgment was rendered. As soon as it heard of it it began this suit; in effect to prevent the enforcement of the judgment, because unconscionable and fraudulently obtained upon a cause of action to which it has a good defense if allowed to present the same.

The bill further alleges that Simon will attempt to collect the fraudulent judgment by *fieri facias*, and prays as specific relief an injunction against his further proceeding under the same, but the general scope and purpose of the bill is what we have stated. A preliminary injunction was issued, after a hearing on affidavits, on June 30, 1905, and Simon appears to have obeyed the order for over two years. A demurrer to the bill was overruled in December, 1906, and a plea to the jurisdiction, filed in February, 1907, was overruled in the following May. Simon answered in August and issue was joined in the same month. The contempt seems to have occurred in November. It consisted in obtaining a writ of *fieri facias* and directing a levy and the service of garnishment process to collect the judgment. It was admitted at the argument that this method was adopted in order to obtain a summary disposition of the cause by this court instead of awaiting the result of a trial in the regular way. The punishment was a small fine, and the imprisonment was ordered only until the fine was paid.

The facts stated seem to us enough to dispose of this case. The usual rule is that a prisoner cannot anticipate the regular course of proceedings having for their end to determine whether he shall be held or released, by alleging want of jurisdiction and petitioning for a *habeas corpus*. *United States* v. *Sing Tuck*,

194 U. S. 161, 168; *Riggins* v. *United States*, 199 U. S. 547; *Whitney* v. *Dick*, 202 U. S. 132, 140; *In re Lincoln*, 202 U. S. 178. In the present instance the release of the petitioner is not the primary issue of the case, to be sure, but it is so closely wrapped up with that issue that when it is apparent that the imprisonment is only nominal and has been incurred after two years' acquiescence, merely in order to secure a speedier hearing in this court, the analogy of the decisions is very close. The petitioner is in no position to demand this summary relief.

This is not a suit *coram non judice* and wholly void by reason of Rev. Stat. § 720, forbidding United States courts to stay by injunction proceedings in any state court. The Circuit Court had jurisdiction of the cause. That must be assumed at this stage, and finally unless we overrule the strong intimations in *Marshall* v. *Holmes*, 141 U. S. 589, and the earlier cases cited in that case. Even if the decision could have been put on a narrower ground, the ground adopted was that the Circuit Court had original jurisdiction of such a suit. It would be going far to say that, although the Circuit Court had power to grant relief by final decree, it had not power to preserve the rights of the parties until the final decree should be reached, or that an injunction continued in force under the authority of the United States, but originally issued by a state court, stood on stronger grounds than one granted by the United States court in the first place. Even if the order was erroneous, it would be going far to say that it was made without jurisdiction and might be disregarded, although the court had jurisdiction of the cause. See *United States* v. *Shipp*, 203 U. S. 563, 573. But without laying down a broader proposition than is required, we are of opinion that in the particular circumstances of this case *habeas corpus* is an extraordinary remedy, for which there has been shown no sufficient ground.

It is argued that the bill does not disclose facts that warrant going behind the judgment, but contains only vague allegations of fraud. But it alleges facts that show a total want of jurisdiction in the state court, and implies at least that the

fictitious service was made with deliberate fraud. Its general nature and purpose are clear. Enough is alleged to amend by, if amendment is necessary, and to give jurisdiction to the Circuit Court. As we cannot pronounce the whole proceeding void, we have nothing to do with the sufficiency of the pleading or the question whether the bill would be good or bad on demurrer. There was at least color of right for the preliminary order and it will be time enough to discuss the merits if the case comes here again after final decree.

Rule discharged.

Petition for habeas corpus denied.

HOUGHTON *v.* MEYER, POSTMASTER GENERAL.[1]

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

No. 49. Argued November 12, 1907.—Decided January 20, 1908.

While the restraining order authorized by § 718, Rev. Stat., is a species of temporary injunction it is only authorized until a pending motion for a temporary injunction can be disposed of.

The undertaking given to obtain a restraining order under § 718, Rev. Stat. must be construed in the light of that section and it necessarily is superseded by an order or decree granting an injunction and thereupon expires by its own limitation, notwithstanding such order or decree may subsequently be reversed.

The givers of an undertaking cannot be held for any period not covered thereby on the conjecture that they would have given a new undertaking had one been required. Their liability must be determined on the one actually given.

In this case the obligors on the undertaking obtained an order restraining the Postmaster General from refusing to transmit their matter at second class rates. The motion on the order was not brought on but on the hearing on the merits the trial court, by decree, granted a permanent injunction. This decree was reversed. In an action brought by the

[1] Original docket title: *Houghton et al.* v. *George B. Cortelyou, Postmaster General.* By order of the court George Von L. Meyer, Postmaster General, was substituted as appellee.

Postmaster General, on the undertaking, claiming damages for entire period until final reversal of decree, *held* that:

The liability on the undertaking was limited to the difference in postage on matter mailed between the date of the restraining order and the entry of the decree of the trial court which superseded the restraining order.

This was not a case in which the parties should be relieved from the obligation of the undertaking for damages during the period for which it was in force. *Russell* v. *Farley*, 105 U. S. 433, distinguished.

27 App. D. C. 188, modified and affirmed.

THE facts are stated in the opinion.

Mr. Holmes Conrad and *Mr. William S. Hall* for appellants:

In the United States courts, where an injunction is granted, neither law nor equity gives any remedy in damages to the defendant, because it is regarded that the injunction flows from the judgment of the court, and not from the plaintiff. Where an injunction is granted and afterwards dissolved, there is no power to award damages unless bond or undertaking has been required upon the issue of the injunction. *Russell* v. *Farley*, 105 U. S. 433. Without a bond no damages can be recovered at all unless a case of malicious prosecution is made out. *Meyers* v. *Block*, 120 U. S. 206, 211.

In this case there can be no claim of malicious prosecution, as Mr. Justice Hagner, upon final hearing, decided that the claim of the plaintiff was well founded and ordered an injunction to issue. *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141, 158.

When a bond has been given, it is within the power of the trial court to decide whether any damages should be recovered. *Russell* v. *Farley*, 105 U. S. 433, 446.

In this case the preliminary injunction or restraining order was superseded by the decree made at the hearing of the cause, and with that decision the office and sole function of the temporary injunction ceased and was no longer operative.

The preliminary injunction or restraining order was by its terms to continue only "until further order." It was never dissolved. It expired by its own limitation. *Sweeney* v. *Hanley*, 126 Fed. Rep. 97, 99.

The injunction which was dissolved was the injunction of March 10, 1903, for which no bond was ever given or asked for. Had the defendant desired security, the matter should have been brought to the attention of the court. *Cayuga Bridge Co.* v. *Magee*, 2 Paige (N. Y.), 116.

The court cannot impose on the plaintiffs any undertaking which they have not given. It only makes the undertaking a condition of granting the injunction. If the plaintiffs refuse to give it, the court can refuse the injunction, but it cannot compel the plaintiffs to give an undertaking. *Tucker* v. *New Brunswick Trading Co.*, 44 Ch. Div. 249.

An undertaking given by plaintiff on the issuing of a restraining order may be continued in effect after the hearing, with the consent of the plaintiff, but not otherwise. *Novello* v. *James*, 5 De G. M. & G. 876.

Mr. Henry H. Glassie, Special Assistant to the Attorney General, for appellee:

Damages should be assessed for the entire period during which the injunction remained in force, for so long as the injunction remained in operation the undertaking remained in force as a means of indemnity. *Dodge* v. *Cohen*, 14 App. D. C. 582; *Hamilton* v. *State, use of Hardesty*, 32 Maryland, 348, 353.

Complainant's injunctions, being dissolved for want of right and equity to sustain them, are conclusively determined to have been wrongfully and inequitably sued out.

Every injunction which upon the same state of facts is dissolved, is inequitably granted, because if the complainant had been equitably entitled to the relief it would have been impossible that the bill should have been dismissed or his injunction denied. On this point the decree that complainant's bill must be dismissed is of course conclusive. *Oelrichs* v. *Spain*, 15 Wall. 211, 228, 229; *Hopkins* v. *State*, 53 Maryland, 502, 517; *Sipe* v. *Holladay*, 62 Indiana, 4, 9.

It is immaterial whether the injunction was granted by mistake of law or upon a misapprehension or misstatements

of the facts. The defendant is entitled to the protection of the undertaking whenever and for whatever reason the complainant actually fails on the merits. *Griffith* v. *Blake*, L. R. 27 Ch. Div. 474, 476, 477; *Hunt* v. *Hunt*, 54 L. J. Ch. (N. S.) 289, 290. See also *Russell* v. *Farley*, 105 U. S. 433, 438, 439; *Cox* v. *Taylor's Administrator*, 10 B. Mon. 17, 21, 22; *Winslow* v. *Mulcahy*, 35 S. W. Rep. 762, 763; *N. Y. & L. B. R. R.* v. *Dennis*, 40 N. J. L. 340.

There is absolutely no equitable consideration in this case which will relieve the complainants from the obligation imposed by their own undertaking. No new facts have supervened which were not known to the complainants at the time. In each case complainants knew that the result of granting the injunction would be the very state of things that has happened—that the Postmaster General would be prevented from getting the full rate and that they would gain and he would lose the difference. The damages which have resulted are not only the natural and inevitable result of their action, but the result actually in their contemplation and which they deliberately intended to produce.

Mr. Justice Day delivered the opinion of the court.

This case is here by appeal from the Court of Appeals of the District of Columbia. The case originated in an action brought against the then Postmaster General (Mr. Payne) to compel him to enter and transmit certain publications of the complainants, Houghton, Mifflin & Company, as second class matter instead of third class as ruled by the Postmaster General; and the bill prayed an injunction restraining the Postmaster General from refusing to transmit them at second class matter rates. A restraining order was issued upon the filing of the bill on May 31, 1902, in the following terms:

"Upon the complainant filing undertaking, as required by equity rule 42, the defendant will be hereby restrained as prayed in the within-mentioned bill until further order, to

be made, if at all, after a hearing, which is fixed for the 16th day of June at ten o'clock A. M., 1902, of which take notice.

"By the court:

A. B. HAGNER, *Justice.*"

An undertaking was given in the following terms:

"George H. Mifflin, one of the complainants, and the American Surety Company of New York, surety, hereby undertake to make good to the defendants all damages by him suffered or sustained by reason of wrongfully and inequitably suing out the injunction in the above-entitled cause, and stipulate that the damages may be ascertained in such manner as the justice shall direct, and that, on dissolving the injunction, he may give judgment thereon against the principal and sureties for said damages in the decree itself dissolving the injunction.

"GEORGE H. MIFFLIN.

"THE AMERICAN SURETY COMPANY, NEW YORK.

"By JNO. S. LOUD.

"Approved 4 June, 1902. A. B. HAGNER."

No further hearing was had upon the application for a temporary injunction, and on March 10, 1903, the case was heard on the merits and the following injunction awarded:

"This cause, coming on to be heard upon the bill and the exhibits filed therewith, and on the papers filed in the cause and the proceedings had therein, was argued by counsel. On consideration thereof it is this 10th day of March, 1903, adjudged, ordered, and decreed—

"(1.) That the complainants are entitled to have their publications entitled 'Riverside Literature Series' received and transmitted through the mails as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879.

"(2.) That the Postmaster General be, and he is hereby, perpetually restrained from enforcing and continuing the can-

cellation of the certificate of entry set forth in paragraph six of said bill, and from refusing to receive said publication and transmit the same through the mails as mailable matter of the second class, in accordance with the provisions of said act of Congress approved March 3, 1879, and from denying to the complainants the receipt, entry, and transmission through the mails of their publication entitled 'Riverside Literature Series' as mailable matter of the second class, as defined by the act of Congress approved March 3, 1879."

An appeal was taken to the Court of Appeals of the District of Columbia, and on June 5, 1903, the decree of the Supreme Court was reversed and the case remanded to the court below, with directions to dismiss the bill. 22 App. D. C. 234. From that decree an appeal was taken to this court, and the decree of the District Court of Appeals was affirmed on April 11, 1904. 194 U. S. 88.

Upon receipt of a mandate of this court the District Court of Appeals issued its mandate, ordering the court below to dismiss the bill. The Postmaster General moved the court to enter a decree upon the mandate of the District Court of Appeals, to dismiss the bill dissolving the injunction, and ascertain the damages by reason of the violation thereof. The District Supreme Court entered a decree setting aside its original decree, and dismissed the bill, and dissolved the injunction theretofore granted, but being of opinion that, as matter of law, the complainants and sureties on the injunction bond given in the case were not liable to damages thereon, the motion for ascertainment of damages upon such undertaking was overruled and denied, and the injunction undertaking cancelled and annulled.

From the part of the decree refusing to assess damages the Postmaster General, Mr. Cortelyou having succeeded Mr. Payne, appealed to the District Court of Appeals, where the order of the court below was reversed, and a decree directed against the appellant and the surety on the injunction bond for the sum of $6,880.86, the amount with interest stipulated as the

difference between postage due at third class rate and that paid as second class rate "between the date of the filing of the injunction herein and June 16, 1904, when such mailing at the second class rate was discontinued." 27 App. D. C. 188. Thereupon appeal was taken to this court.

It is the contention of the appellants that the original undertaking being entered only for a temporary purpose, had spent its force, and that there is no liability thereon, notwithstanding the fact that the original decree granting a permanent injunction was reversed by the District Court of Appeals, which judgment was affirmed in this court.

The contention of the appellee is that the damages sustained by the Postmaster General during the time pending this action was secured by the bond, and recovery may be had for the damages sustained, or, if not for the full amount, at least for the time from the granting of the restraining order until the final decree in the court of original jurisdiction.

The determination of the question involved depends upon the nature and character of the undertaking given. The restraining order issued in the case was authorized by § 718 of the Revised Statutes of the United States, which is as follows:

"Whenever notice is given of a motion for an injunction out of a Circuit or District Court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge." Rev. Stat. § 718.

Under this section, originally passed June 1, 1872 (§ 7, c. 255, 17 Stat. 196, 197), a restraining order with features distinguishing it from an interlocutory injunction was introduced into the statutory law. In the prior act of Congress of March 3, 1793, c. 22, 1 Stat. 334, 335, it was provided in § 5: "Nor shall a writ of injunction be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same."

By force of § 718 a judge may grant a restraining order in case it appears to him there is danger of irreparable injury, to be in force "until the decision upon the motion" for temporary injunction. Thus by its very terms the section (718) does not deal with temporary injunctions, concerning which power is given in other sections of the statutes, but is intended to give power to preserve the *status quo* when there is danger of irreparable injury from delay in giving the notice required by Equity Rule 55, governing the issue of injunctions. While the statutory restraining order is a species of temporary injunction, it is only authorized, as § 718 imports by its terms, until the pending motion for a temporary injunction can be heard and decided. *Yuengling* v. *Johnson*, 1 Hughes, 607; *S. C.*, 30 Fed. Cases, 866, Case No. 18195; *Barstow* v. *Becket* 110 Fed. Rep. 826, 827; *North American Land and Timber Co.* v. *Watkins*, 109 Fed. Rep. 101, 106; *Worth Mfg. Co.* v. *Bingham*, 116 Fed. Rep. 785, 789.

And the same view has been recognized in other jurisdictions having similar statutory provisions. "A temporary restraining order is distinguished from an interlocutory injunction in that it is ordinarily granted merely pending the hearing of a motion for a temporary injunction and its life ceases with the disposition of that motion and without further order of the court, while, as we have seen, an interlocutory injunction is usually granted until the coming in of the answer or until the final hearing of the cause and stands as a binding restraint until rescinded by the further action of the court." 1 High on Injunctions (4th ed.), § 3.

Turning from a consideration of the authority conferred to the terms of the order, it will be seen that the judge acted under the terms of § 718. For the order of restraint is "until further order, to be made, if at all, after a hearing, which is fixed for the 16th day of June, at ten o'clock A. M., 1902, of which take notice." This is the order of which the defendant had notice and concerning which indemnity was required and given in the bond now in suit.

As we have noticed, no further undertaking was required of Houghton, Mifflin & Company after the restraining order issued in its favor. The Court of Appeals of the District said, 27 App. D. C. 195:

"But we do not think the bond ceased to be in force after the decree was entered making the injunction perpetual. The parties, by their actions, treated it as though it continued to apply. The appellant would, had any question been raised, have asked for a new bond, in which event the appellees doubtless would have conceded that the bond remained in force. When the main case was before this court, and later was taken to the United States Supreme Court, it was considered that the original undertaking was in force or a new one would have been required,—one other than the supersedeas bond then given."

But we do not think the case can be decided upon conjecture as to what bonds might have been required. We must determine the case upon the liability of the principals and sureties on the bond which was actually given.

When the parties gave this undertaking, the court, exercising its discretion, had required that the restraining order should be upon condition that bond be given to secure the defendant against loss because of this temporary restraint.

It is true that the restraining order was, by its terms, to be in force until "further order," to be made, if at all, after hearing. Neither party brought on for hearing the pending motion for a temporary injunction. When the further order was made nothing was said of the restraining order. A new and permanent injunction in favor of the plaintiffs was granted. This decree necessarily superseded the restraining order, and it expired by the limitation contained in its terms, and there was no further liability on the bond, given only to secure that order.

It is further contended by the appellants that they should be relieved from all liability on this bond, upon the principles laid down in *Russell* v. *Farley*, 105 U. S. 433. In that case the

equity practice in the courts of the United States concerning security for injunctions was elaborately discussed by Mr. Justice Bradley, speaking for the court. It was held that the exercise of discretion involved in the decision of the court of original jurisdiction, in awarding or withholding damages, should only be reversed in clear cases. And examining the procedure in the case then in hand, with a view to ascertaining whether injustice had been done, the fact is shown that the injunction secured by the obligation given in that case had never been entirely dissolved; that it had never been decided that the complainant was not entitled to it, at least as to a portion of the property claimed by the parties suing out the injunction, and it turned out on the final hearing that as to more than one-half of the claim the injunction was properly issued. In course of the discussion the learned justice says, p. 442:

"When the pledge [deposited by order of court] is no longer required for the purposes of justice, the court must have the power to release it, and leave the parties to the ordinary remedies given by the law to litigants *inter sese*. Where the fund is security for a debt or a balance of account, or other money demand, this would rarely be allowable; but in many other cases it might not infrequently occur that injustice would result from keeping property impounded in the court. On general principles the same reason applies where, instead of a pledge of money or property, a party is required to give bond to answer the damage which the adverse party may sustain by the action of the court. In the course of the cause, or at the final hearing, it may manifestly appear that such an extraordinary security ought not to be retained as a basis of further litigation between the parties; that the suit has been fairly and honestly pursued or defended by the party who was required to enter into the undertaking, and that it would be inequitable to subject him to any other liability than that which the law imposes in ordinary cases. In such a case it would be a perversion, rather than a furtherance, of justice

to deny to the court the power to supersede the stipulation imposed."

In the present case the court of original jurisdiction, the Supreme Court of the District, refused to assess damages upon the injunction bond, for what reason the record does not disclose. The District Court of Appeals, as we have seen, assessed damages for the entire period, during which it held the injunction to be in force. We do not think this case comes within the class outlined in *Russell* v. *Farley*, wherein the order of the trial court ought not to be disturbed upon principles of equity and in view of the superior knowledge of that court of the conduct of the parties in the course of the litigation.

In this case the Government and the appellants were in controversy as to the rate of postage to be charged upon a certain class of publications sent through the mail by the appellants. It is true that the department's rulings for some years had been in favor of the contention of the appellants as to the class to which this mailable matter belonged. When the Postmaster General ruled to the contrary, and correctly, as has now been held in the District Court of Appeals and in this court, the publishers applied to the court for an injunction to continue them in their original right to receive this lower rate of postage pending the litigation which they had begun, with a view to testing the right of the Government to make this demand. The court entertained the suit and awarded a restraining order, but upon the condition that if the publishers continued to receive the lower rate postage for which they contended, notwithstanding the ruling of the Postmaster General, the Government was to be indemnified against loss should it turn out that its contention was right and that of the complainants wrong. The publishers accepted this condition, and gave the bond to secure their right to continue sending the mailable matter in controversy at the old rate, pending the further order of the court.

As a result of the final decision in this court, it turned out that the Postmaster General was right, and that the Govern-

ment was justly entitled to the additional rate of postage as ruled by the Postmaster General. The result of the decision established not only the right of the Government to receive the additional postage, pending the controversy, but also established the fact that the publishers had received a very considerable amount of service from the Government in carrying the publications through the mails at a rate less than it was entitled to charge.

We do not perceive, in this condition of affairs, any room for the application of the doctrine laid down in *Russell* v. *Farley*, which permits a court to relieve from liability on an injunction bond. The result of this litigation leaves no doubt as to the rights of the parties, and the Government's right to avail itself of the security given to secure payment of the postage which it was legally entitled to charge.

It is not necessary for us to decide whether further and other security might not have been required under Equity Rule 93, or otherwise, as a condition of continuing the injunction after final judgment. What we determine is that this undertaking was authorized and given in pursuance of § 718, Rev. Stat., and should be construed accordingly. The District Court of Appeals should have sustained the order of the Supreme Court of the District, declining to assess any damages on the bond, except for the period from the time the bond was approved until March 10, 1903, the date of the decree in the court of original jurisdiction.

The judgment of the Court of Appeals giving damages for the entire period of the litigation and until the legal rate of postage was paid by appellants should be modified so as to include only damages for the period covered by the restraining order, as above stated, and, as so modified,

Affirmed, costs in this court to be equally divided.

ADAIR *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 293. Argued October 29, 30, 1907.—Decided January 27, 1908.

It is not within the power of Congress to make it a criminal offense against the United States for a carrier engaged in interstate commerce, or an agent or officer thereof, to discharge an employé simply because of his membership in a labor organization; and the provision to that effect in § 10 of the act of June 1, 1898, 30 Stat. 424, concerning interstate carriers is an invasion of personal liberty, as well as of the right of property, guaranteed by the Fifth Amendment to the Constitution of the United States, and is therefore unenforceable as repugnant to the declaration of that amendment that no person shall be deprived of liberty or property without due process of law.

While the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, are subject to such reasonable restrictions as the common good or general welfare may require, it is not within the functions of government—at least in the absence of contract—to compel any person in the course of his business, and against his will, either to employ, or be employed by, another. An employer has the same right to prescribe terms on which he will employ one to labor as an employé has to prescribe those on which he will sell his labor, and any legislation which disturbs this equality is an arbitrary and unjustifiable interference with liberty of contract.

Quære, and not decided, whether it is within the power of Congress to make it a criminal offense against the United States for either an employer engaged in interstate commerce, or his employé, to disregard, without sufficient notice or excuse, the terms of a valid labor contract.

The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed, but the rules prescribed must have a real and substantial relation to, or connection with, the commerce regulated, and as that relation does not exist between the membership of an employé in a labor organization and the interstate commerce with which he is connected, the provision above referred to in § 10 of the act of June 1, 1898 cannot be sustained as a regulation of interstate commerce and as such within the competency of Congress.

The power to regulate interstate commerce, while great and paramount, cannot be exerted in violation of any fundamental right secured by other provisions of the National Constitution.

The provision above referred to, in § 10 of the act of June 1, 1898, is severable, and its unconstitutionality may not affect other provisions of the act or provisions of that section thereof.

THE facts, which involve the constitutionality of § 10 of the act of Congress, concerning carriers engaged in interstate commerce (known as the Erdman Act), passed June 1, 1898, c. 370, 30 Stat. 424, are stated in the opinion.

Mr. Benjamin D. Warfield, with whom *Mr. Henry L. Stone* was on the brief, for plaintiff in error:

Section 10 is unconstitutional. If it affects commerce at all, it does so only obliquely, remotely, indirectly and collaterally. A regulation of commerce to come within the meaning of the commerce clause of the Constitution, must be direct and substantial, and not merely indirect, remote, incidental and collateral. Therefore § 10 was beyond the power of Congress to enact. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Hopkins* v. *United States*, 171 U. S. 578; *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Hooper* v. *California*, 105 U. S. 648, 654; *Williams* v. *Fears*, 179 U. S. 270, 278; *Munn* v. *Illinois*, 94 U. S. 113; *Mugler* v. *Kansas*, 123 U. S. 623, 661. See also *L. & N. R. Co.* v. *Kentucky*, 161 U. S. 677; *Smith* v. *Alabama*, 124 U. S. 465; *Sherlock* v. *Alling*, 93 U. S. 102; *L. S. & M. S. R. R. Co.* v. *Smith*, 173 U. S. 684.

The act under consideration does not prescribe any rule as to traffic or transportation. No rule whatever is laid down. There are no regulations to which the carrier is required to conform, or failing in obedience to which it is to be rendered liable in a civil or a criminal forum. The act is a bold attempt to regulate an ordinary relation of life—of master and servant—one hitherto supposed to be entirely within state control.

Section 10 violates the Fifth Amendment. It impairs, if it does not in fact destroy, the valuable property right of contract. Similar state statutes have been declared unconstitutional. *State* v. *Julow*, 31 S. W. Rep. 781; *Gillespie* v. *People*, 58 N. E. Rep. 1007; *State ex rel. Zillmer* v. *Kreutzberg*, 90

N. W. Rep. 1098; *People* v. *Marcus*, 77 N. E. Rep. 1073; *Wallace* v. *Georgia C. & N. Ry. Co.*, 22 S. E. Rep. 579; *New York &c. R. Co.* v. *Shaffer*, 62 N. E. Rep. 1036. See also *Shaver* v. *Pennsylvania Co.*, 71 Fed. Rep. 931; *Brewster* v. *Miller's Sons & Co.*, 101 Kentucky, 358; *Hundley* v. *L. & N. R. Co.*, 105 Kentucky, 162; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Arthur* v. *Oakes*, 63 Fed. Rep. 310.

Section 10 is unconstitutional as class legislation. The classification is unreasonable. The statute attempts to confer privileges upon union labor that are not conferred upon non-union labor. No restraint whatever is imposed upon carriers with respect to discharging or discriminating against non-union laborers. However lawful it may be for employés to organize and become members of labor unions or associations, under our form of government, which guarantees equal privileges to all before the law, it is not competent for Congress, or state legislatures, to make such an unreasonable classification as in the statute before us, whereby union labor is preferred as against non-union labor. *Johnson* v. *Ry. Co.*, 43 Minnesota, 223; *S. C.*, 8 L. R. A. 419; *Gulf, Col. & Santa Fé Ry. Co.* v. *Ellis*, 165 U. S. 150; *Robertson* v. *Baldwin*, 165 U. S. 275.

The Attorney General and *Mr. William R. Harr*, Special Assistant to the Attorney General, for defendant in error:

Section 10 of the act has a clear and direct relation to interstate commerce. Its constitutionality is not to be determined by considering it separately from the other provisions of the act, as was done by Judge Evans in *United States* v. *Scott*, 148 Fed. Rep. 431. Considered in the light of the other provisions of the act and the purpose which pervades the entire statute, the relation of § 10 to interstate commerce is at once apparent. In construing statutes the whole statute and all of its parts are to be taken together. *Pennington* v. *Coxe*, 2 Cranch, 34.

The manifest purpose of the act is the protection of interstate and foreign commerce by the avoidance of strikes, lockouts, etc., which are the forms such interruptions usually assume.

The history of the act removes any doubt on this point. It was the result of the great railroad strike at Chicago in June–July, 1894. See Senate Rep. 591, 55th Cong., 2d Session; H. Rep. 454, 55th Cong., 2d Session.

It recognized the fact that such interruptions were not apt to assume serious proportions unless the employés were members of labor organizations and the latter became involved in it. Congress also recognized the fact that discrimination against employés because of their membership in a labor organization was calculated to bring on such disturbances. For the purpose, therefore, of preventing these interruptions, it provided means for the arbitration of disputes between the carriers and their employés through the labor organizations to which the latter belonged, and forbade discrimination against employés because of their membership in such organizations.

The relation of the inhibitions in § 10 to the general scheme for the protection of interstate commerce embodied in the act against interruption by strikes, lockouts, etc., is therefore apparent. Congress has the constitutional authority so to regulate the business of a common carrier engaged in interstate commerce as adequately to protect and safeguard the interests of such commerce.

The right of individuals or corporations to make contracts and do business is at all times subservient to the power of Congress to regulate interstate commerce, and common carriers are subject to greater control than private individuals by the State or Congress (according as their business is local or interstate), on account of the public nature of such business. See *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe and Steel Co.* v. *United States*, 175 U. S. 211; *United States* v. *Northern Securities Co.*, 193 U. S. 197; *United States* v. *Swift & Co.*, 196 U. S. 375.

When the business of the carrier is interstate, the power of the State to control the conduct of its business in the interest of the public health, safety or convenience is subject to the

paramount right of Congress over the subject, which may displace all state regulations by legislation of its own. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Nashville &c. Ry.* v. *Alabama*, 128 U. S. 96; *Hennington* v. *Georgia*, 163 U. S. 299, 317; *New York, New Haven & Hartford Ry. Co.* v. *New York*, 165 U. S. 628, 631; *Reid* v. *Colorado*, 187 U. S. 137. See also *Granger Cases*, 94 U. S. 113; *Wabash, St. Louis & Pacific Ry. Co.* v. *Illinois*, 118 U. S. 557; *B. & O. R. R. Co.* v. *Baugh*, 149 U. S. 368.

Although the Supreme Court has held that the act to regulate commerce did not confer upon the Interstate Commerce Commission the power to fix rates, *Cincinnati &c. Railway* v. *Interstate Comm. Comm.*, 162 U. S. 184; *Interstate Comm. Comm.* v. *Cincinnati &c. Railway*, 167 U. S. 479, in so doing it plainly recognized the plenary authority of Congress over the matter. See *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, construing the safety-appliance act of March 2, 1893, and showing that Congress may change the common law rules of liability between master and servant in respect to common carriers engaged in interstate commerce; and may also legislate for the protection of employés of such common carriers.

The cases above referred to simply extend to interstate commerce by land the principles theretofore enumerated by the Supreme Court in reference to interstate commerce by water. Prior to the construction of railroads the plenary power of Congress over the navigable waters of the United States and the agencies and instrumentalities of interstate commerce thereon had been firmly established, and later cases confirm its power in that regard. *Gibbons* v. *Ogden*, 9 Wheat. 1; *United States* v. *Coombs*, 12 Pet. 72; *Waring* v. *Clarke*, 5 How. 441; *Sinnot* v. *Davenport*, 22 How. 240; *Gilman* v. *Philadelphia*, 3 Wall. 713; *The Daniel Ball*, 10 Wall. 557; *Bridge Co.* v. *United States*, 105 U. S. 470; *Escanaba Company* v. *Chicago*, 107 U. S. 678; *Williamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1; *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211.

These cases affirm the right of Congress to license, inspect and control vessels engaged in interstate commerce upon the navigable waters of the United States, and to exercise exclusive control over such highways in the interest of commerce and regulation thereon.

There is no invasion of the carrier's liberty by this statute. Congress has the right to control common carriers engaged in interstate commerce in the matter of the selection of their employés so far as it may be necessary for the protection of such commerce and the persons engaged in it, whether as shippers, passengers or employés.

Counsel rely on certain decisions, holding that a State had no authority to enact legislation forbidding discrimination by employers against members of labor organizations. *Gillespie* v. *The People*, 188 Illinois, 176; *State* v. *Julow*, 129 Missouri, 163; *State* v. *Kreutzerberg* (Wisconsin), 90 N. W. Rep. 1098.

The correctness of these decisions may be doubted. Such statutes do not deprive the employer of any lawful right. They simply protect the rights of the employés against invasion by the employer. The alleged right of the employer is a right to interfere with the liberty of his employés because they are in his service. See *Davis* v. *State*, 30 Ohio L. J. 342; 11 Ohio Dec. Reprint, 894.

The courts have nothing to do with the policy of legislation, the only question for them being as to the power of Congress over the subject. *United States* v. *Joint Traffic Association*, 171 U. S. 505. This statute does not come under the exception intimated in that case in the case of "a possible gross perversion of the principle" that Congress was the judge of the necessity and propriety of legislation for the proper protection of interstate commerce. *Lochner* v. *New York*, 198 U. S. 45, discussed and distinguished.

Mr. Justice Harlan delivered the opinion of the court.

This case involves the constitutionality of certain provisions of the act of Congress of June 1, 1898, 30 Stat. 424, c. 370,

concerning carriers engaged in interstate commerce and their employés.

By the first section of the act it is provided: "That the provisions of this act shall apply to any common carrier or carriers and their officers, agents, and employés, except masters of vessels and seamen, as defined in section 4612, Revised Statutes of the United States, engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage. The term 'employés' as used in this act shall include all persons actually engaged in any capacity in train operation or train service of any description, and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract: Provided, however, That this act shall not be held to apply to employés of street railroads and shall apply only to employés engaged in railroad train service. In every such case the carrier shall be responsible for the acts and defaults of such employés in the same manner and to the same extent as if said cars were owned by it and said employés directly employed by it, and any provisions to the contrary of any such lease or other contract shall be binding only as between the parties thereto and shall not affect the obligations of said carrier either to the public or to the private parties concerned."

The 2d, 3d, 4th, 5th, 6th, 7th, 8th and 9th sections relate to the settlement, by means of arbitration, of controversies concerning wages, hours of labor, or conditions of employment arising between a carrier subject to the provisions of the act and its employés, which seriously interrupt or threaten to interrupt the business of the carrier. Those sections prescribe the mode in which controversies may be brought under the cognizance of arbitrators, in what way the arbitrators may be designated, and the effect of their decisions. The first subdivision of § 3 contains a proviso, "that no employé shall be compelled to render personal service without his consent."

The 11th section relates to the compensation and expenses of the arbitrators.

By the 12th section the act of Congress of October 1, 1888, 25 Stat. 501, c. 1063, creating boards of arbitrators or commissioners for settling controversies and differences between railroad corporations and other common carriers engaged in interstate or territorial transportation of persons or property and their employés, was repealed.

The 10th section, upon which the present prosecution is based, is in these words:

"That any employer subject to the provisions of this act and any officer, agent, or receiver of such employer, who shall require any employé, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; *or shall threaten any employé with loss of employment, or shall unjustly discriminate against any employé because of his membership in such a labor corporation, association, or organization;* or who shall require any employé or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employé or applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from

such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employé, attempt or conspire to prevent such employé from obtaining employment, or who shall, after the quitting of an employé, attempt or conspire to prevent such employé from obtaining employment, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

It may be observed in passing that while that section makes it a crime against the United States to unjustly discriminate against an employé of an interstate carrier because of his being a member of a labor organization, it does not make it a crime to unjustly discriminate against an employé of the carrier because of his *not* being a member of such an organization.

The present indictment was in the District Court of the United States for the Eastern District of Kentucky against the defendant Adair.

The first count alleged "that at and before the time hereinafter named the Louisville and Nashville Railroad Company is and was a railroad corporation, duly organized and existing by law and a common carrier engaged in the transportation of passengers and property wholly by steam railroad for a continuous carriage and shipment from one State of the United States to another State of the United States of America, that is to say, from the State of Kentucky into the States of Ohio, Indiana and Tennessee, and from the State of Ohio into the State of Kentucky, and was at all times aforesaid and at the time of the commission of the offense hereinafter named, a common carrier of interstate commerce, and an employer, subject to the provisions of a certain act of Congress of the United States of America, entitled, 'An Act concerning carriers engaged in interstate commerce and their employés,' approved June 1, 1898, and said corporation was not at any

time a street railroad corporation. That before and at the time of the commission of the offense hereinafter named one William Adair was an agent and employé of said common carrier and employer, and was at all said times master mechanic of said common carrier and employer in the district aforesaid, and before and at the time hereinafter stated one O. B. Coppage was an employé of said common carrier and employer in the district aforesaid, and as such employé was at all times hereinafter named actually engaged in the capacity of locomotive fireman in train operation and train service for said common carrier and employer in the transportation of passengers and property aforesaid, and was an employé of said common carrier and employer actually engaged in said railroad transportation and train service aforesaid, to whom the provisions of said act applied, and at the time of the commission of the offense hereinafter named said O. B. Coppage was a member of a certain labor organization, known as the Order of Locomotive Firemen, as he the said William Adair then and there well knew, a more particular description of said organization and the members thereof is to the grand jurors unknown."

The specific charge in that count was "that said William Adair, agent and employé of said common carrier and employer as aforesaid, in the district aforesaid, on and before the 15th day of October, 1906, did unlawfully and unjustly discriminate against said O. B. Coppage, employé as aforesaid, by then and there discharging said O. B. Coppage from such employment of said common carrier and employer, *because of his membership in said labor organization, and thereby did unjustly discriminate against an employé of a common carrier and employer engaged in interstate commerce because of his membership in a labor organization,* contrary to the forms of the statute in such cases made and provided, and against the peace and dignity of the United States."

The second count repeated the general allegations of the first count as to the character of the business of the Louisville

and Nashville Railroad Company and the relations between that corporation and Adair and Coppage. It charged "that said William Adair, in the district aforesaid and within the jurisdiction of this court, agent and employé of said common carrier and employer aforesaid, on and before the 15th day of October, 1906, did unlawfully *threaten said O. B. Coppage, employé as aforesaid, with loss of employment, because of his membership in said labor organization,* contrary to the forms of the statute in such cases made and provided, and against the peace and dignity of the United States."

The accused Adair demurred to the indictment as insufficient in law, but the demurrer was overruled. After reviewing the authorities, in an elaborate opinion, the court held the tenth section of the act of Congress to be constitutional. 152 Fed. Rep. 737. The defendant pleaded not guilty, and after trial a verdict was returned of guilty on the first count and a judgment rendered that he pay to the United States a fine of $100. We shall, therefore, say nothing as to the second count of the indictment.

It thus appears that the criminal offense charged in the count of the indictment upon which the defendant was convicted was, in substance and effect, that being an agent of a railroad company engaged in interstate commerce and subject to the provisions of the above act of June 1, 1898, he discharged one Coppage from its service *because of his membership in a labor organization*—no other ground for such discharge being alleged.

May Congress make it a criminal offense against the United States—as by the tenth section of the act of 1898 it does—for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employé from service simply because of his membership in a labor organization?

This question is admittedly one of importance, and has been examined with care and deliberation. And the court has reached a conclusion which, in its judgment, is consistent

with both the words and spirit of the Constitution and is sustained as well by sound reason.

The first inquiry is whether the part of the tenth section of the act of 1898 upon which the first count of the indictment was based is repugnant to the Fifth Amendment of the Constitution declaring that no person shall be deprived of liberty or property without due process of law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good. This court has said that "in every well-ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29, and authorities there cited. Without stopping to consider what would have been the rights of the railroad company under the Fifth Amendment, had it been indicted under the act of Congress, it is sufficient in this case to say that as agent of the railroad company and as such responsible for the conduct of the business of one of its departments, it was the defendant Adair's right—and that right inhered in his personal liberty, and was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests. It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not,

as he chose, an employé of the railroad company upon the terms offered to him. Mr. Cooley, in his treatise on Torts, p. 278, well says: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress."

In *Lochner* v. *New York*, 198 U. S. 45, 53, 56, which involved the validity of a state enactment prescribing certain maximum hours for labor in bakeries, and which made it a misdemeanor for an employer to require or permit an employé in such an establishment to work in excess of a given number of hours each day, the court said: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer* v. *Louisiana*, 165 U. S. 578. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. *Mugler* v. *Kansas*, 123 U. S. 623; *In re Kemmler*, 136 U. S. 436; *Crowley* v. *Christensen*, 137 U. S. 86; *In re Converse*, 137 U. S. 624. . . . In every case that

comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor." Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation. The minority were of opinion that the business referred to in the New York statute was such as to require regulation, and that as the statute was not shown plainly and palpably to have imposed an unreasonable restraint upon freedom of contract, it should be regarded by the courts as a valid exercise of the State's power to care for the health and safety of its people.

While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer,

for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé. It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land. These views find support in adjudged cases, some of which are cited in the margin.[1] Of course, if the parties by contract fix the period of service, and prescribe the conditions upon which the contract may be terminated, such contract would control the rights of the parties as between themselves, and for any violation of those provisions the party wronged would have his appropriate civil action. And it may be—but upon that point we express no opinion—that in the case of a labor contract between an employer engaged in interstate commerce and his employé, Congress could make it a crime for either party without sufficient or just excuse or notice to disregard the terms of such contract or to refuse to perform it. In the absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employé in his personal service any more than an employé

[1] *People* v. *Marcus*, 185 N. Y. 257; *National Protection Assn.* v. *Cummings*, 170 N. Y. 315; *Jacobs* v. *Cohen*, 183 N. Y. 207; *State* v. *Julow*, 129 Missouri, 163; *State* v. *Goodwill*, 33 W. Va. 179; *Gillespie* v. *People*, 188 Illinois, 176; *State* v. *Kreutzberg*, 114 Wisconsin, 530; *Wallace* v. *Georgia, C. & N. Ry. Co.*, 94 Georgia, 732; *Hundley* v. *L. & N. R. R. Co.*, 105 Kentucky, 162; *Brewster* v. *Miller's Sons & Co.*, 101 Kentucky, 268; *N. Y. &c. R. R. Co.* v. *Schaffer*, 65 Ohio St. 414; *Arthur* v. *Oakes*, 63 Fed. Rep. 310.

can be compelled, against his will, to remain in the personal service of another. So far as this record discloses the facts the defendant, who seemed to have authority in the premises, did not agree to keep Coppage in service for any particular time, nor did Coppage agree to remain in such service a moment longer than he chose. The latter was at liberty to quit the service without assigning any reason for his leaving. And the defendant was at liberty, in his discretion, to discharge Coppage from service without giving any reason for so doing.

As the relations and the conduct of the parties towards each other was not controlled by any contract other than a general agreement on one side to accept the services of the employé and a general agreement on the other side to render services to the employer—no term being fixed for the continuance of the employment—Congress could not, consistently with the Fifth Amendment, make it a crime against the United States to discharge the employé because of his being a member of a labor organization.

But it is suggested that the authority to make it a crime for an agent or officer of an interstate carrier, having authority in the premises from his principal, to discharge an employé from service to such carrier, simply because of his membership in a labor organization, can be referred to the power of Congress to regulate interstate commerce, without regard to any question of personal liberty or right of property arising under the Fifth Amendment. This suggestion can have no bearing in the present discussion unless the statute, in the particular just stated, is within the meaning of the Constitution a regulation of commerce among the States. If it be not, then clearly the Government cannot invoke the commerce clause of the Constitution as sustaining the indictment against Adair.

Let us inquire what is commerce, the power to regulate which is given to Congress?

This question has been frequently propounded in this court, and the answer has been—and no more specific answer could

well have been given—that commerce among the several States comprehends traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph—indeed, every species of commercial intercourse among the several States, but not to that commerce "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." The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed.[1] Of course, as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that which is done is in plain violation of the Constitution. *Northern Securities Co.* v. *United States*, 193 U. S. 197, and authorities there cited. In this connection we may refer to *Johnson* v. *Railroad*, 196 U. S. 1, relied on in argument, which case arose under the act of Congress of March 2, 1893, 27 Stat. 531, c. 196. That act required carriers engaged in interstate commerce to equip their cars used in such commerce with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes. But the act upon its face showed that its object was to promote the safety of employés and travelers upon railroads; and this court sustained its validity upon the ground that it manifestly had reference to interstate commerce and was calculated to subserve the interests of such commerce by affording protection to employés and travelers. It was held that there was a substantial connection between the object sought to be attained by the act and the means provided to accomplish that object. So, in regard to *Employers' Liabil-*

[1] *Gibbons* v. *Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283; *Almy* v. *State of California*, 24 How. 169; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 9, 12; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347, 356; *Lottery Case*, 188 U. S. 321, 352; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Employers' Liability Cases*, 207 U. S. 463.

ity Cases, 207 U. S. 463, decided at the present term. In that case the court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employés in such interstate commerce, in cases of personal injuries received by employés while actually engaged in such commerce. The decision on this point was placed on the ground that a rule of that character would have direct reference to the conduct of interstate commerce, and would, therefore, be within the competency of Congress to establish for commerce among the States, but not as to commerce completely internal to a State. Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employé's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employé is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of its members as wage-earners—an object entirely legitimate and to be commended rather than condemned. But surely those associations as labor organizations have nothing to do with interstate commerce as such. One who engages in the service of an interstate carrier will, it must be assumed, faithfully perform his duty, whether he be a member or not a member of a labor organization. His fitness for the position in which he labors and his diligence in the discharge of his duties cannot in law or sound reason depend in any degree upon his being or not being a member of a labor organization. It cannot be assumed that his fitness is assured, or his diligence increased, by such membership, or that he is less fit or less diligent be-

cause of his not being a member of such an organization. It is the employé as a man and not as a member of a labor organization who labors in the service of an interstate carrier. Will it be said that the provision in question had its origin in the apprehension, on the part of Congress, that if it did not show more consideration for members of labor organizations than for wage-earners who were not members of such organizations, or if it did not insert in the statute some such provision as the one here in question, members of labor organizations would, by illegal or violent measures, interrupt or impair the freedom of commerce among the States? We will not indulge in any such conjectures, nor make them, in whole or in part, the basis of our decision. We could not do so consistently with the respect due to a coördinate department of the Government. We could not do so without imputing to Congress the purpose to accord to one class of wage-earners privileges withheld from another class of wage-earners engaged, it may be, in the same kind of labor and serving the same employer. Nor will we assume, in our consideration of this case, that members of labor organizations will, in any considerable numbers, resort to illegal methods for accomplishing any particular object they have in view.

Looking alone at the words of the statute for the purpose of ascertaining its scope and effect, and of determining its validity, we hold that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employé because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its interstate business *only* members of labor organizations, or *only* those who are *not* members of such organizations—a power which could not be recognized as existing under the Constitution of the United States. No such rule of criminal liability as that to which

we have referred can be regarded as, in any just sense, a regulation of interstate commerce. We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *Lottery Case*, 188 U. S. 321, 353.

It results, on the whole case, that the provision of the statute under which the defendant was convicted must be held to be repugnant to the Fifth Amendment and as not embraced by nor within the power of Congress to regulate interstate commerce, but under the guise of regulating interstate commerce and as applied to this case it arbitrarily sanctions an illegal invasion of the personal liberty as well as the right of property of the defendant Adair.

We add that since the part of the act of 1898 upon which the first count of the indictment is based, and upon which alone the defendant was convicted, is severable from its other parts, and as what has been said is sufficient to dispose of the present case, we are not called upon to consider other and independent provisions of the act, such, for instance, as the provisions relating to arbitration. This decision is therefore restricted to the question of the validity of the particular provision in the act of Congress making it a crime against the United States for an agent or officer of an interstate carrier to discharge an employé from its service because of his being a member of a labor organization.

The judgment must be reversed, with directions to set aside the verdict and judgment of conviction, sustain the demurrer to the indictment, and dismiss the case.

It is so ordered.

Mr. Justice Moody did not participate in the decision of this case.

Mr. Justice McKenna, dissenting.

The opinion of the court proceeds upon somewhat narrow

lines and either omits or does not give adequate prominence to the considerations which, I think, are determinative of the questions in the case. The principle upon which the opinion is grounded is, as I understand it, that a labor organization has no legal or logical connection with interstate commerce, and that the fitness of an employé has no dependence or relation with his membership in such organization. It is hence concluded that to restrain his discharge merely on account of such membership is an invasion of the liberty of the carrier guaranteed by the Fifth Amendment of the Constitution of the United States. The conclusion is irresistible if the propositions from which it is deduced may be viewed as abstractly as the opinion views them. May they be so viewed?

A summary of the act is necessary to understand § 10. Detach that section from the other provisions of the act and it might be open to condemnation.

The first section of the act designates the carriers to whom it shall apply. The second section makes it the duty of the Chairman of the Interstate Commerce Commission and the Commissioner of Labor, in case of a dispute between carriers and their employés which threatens to interrupt the business of the carriers, to put themselves in communication with the parties to the controversy and use efforts to "mediation and conciliation." If the efforts fail, then § 3 provides for the appointment of a board of arbitration—one to be named by the carrier, one by the labor organization to which the employés belong, and the two thus chosen shall select a third.

There is a provision that if the employés belong to different organizations they shall concur in the selection of the arbitrator. The board is to give hearings; power is invested in the board to summon witnesses, and provision is made for filing the award in the clerk's office of the Circuit Court of the United States for the district where the controversy arose. Other sections complete the scheme of arbitration thus outlined, and make, as far as possible, the proceedings of the arbitrators

judicial, and pending them put restrictions on the parties and damages for violation of the restrictions.

Even from this meager outline may be perceived the justification and force of § 10. It prohibits discrimination by a carrier engaged in interstate commerce, in the employment under the circumstances hereafter mentioned or the discharge from employment of members of labor organizations "*because of such membership.*" This the opinion condemns. The actions prohibited, it is asserted, are part of the liberty of a carrier protected by the Constitution of the United States from limitation or regulation. I may observe that the declaration is clear and unembarrassed by any material benefit to the carrier from its exercise. It may be exercised with reason or without reason, though the business of the carrier is of public concern. This, then, is the contention, and I bring its elements into bold relief to submit against them what I deem to be stronger considerations, based on the statute and sustained by authority.

I take for granted that the expressions of the opinion of the court, which seem to indicate that the provisions of § 10 are illegal because their violation is made criminal, are used only for description and incidental emphasis, and not as the essential ground of the objections to those provisions.

I may assume at the outset that the liberty guaranteed by the Fifth Amendment is not a liberty free from all restraints and limitations, and this must be so or government could not be beneficially exercised in many cases. Therefore in judging of any legislation which imposes restraints or limitations the inquiry must be, what is their purpose and is the purpose within one of the powers of government? Applying this principle immediately to the present case without beating about in the abstract, the inquiry must be whether § 10 of the act of Congress has relation to the purpose which induced the act and which it was enacted to accomplish, and whether such purpose is in aid of interstate commerce and not a mere restriction upon the liberty of carriers to employ whom they please, or to have business relations with whom they please. In the inquiry there

is necessarily involved a definition of interstate commerce and of what is a regulation of it. As to the first, I may concur with the opinion; as to the second, an immediate and guiding light is afforded by the *Employers' Liability Cases*, recently decided, 207 U. S. 463. In those cases there was a searching scrutiny of the powers of Congress, and it was held to be competent to establish a new rule of liability of the carrier to his employés—in a word, competent to regulate the relation of master and servant, a relation apparently remote from commerce, and one which was earnestly urged by the railroad to be remote from commerce. To the contention the court said: "But we may not test the power of Congress to regulate commerce solely by abstractly considering the broad 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 that power to regulate commerce." In other words, that the power is not confined to a regulation of the mere movement of goods or persons.

And there are other examples in our decisions—examples, too, of liberty of contract and liberty of forming business relations (made conspicuous as grounds of decision in the present case)—which were compelled to give way to the power of Congress. *Northern Securities Company* v. *United States*, 193 U. S. 197. In that case exactly the same definitions were made as made here and the same contentions were pressed as are pressed here. The Northern Securities Company was not a railroad company. Its corporate powers were limited to buying, selling and holding stock, bonds and other securities, and, it was contended, that as such business was not commerce at all it could not be within the power of Congress to regulate. The contention was not yielded to, though it had the support of members of this court. Asserting the application of the Anti-

Trust Act of 1890 to such business and the power of Congress to regulate it, the court said "that a sound construction of the Constitution allows to Congress a large discretion 'with respect to the means by which the powers it [the commerce clause] confers are to be carried into execution, which enables that body to perform the high duties assigned to it, in the manner most beneficial to the people.' " It was in recognition of this principle that it was declared in *United States* v. *Joint Traffic Association*, 171 U. S. 571: "The prohibition of such contracts [contracts fixing rates] may in the judgment of Congress be one of the reasonable necessities of proper regulation of commerce, and Congress is the *judge* of such necessity and propriety, unless, *in case of a possible gross perversion of the principle*, the courts might be applied to for relief." The contentions of the parties in the case invoked the declaration. There as here an opposition was asserted between the liberty of the railroads to contract with one another and the power of Congress to regulate commerce. That power was pronounced paramount, and it was not perceived, as it seems to be perceived now, that it was subordinate and controlled by the provisions of the Fifth Amendment. Nor was the relation of the power of Congress to that amendment overlooked. It was commented upon and reconciled. And there is nothing whatever in *Gibbons* v. *Ogden*, 9 Wheat. 1, or in *Lottery Case*, 188 U. S. 321, which is to the contrary.

From these considerations we may pass to an inspection of the statute of which § 10 is a part, and inquire as to its purpose, and if the means which it employs has relation to that purpose and to interstate commerce. The provisions of the act are explicit and present a well coördinated plan for the settlement of disputes between carriers and their employés, by bringing the disputes to arbitration and accommodation, and thereby prevent strikes and the public disorder and derangement of business that may be consequent upon them. I submit no worthier purpose can engage legislative attention or be the object of legislative action, and, it might be urged,

to attain which the congressional judgment of means should not be brought under a rigid limitation and condemned, if it contribute in any degree to the end, as a "gross perversion of the principle" of regulation, the condition which, it was said in *United States* v. *Joint Traffic Association, supra*, might justify an appeal to the courts.

We are told that labor associations are to be commended. May not then Congress recognize their existence; yes, and recognize their power as conditions to be counted with in framing its legislation? Of what use would it be to attempt to bring bodies of men to agreement and compromise of controversies if you put out of view the influences which move them or the fellowship which binds them—maybe controls and impels them—whether rightfully or wrongfully, to make the cause of one the cause of all? And this practical wisdom Congress observed—observed, I may say, not in speculation of uncertain provision of evils, but in experience of evils—an experience which approached to the dimensions of a National calamity. The facts of history should not be overlooked, nor the course of legislation. The act involved in the present case was preceded by one enacted in 1888 of similar purport. 25 Stat. 501, c. 1063. That act did not recognize labor associations, or distinguish between the members of such associations and the other employés of carriers. It failed in its purpose, whether from defect in its provisions or other cause we may only conjecture. At any rate, it did not avert the strike at Chicago in 1894. Investigation followed, and, as a result of it, the act of 1898 was finally passed. Presumably its provisions and remedy were addressed to the mischief which the act of 1888 failed to reach or avert. It was the judgment of Congress that the scheme of arbitration might be helped by engaging in it the labor associations. Those associations unified bodies of employés in every department of the carriers, and this unity could be an obstacle or an aid to arbitration. It was attempted to be made an aid, but how could it be made an aid if, pending the efforts of "mediation and conciliation"

of the dispute, as provided in § 2 of the act, other provisions of the act may be arbitrarily disregarded, which are of concern to the members in the dispute? How can it be an aid, how can controversies which may seriously interrupt or threaten to interrupt the business of carriers (I paraphrase the words of the statute), be averted or composed if the carrier can bring on the conflict or prevent its amicable settlement by the exercise of mere whim and caprice? I say mere whim or caprice, for this is the liberty which is attempted to be vindicated as the Constitutional right of the carriers. And it may be exercised in mere whim and caprice. If ability, the qualities of efficient and faithful workmanship can be found outside of labor associations, surely they may be found inside of them. Liberty is an attractive theme, but the liberty which is exercised in sheer antipathy does not plead strongly for recognition.

There is no question here of the right of a carrier to mingle in his service "union" and "non-union" men. If there were, broader considerations might exist. In such a right there would be no discrimination for the "union" and no discrimination against it. The efficiency of an employé would be its impulse and ground of exercise.

I need not stop to conjecture whether Congress could or would limit such right. It is certain that Congress has not done so by any provision of the act under consideration. Its letter, spirit and purpose are decidedly the other way. It imposes, however, a restraint, which should be noticed. The carriers may not require an applicant for employment or an employé to agree not to become or remain a member of a labor organization. But this does not constrain the employment of anybody, be he what he may.

But it is said it cannot be supposed that labor organizations will, "by illegal or violent measures, interrupt or impair the freedom of commerce," and to so suppose would be disrespect to a coördinate branch of the Government and to impute to it a purpose "to accord to one class of wage-earners privileges withheld from another class of wage-earners engaged, it may

be, in the same kind of labor and serving the same employer." Neither the supposition nor the disrespect is necessary, and, it may be urged, they are no more invidious than to impute to Congress a careless or deliberate or purposeless violation of the Constitutional rights of the carriers. Besides, the legislation is to be accounted for. It, by its letter, makes a difference between members of labor organizations and other employés of carriers. If it did not, it would not be here for review. What did Congress mean? Had it no purpose? Was it moved by no cause? Was its legislation mere wantonness and an aimless meddling with the commerce of the country? These questions may find their answers in *In re Debs*, 158 U. S. 564.

I have said that it is not necessary to suppose that labor organizations will violate the law, and it is not. Their power may be effectively exercised without violence or illegality, and it cannot be disrespect to Congress to let a committee of the Senate speak for it and tell the reason and purposes of its legislation. The Committee on Education in its report said of the bill: "The measure under consideration may properly be called a voluntary arbitration bill, having for its object the settlement of disputes between capital and labor, as far as the interstate transportation companies are concerned. The necessity for the bill arises from the calamitous results in the way of ill-considered strikes arising from the tyranny of capital or the unjust demands of labor organizations, whereby the business of the country is brought to a standstill and thousands of employés, with their helpless wives and children, are confronted with starvation." And, concluding the report, said: "It is our opinion that this bill, should it became a law, would reduce to a minimum labor strikes which affect interstate commerce, and we therefore recommend its passage."

With the report was submitted a letter from the Secretary of the Interstate Commerce Commission, which expressed the judgment of that body, formed, I may presume, from experience of the factors in the problem. The letter said: "With the corporations as employers on one side and the organiza-

tions of railway employés as the other, there will be a measure of equality of power and force which will surely bring about the essential requisites of friendly relation, respect, consideration, and forebearance." And again: "It has been shown before the labor commission of England that where the associations are strong enough to command the respect of their employers the relations between employer and employé seem most amicable. For there the employers have learned the practical convenience of treating with one thoroughly representative body instead of with isolated fragments of workmen; and the labor associations have learned the limitations of their powers."

It is urged by defendant in error that "there is a marked distinction between a power to regulate commerce and a power to regulate the affairs of an individual or corporation engaged in such commerce," and how can it be, it is asked, a regulation of commerce to prevent a carrier from selecting his employés or constraining him to keep in his service those whose loyalty to him is "seriously impaired, if not destroyed, by their prior allegiance to their labor unions"? That the power of regulation extends to the persons engaged in interstate commerce is settled by decision. *Employers' Liability Cases*, 207 U. S. 463, and the cases cited in Mr. Justice Moody's dissenting opinion. The other proposition points to no evil or hazard of evil. Section 10 does not constrain the employment of incompetent workmen and gives no encouragement or protection to the disloyalty of an employé or to deficiency in his work or duty. If guilty of either he may be instantly discharged without incurring any penalty under the statute.

Counsel also makes a great deal of the difference between direct and indirect effect upon interstate commerce, and assert that § 10 is an indirect regulation at best and not within the power of Congress to enact. Many cases are cited, which, it is insisted, sustain the contention. I cannot take time to review the cases. I have already alluded to the contention, and it is enough to say that it gives too much isolation to § 10.

The section is part of the means to secure and make effective the scheme of arbitration set forth in the statute. The contention, besides, is completely answered by *Employers' Liability Cases, supra.* In that case, as we have seen, the power of Congress was exercised to establish a rule of liability of a carrier to his employés for personal injuries received in his service. It is manifest that the kind or extent of such liability is neither traffic nor intercourse, the transit of persons or the carrying of things. Indeed such liability may have wider application than to carriers. It may exist in a factory; it may exist on a farm, and in both places, or in commerce—its direct influence might be hard to find or describe. And yet this court did not hesitate to pronounce it to be within the power of Congress to establish. "The primary object," it was said in *Johnson* v. *Railroad,* 196 U. S. 17, of the safety appliance act, "was to promote *the public welfare* by securing the safety of employés and travelers." The rule of liability for injuries is even more round about in its influence on commerce and as much so as the prohibition of § 10. To contend otherwise seems to me to be an oversight of the proportion of things. A provision of law which will prevent or tend to prevent the stoppage of every wheel in every car of an entire railroad system certainly has as direct influence on interstate commerce as the way in which one car may be coupled to another, or the rule of liability for personal injuries to an employé. It also seems to me to be an oversight of the proportions of things to contend that in order to encourage a policy of arbitration between carriers and their employés which may prevent a disastrous interruption of commerce, the derangement of business, and even greater evils to the public welfare, Congress cannot restrain the discharge of an employé, and yet can, to enforce a policy of unrestrained competition between railroads, prohibit reasonable agreements between them as to the rates at which merchandise shall be carried. And mark the contrast of what is prohibited. In the one case the restraint, it may be, of a whim—certainly of nothing that affects the ability of an employé to perform his

duties; nothing, therefore, which is of any material interest to the carrier; in the other case a restraint of a carefully considered policy which had as its motive great material interests and benefits to the railroads, and, in the opinion of many, to the public. May such action be restricted, must it give way to the public welfare, while the other, moved, it may be, by prejudice and antagonism, is intrenched impregnably in the Fifth Amendment of the Constitution against regulation in the public interest.

I would not be misunderstood. I grant that there are rights which can have no material measure. There are rights which, when exercised in a private business, may not be disturbed or limited. With them we are not concerned. We are dealing with rights exercised in a *quasi*-public business and therefore subject to control in the interest of the public.

I think the judgment should be affirmed.

MR. JUSTICE HOLMES, dissenting.

I also think that the statute is constitutional, and but for the decision of my brethren I should have felt pretty clear about it.

As we all know, there are special labor unions of men engaged in the service of carriers. These unions exercise a direct influence upon the employment of labor in that business, upon the terms of such employment and upon the business itself. Their very existence is directed specifically to the business, and their connection with it is at least as intimate and important as that of safety couplers, and, I should think, as the liability of master to servant, matters which, it is admitted, Congress might regulate, so far as they concern commerce among the States. I suppose that it hardly would be denied that some of the relations of railroads with unions of railroad employés are closely enough connected with commerce to justify legislation by Congress. If so, legislation to prevent the exclusion of such unions from employment is sufficiently near.

The ground on which this particular law is held bad is not so much that it deals with matters remote from commerce among the States, as that it interferes with the paramount individual rights, secured by the Fifth Amendment. The section is, in substance, a very limited interference with freedom of contract, no more. It does not require the carriers to employ any one. It does not forbid them to refuse to employ any one, for any reason they deem good, even where the notion of a choice of persons is a fiction and wholesale employment is necessary upon general principles that it might be proper to control. The section simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed. I hardly can suppose that the grounds on which a contract lawfully may be made to end are less open to regulation than other terms. So I turn to the general question whether the employment can be regulated at all. I confess that I think that the right to make contracts at will that has been derived from the word liberty in the amendments has been stretched to its extreme by the decisions; but they agree that sometimes the right may be restrained. Where there is, or generally is believed to be, an important ground of public policy for restraint the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along. But suppose the only effect really were to tend to bring about the complete unionizing of such railroad laborers as Congress can deal with, I think that object alone would justify the act. I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ,—I think that laboring men sometimes attribute to them advantages, as

many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind—but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large.

BRAXTON COUNTY COURT *v.* THE STATE OF WEST VIRGINIA *ex rel.* THE STATE TAX COMMISSIONERS.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

No. 124. Submitted January 14, 1908.—Decided January 27, 1908.

Speaking generally, and subject to the rule that no State can set at naught the provisions of the National Constitution, the regulation of municipal corporations is peculiarly within state control, the legislature determining the taxing body, the taxing districts, and the limits of taxation.

Notwithstanding that plaintiff in error's charge of unconstitutionality of a state statute may not be frivolous, in order to give this court jurisdiction to review the action of the state court sustaining the statute the question must be raised in this court by one adversely affected by the decision and whose interest is personal and not of an official nature. *Smith, Auditor,* v. *Indiana,* 191 U. S. 138.

A county court of West Virginia has no personal interest in the amount of tax levy made by it which will give this court jurisdiction to review at its instance the decision of the highest court of that State determining that the levy is excessive, even though the basis of request for review is the ground that the reduction of the assessment leaves the county unable for lack of funds to fulfill the obligations of its contracts.

60 West Virginia, 339, affirmed.

SECTIONS 7 and 8, article 10, of the West Virginia constitution of 1872 prohibit the county authorities, except in certain specified cases, from levying taxes in excess of ninety-five cents per $100 valuation. In 1904 the valuation of property in Braxton County was $2,799,604. The state legislature, at

an extraordinary session in 1904 and the regular session of 1905, changed the statute law in respect to taxation, largely remodelling the entire tax system. One of the objects of such legislation was to secure a more correct valuation of property. In 1906, under this new legislation, the assessed value of the property in Braxton County was $10,195,301, nearly four times the amount of the assessment in 1904. In view of an expected increase in valuation the legislature enacted, chapter 48 of the acts of 1905 (Code of West Va., 1906, § 29, chap. 39), by which it was provided that no county court should, in the year 1906, assess or levy taxes which should exceed by more than seven per cent the aggregate amount of taxes levied by it in the year 1904. The levy made in the county of Braxton in 1904 of ninety-five cents on the $100 valuation produced the sum of $26,596.23, subject, of course, to such minor reductions as might come from delinquencies and exonerations. Therefore, under the act of 1905, the amount which the county court could levy in 1906 was the $26,596.23 plus an addition of not to exceed seven per cent, or $1,861.73, making a total of $28,457.96. To raise this amount a levy of not to exceed twenty-eight cents on each $100 was sufficient. The county court, however, made a levy of sixty-five cents on every $100, and caused it to be entered upon the records of the court. Such levy of sixty-five cents would produce the sum of $66,269.45, more than double the amount which was authorized under the legislation of 1905. Thereupon the state tax commissioner and certain residents and taxpayers of Braxton County applied to the Supreme Court of the State for a mandamus to compel the county court to change that assessment to conform to the requirements of the act of 1905. The county court made answer and return to the alternative writ of mandamus, pleading that the amount necessary during the current fiscal year to pay the necessary expenses, discharge the county debts and liabilities payable during that year was at least $57,146, not including an amount for interest and sinking fund of certain railroad bonds, theretofore legally issued by the county.

In other words, it may be said, in a general way, that the defense of the county court was that the sum authorized to be levied by the act of 1905 was insufficient to meet the ordinary expenses of the county, pay the interest, and provide a sinking fund for outstanding bonds. It was pleaded specifically that at the time these railroad bonds were issued there was not only no restriction upon the power of the county court to levy taxes for payment of the principal and interest thereof, but, on the contrary, that the general statutory law in force required the county to levy a tax in amount sufficient to pay the annual interest and provide a sinking fund. It was contended that these provisions entered into and became a part of the contract with the bondholders, and that the restrictions made by the act of 1905 worked an impairment of the obligation of the contract, and hence it was in conflict with § 10 of Article I of the Federal Constitution.

The Supreme Court of Appeals issued the mandamus as prayed for, whereupon the defendants brought the case here on error. *State ex rel. Dillon* v. *County Court*, 60 W. Va. 339.

Mr. George E. Price for plaintiffs in error:

This case is not governed by the cases of *Clark* v. *Kansas City*, 176 U. S. 114; *Lampasas* v. *Bell*, 180 U. S. 276; *Wellington, Petitioner*, 16 Pick. 87, 96; *Smith, Auditor of Marion County*, v. *Indiana*, 191 U. S. 138, holding that the objection made to the constitutionality of an act must be by a party whose rights it does affect, and who has legal interest in defeating it.

The county court of Braxton County has a right to raise the question whether it was bound to obey the act of 1905 in this case. It is interested in this matter as a party to the contracts, the obligations of which are impaired by this statute; it is a corporation. See Code, chap. 36, §§ 1, 4, 16, 17 and 43.

The county court is a party to all contracts, debts and obligations of its county. It stands for the county. When bonds are issued they are made in its name and issued by it.

This was the case with the railroad bonds in question. By these bonds the county court expressly agreed to pay certain sums of money at certain times and in a certain way, and it certainly has a deep interest in seeing that it is not deprived of the power to carry out its agreement.

The people of the county, the taxpayers, are certainly parties to the contracts of the county. It is they who pay the county's debts and discharge its obligations. If after they have contracted a debt in their aggregate capacity as a county, a law is passed that impairs its obligations, they have as much right as the creditor to object to it and to test its validity in the courts. This must be done, if at all, in the name and by means of the county court, their representative. *Clark* v. *County Court*, 55 W. Va. 278, 285. While one or a few could bring such a suit, the burden should not be placed on one or a few which ought to be borne by all. And see *Board of Liquidation* v. *Louisiana*, 179 U. S. 622.

The obligation of a contract consists in its binding force on the party who made it. This depends on the laws in force when it is made. These laws are necessarily referred to in all contracts as forming part of them as the measure of the obligation to perform them and as creating the right acquired by the other parties to compel performance. The obligation does not inhere and subsist in the contract *proprio vigore*, but in the law applicable to the contract. *Ogden* v. *Saunders*, 12 Wheat. 213, 302; *McCracken* v. *Hayward*, 2 How. 608; *Goodale* v. *Fennell*, 27 Ohio St. 426; *S. C.*, 22 Am. Rep. 221; *United States* v. *Judges*, 32 Fed. Rep. 715; *State* v. *New Orleans*, 37 La. Ann. 17; *Von Huffman* v. *City of Quincy*, 4 Wall. 535, 549; *United States* v. *Mayor and Administrators of the City of New Orleans*, 103 U. S. 358; *Butz* v. *City of Muscatine*, 8 Wall. 575; *White* v. *Hart*, 13 Wall. 647; *Walker* v. *Whitehead*, 16 Wall. 318; *City of Galena* v. *Amy*, 5 Wall. 709; *Riggs* v. *Johnson Co.*, 6 Wall. 194; *Mobile* v. *Watson*, 116 U. S. 305; *Curran* v. *State of Arkansas*, 15 How. 304; *Planters' Bank* v. *Shark*, 6 How. 301; *Green* v. *Biddle*, 8 Wheat. 1.

The constitutional provisions and the laws which were in force in West Virginia when the railroad bonds of Braxton County were issued, not only authorized, but required the county court to provide for the collection of a direct annual tax sufficient to pay annually the interest on said bonds, and the principal thereof within and not exceeding thirty-four years. Const. of West Virginia, Article 10, § 8. The law governing the county court in such a case is § 59, c. 54 of the Code.

Mr. W. Mollohan for defendants in error:

The county court of Braxton County under the constitution and statute law of the State of West Virginia, as construed by the highest court of that State, is a mere fiscal or administrative board for the management of county affairs and has no personal or direct interest in claims against the county owned or held by third persons, such as will authorize it to prosecute a writ of error in this case, nor under such constitution, statutes and decisions has it the right to stand in judgment for such third parties and present for decision the question whether or not any given statute violates their contract rights against the county.

Even if this court should be of opinion that it is not bound to accept the decision of the Supreme Court of Appeals of West Virginia as to the powers of the county court to stand in judgment for its creditors and present for decision the question of alleged impairment of creditors' contracts, yet under the decisions of this court the county court of Braxton County had no such interest as would enable it to prosecute a writ of error to this court. *Henderson* v. *Tennessee*, 10 How. 311; *Lampasas* v. *Bell*, 180 U. S. 276; *Giles* v. *Little*, 134 U. S. 635; *Smith, Auditor*, v. *Indiana*, 191 U. S. 138; *Tyler* v. *Registration Court Judges*, 179 U. S. 405; *Clark* v. *Kansas City*, 176 U. S. 114; *Turpin* v. *Lemon*, 187 U. S. 51; *Ludeling* v. *Chaffee*, 143 U. S. 301; *Caffrey* v. *Oklahoma*, 177 U. S. 346.

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

Speaking generally, the regulation of municipal corporations is a matter peculiarly within the domain of state control. The taxing body, the taxing district and the limits of taxation are determinable by the legislature of the State. *Kelly* v. *Pittsburgh*, 104 U. S. 78; *Forsyth* v. *Hammond*, 166 U. S. 506, and cases cited in the opinion; *Williams* v. *Eggleston*, 170 U. S. 304, 310; 1 Dillon on Municipal Corporations (4th ed., p. 52), and following. True, the legislature may sometimes, by restrictive legislation in respect to taxes, seek to prevent the payment by a municipality of its contract obligations, and in such a case the courts will enforce the protective clauses of the Federal Constitution against any state legislation impairing the obligation of a contract. In other words, no State can in respect to any matter set at naught the paramount provisions of the National Constitution.

Again, that the act of the State is charged to be in violation of the National Constitution, and that the charge is not frivolous, does not always give this court jurisdiction to review the judgment of a state court. The party raising the question of constitutionality and invoking our jurisdiction must be interested in and affected adversely by the decision of the state court sustaining the act, and the interest must be of a personal and not of an official nature. *Clark* v. *Kansas City*, 176 U. S. 114, 118; *Lampasas* v. *Bell*, 180 U. S. 276, 283; *Smith* v. *Indiana*, 191 U. S. 138, 148. In the latter case suit was brought in the state court against a county auditor to test the constitutionality of the exemption law of Indiana, which was claimed to be in conflict with the Federal Constitution. The decision of the state court having been in favor of the act, the auditor brought the case here. Mr. Justice Brown, delivering the opinion of the court, cited the following cases: *Tyler* v. *Registration Court Judges*, 179 U. S. 405; *Clark* v. *Kansas City*, 176 U. S. 114; *Turpin* v. *Lemon*, 187 U. S. 51;

Lampasas v. *Bell*, 180 U. S. 276; *Ludeling* v. *Chaffee*, 143 U. S. 301; *Giles* v. *Little*, 134 U. S. 645; and said (191 U. S. 148):

"These authorities control the present case. It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their non-performance was equally so. He neither gained nor lost anything by invoking the advice of the Supreme Court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons, viz., the taxpayers, and in this particular case the case is analogous to that of *Caffrey* v. *Oklahoma*, 177 U. S. 346. We think the interest of an appellant in this court should be a personal and not an official interest, and that the defendant, having sought the advice of the courts of his own State in his official capacity, should be content to abide by their decisions."

These decisions control this case and compel a dismissal of the writ of error, and

It is so ordered.

UNITED STATES *v.* A. GRAF DISTILLING COMPANY.

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

No. 24. Argued December 16, 1907.—Decided January 27, 1908.

A revenue statute containing provisions of a highly penal nature should be construed in a fair and reasonable manner, and, notwithstanding plain and unambiguous language, provisions for the prevention of evasion of taxation, which naturally are applicable to taxable articles only, will not be held applicable to articles not taxable, wholly harmless, and not used for an illegal purpose, in an improper manner, or in any way affording opportunities to defraud the revenue.

The sale of a barrel of whiskey, stamped, branded and marked so as to show that the contents have been duly inspected, and the tax thereon paid, into which a non-taxable substance has been introduced after such stamping, branding and marking by an officer of the revenue, does not

authorize a seizure and forfeiture thereof to the United States under the provisions of § 3455, Rev. Stat.

The phrase "anything else," as employed in § 3455, Rev. Stat., does not include substances that are not in themselves taxable under the law of the United States.

THIS case comes here on a certificate from the United States Circuit Court of Appeals for the Eighth Circuit. The proceeding was commenced in the District Court of the United States for the Eastern District of Missouri, January 4, 1905, by the United States District Attorney for that district, who filed therein an amended information, praying for a decree of forfeiture, condemnation and sale of three barrels of whiskey, which had theretofore been seized by the collector of internal revenue and were still in his possession and custody.

The sole ground for the seizure and forfeiture averred in the information is contained in the following paragraph thereof, as certified by the Circuit Court of Appeals:

"That prior to the time of said seizure of said barrels and packages, they, and each of them, had been purchased and received by A. Graf & Co., they then being stamped, branded, and marked so as to show that the contents thereof were distilled spirits of a certain proof, which had before then been duly inspected by an officer of the revenue, to wit, a United States gauger. That afterwards and before said seizure said barrels and packages, and each of them, and the contents therein then contained, were sold to divers persons, each of the barrels and packages at the time of the sales last aforesaid containing things else than the contents which were therein when said barrels and packages were so lawfully stamped, branded and marked by said officer of the revenue as aforesaid, to wit, burnt sugar, commonly called caramel, which had been added to and placed in said spirits before said last-mentioned sales thereof, in violation of section 3455 of the Revised Statutes of the United States, whereby and by force of said statute said barrels and packages and all the contents thereof became and are forfeited to the United States."

The claimant, A. Graf Distilling Company, demurred to the information on the ground that it was insufficient in law to authorize a decree of forfeiture.

The demurrer was sustained by the District Court and, the United States declining to plead further, it was adjudged that the barrels of whiskey be restored to the claimant.

The ground of the decision of the District Court was that the purpose of § 3455, Rev. Stat., is to prevent the disposition of packages stamped, branded, or marked, when empty or when containing a taxable substance other than the contents which were therein when they were so lawfully stamped, branded, or marked by an officer of the revenue; and that burnt sugar or caramel not being taxable is not within the meaning of the phrase "anything else" as contained in the section referred to.

The Circuit Court of Appeals, in order to a correct determination of the cause, desired the instruction of this court upon the following questions:

"1. Does the sale of a barrel of whiskey, stamped, branded, and marked so as to show that the contents have been duly inspected, and that the tax thereon has been paid, into which burnt sugar or caramel has been introduced after such stamping, branding, and marking by an officer of the revenue, authorize a seizure and forfeiture thereof to the United States under the provisions of section 3455 of the Revised Statutes of the United States?

"2. Does the phrase 'anything else,' as employed in section 3455 of the Revised Statutes, include substances that are not in themselves taxable under the laws of the United States?"

Section 3455 of the Revised Statutes (2 Comp. Stat. 2279), under which the seizure of the whiskey was made, is set forth in the margin.[1]

[1] SEC. 3455. Whenever any person sells, gives, purchases, or receives any box, barrel, bag, vessel, package, wrapper, cover, or envelope of any kind, stamped, branded, or marked in any way so as to show that the contents or

Mr. Assistant Attorney General Cooley for the United States:

The statute is clear and unambiguous and admits of no construction.

The primary rule of statutory construction is that when the language of the statute is clear and unambiguous it admits of no construction, or the rule might be more accurately expressed by saying that where the language admits of but one meaning the task of interpretation does not arise at all. Endlich, Interpretation of Statutes, § 4, and cases cited; *United States* v. *Palmer*, 3 Wheat. 610, 630.

However unjust, arbitrary, or inconvenient a statute may be, if the language is clear the court will enforce the plain meaning. To be sure, if literal interpretation leads to a result obviously not intended by the legislative branch, the duty of the court is, reading the statute as a whole and taking into consideration other statutes in *pari materia*, to give effect to the intention.

In the case at bar it cannot be said that the language of the statute is anything but clear and unambiguous. The pro-

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intended contents thereof have been duly inspected, or that the tax thereon has been paid, or that any provision of the internal revenue laws has been complied with, whether such stamping, branding, or marking may have been a duly authorized act or may be false and counterfeit, or otherwise without authority of law, said box, barrel, bag, vessel, package, wrapper, cover, or envelope being empty, or containing anything else than the contents which were therein when said articles had been so lawfully stamped, branded, or marked by an officer of the revenue, he shall be liable to a penalty of not less than fifty nor more than five hundred dollars. And every person who makes, manufactures, or produces any box, barrel, bag, vessel, package, wrapper, cover, or envelope, stamped, branded, or marked, as above described, or stamps, brands, or marks the same, as hereinbefore recited, shall be liable to penalty as before provided in this section. And every person who violates the foregoing provisions of this section, with intent to defraud the revenue, or to defraud any person, shall be liable to a fine of not less than one thousand nor more than five thousand dollars, or to imprisonment for not less than six months nor more than five years, or to both, at the discretion of the court. And all articles sold, given, purchased, received, made, manufactured, produced, branded, stamped, or marked in violation of the provisions of this section, and all their contents, shall be forfeited to the United States.

hibition against selling, buying, giving, or receiving a receptacle containing "anything else" than the contents which were therein when the tax was paid is as clear as the English language can make it.

The statute being a revenue law should not be strictly construed. *United States* v. *Stowell*, 133 U. S. 1, 12.

The construction of these revenue statutes must be such as is most favorable to their enforcement. 18 Opinions Atty. Gen. 246, 248.

Even if there is uncertainty as to the meaning of § 3455, Rev. Stat., the spirit and purpose of this section, when read in connection with the revenue laws as a whole, forbid the addition of coloring matter to tax-paid spirits.

The construction contended for by the Government is in harmony with that given to other sections of the internal revenue laws. *United States* v. *Two Bay Mules*, 36 Fed. Rep. 84; *United States* v. *Goodrich Transportation Co.*, 8 Biss. 224; *United States* v. *Ulrici*, 3 Dill. 532.

Where statutes are thus drawn in unqualified terms, courts have invariably refused to place a narrow construction upon them, even though at times a real hardship was imposed. The remedy for harsh legislation, it has been wisely declared, is with the legislature and not with the courts. The very spirit and purpose of the revenue laws require that the contention of the Government should be upheld. *Dobbins's Distillery* v. *United States*, 96 U. S. 395, 401; *United States* v. *Bayaud*, 16 Fed. Rep. 376, 384; *United States* v. *Dobbs et al.*, Fed. Cases No. 14,972; *United States* v. *Fifty Barrels of Whiskey*, Fed. Cases No. 15,091.

Mr. Warwick M. Hough for the A. Graf Distilling Company:

The object of the internal revenue laws being taxation rather than regulation, it is manifest that only those changes in the contents of packages were intended to be noticed by the law, the making of which subjected the person making them to the payment of a special tax; or the making or doing

of which was specifically prohibited upon the theory that it might open the door to a fraud.

But, in seeking a forfeiture, or the imposition of fines, penalties, or imprisonment, specific authority therefor must be found in the law itself, and such a proceeding cannot be sustained upon the theory that permission for the doing of the specific act alleged to constitute an offense does not appear in the law. On the contrary, what is not specifically prohibited by the law is to be understood as being permitted or intended to be passed unnoticed.

Even though some changes may take place naturally, or adventitiously in the contents of a cask or package which has been duly marked, stamped, and branded, as required by law, no notice is to be taken of such changes unless they are such as would require a change of marks, stamps, or brands; and no change in the marks, stamps, or brands is required by law, except when there is such a change in the contents of the package as would subject the person making such change to the payment of some special tax therefor. *United States* v. *Thirty-two Barrels of Spirits*, 5 Fed. Rep. 188; *Three Packages of Distilled Spirits*, 14 Fed. Rep. 569; *United States* v. *Nine Casks and Packages*, 51 Fed. Rep. 191; *United States* v. *Fourteen Packages of Whiskey*, 66 Fed. Rep. 984; *United States* v. *One Package of Distilled Spirits*, 88 Fed. Rep. 856.

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

Other phases of this controversy have appeared in the courts below and are reported *sub nomine United States* v. *Three Packages of Distilled Spirits*, in 125 Fed. Rep. 52, and 129 Fed. Rep. 329. After the reversal of the judgment of forfeiture and the granting of a new trial by the Circuit Court of Appeals, as disclosed by those reports, the information was amended by making the allegations contained in the foregoing statement, and the original averment as to placing other

distilled spirits of a different quality in the barrels after being stamped is not before us.

We are here called upon to determine what is the proper construction of the language of the statute when it speaks of selling a barrel and its contents after it has been properly stamped, and which at the time of sale contained anything else than the contents which were therein when the barrel was stamped by the revenue officer. Does the addition after such stamping, of burnt sugar or caramel, placed in the barrel for the sole purpose of coloring the contents (in this case whiskey), and without intent to defraud the revenue or any person, render the seller liable to the penalty provided by the statute, and the barrel and its contents liable to forfeiture? This coloring matter was not itself taxable. There is no charge that it is unhealthy, and it is plain that its use defrauds no one within the legal meaning of that term. The statute is not a health law, nor is its purpose to prevent the coloring of whiskey before its sale to the consumer. The matter which was added to the contents of the barrel, after it was stamped and branded, did not increase or decrease the amount of the tax otherwise payable on the spirits so colored.

The Government, however, contends that it is wholly immaterial whether the coloring matter added is not itself taxable; it is, within the terms of the statute, something "else than the contents which were" in the barrel when it was lawfully stamped by the officer of the revenue, and if the person who adds the coloring matter subsequently sells the barrel and contents such act subjects them to forfeiture, and renders the person making the sale subject to the penalty named in the first part of the section. The counsel for the Government insists that there is no room for construction other than such as the plain language of the statute calls for; and it is contended that to hold otherwise destroys the statute and opens the door to fraud which is not easy to detect, and which the statute was intended to prevent. In a very careful review of the various provisions of the internal revenue statute, counsel

for the Government has called attention to many acts which are forbidden and which would seem to be innocent, but which were, nevertheless, thought to be of such a character as to open the door for fraud upon the revenue, and hence it is argued that this addition of coloring matter was an act which although it might seem to be innocent in itself, yet nevertheless comes within the plain prohibition of this section, and effect must be given to that prohibition, because it may tend to prevent some subsequent fraud, however harsh or unreasonable the provision might otherwise seem to be. We must first, however, be satisfied that this alleged total, absolute and unconditional prohibition was the real intention of Congress, to be gathered from the language of the section when read in connection with the language of the whole statute. There is no doubt that many of its provisions are harsh beyond anything known heretofore in our history (*United States* v. *Ulrici*, 3 Dill. 532, 539), and yet we cannot persuade ourselves that the act proved in this case comes within the law.

The section is one of many dealing with the subject of collecting a revenue from the taxation of the articles therein mentioned and in the manner therein provided. The aim of the whole statute is to make all of the taxable articles actually pay the tax, and to that end it prohibits those acts which might possibly lead to an evasion of the payment of the tax due upon any taxable article. When, therefore, in the course of the many provisions for collecting the tax and for preventing any evasion of its due payment the statute prohibits the putting of anything else in the barrel or package, etc., after it has been branded or stamped, it seems to us the natural meaning of the language limits the addition to anything of a taxable nature and does not include an article which is not taxable, is wholly harmless and added for a purpose not illegal or in itself improper.

We concur, of course, in the rule which has been upheld in this court, that a statute like this one, for the raising of a revenue, even when accompanied by provisions of a very

highly penal nature, is still to be construed as a whole and in a fair and reasonable manner, and not strictly in favor of a defendant. *United States* v. *Stowell*, 133 U. S. 1. Construed under this rule, we are unable to conclude that the section applies to this case. The language used, when considered in connection with the whole statute, is not so plain as to preclude the application of those general rules of construction of statutes which frequently interpret language in accordance with what seems to be the real meaning of the legislature, although not in exact and literal obedience to the wording of the law.

We do not think that the opportunities for perpetrating a fraud upon the revenue are in any way extended by reason of the addition in question. A liquor dealer having a properly stamped barrel in his possession might violate the law and empty the contents of the barrel without destroying the stamps, and might then dispose of the barrel, so stamped, to an illicit distiller, who might then endeavor to perpetrate a fraud upon the revenue by filling the barrel with non-tax-paid spirits, but we do not see that the prior addition, as mentioned, of coloring matter to the contents of the barrel would aid him in his attempt, nor would the absence of such matter tend in any degree to its prevention or detection. It is not the coloring matter which was added to the contents of the barrel before they were emptied that would in such case aid the attempted fraud, for such coloring matter would probably have been emptied with the other contents of the barrel. The opportunities for fraud commenced at the time the liquor dealer emptied the contents of the barrel without destroying the stamp, and that opportunity was not in the slightest degree affected by the addition, and the attempted fraud of the distiller is not made more easy of accomplishment because of such addition. We cannot see, therefore, that any reasonable purpose could be attributed to Congress in prohibiting an addition, such as is charged in this case, and we cannot construe the section on the mistaken theory that though the act was

really innocent, yet it might aid in the evasion of payment of some portion of a tax, and hence must be regarded as prohibited.

The statute in question, although there has been no intent to defraud, makes a person violating it liable to the lighter penalty, while if the intent to defraud be alleged the article is still liable to forfeiture and the person may be fined a much larger sum and also imprisoned. On this ground it is contended the statute is intended to meet just such a case as the one before us, where there was no intent to defraud and where there was no addition of anything which was itself taxable, but where, nevertheless, something else had been added after the stamping and branding, which was not a part of the contents of the barrel when it was so stamped. It is therefore urged that as the section provides for a forfeiture of the article and a fine upon the person guilty of the addition, even when no intent to defraud is alleged or proved, it emasculates the section to hold that the addition must be something which is itself taxable. We do not think so. When there has been an addition of anything that was taxable, the statute applies, although there was no intention to defraud, while if there were such intention a much heavier penalty is imposed. The two portions of the section are distinct and each may be enforced, however harsh the first may appear to be, when imposed in a case where the action was really without any intention to defraud the revenue or any person.

It has been held under other sections of this act, somewhat similar, that the addition of water to the contents of a barrel or package is no ground of forfeiture. We do not say that the language is exactly the same, but only that it is somewhat similar. *United States* v. *Thirty-two Barrels of Distilled Spirits*, 5 Fed. Rep. 188; *Three Packages of Distilled Spirits*, 14 Fed. Rep. 569; *United States* v. *Bardenheier*, 49 Fed. Rep. 846, 948; *United States* v. *Nine Casks &c.*, 51 Fed. Rep. 191. Reference is made to them in the opinion in this case in 125 Fed. Rep. 52, *supra*.

We think the reasonable construction of this statute requires that the questions submitted should be answered in the negative. It will be

So certified.

PENN REFINING COMPANY, LIMITED, *v.* WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY.

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

No. 27. Argued October 18, 21, 1907.—Decided January 27, 1908.

An order of the Interstate Commerce Commission, that carriers not charging for tanks on tank-oil shipments desist from charging for the barrel on barrel shipments, or else furnish tank cars to all shippers applying therefor, *held*, in this case, to be equivalent to a holding that the charge for the barrel, is not in itself excessive, and therefore, also *held*, that barrel-oil shippers who had not demanded tank cars had not been discriminated against, and were not entitled to reparation for the amounts paid by them on the barrels.

It is the duty of a connecting carrier on a joint through rate to accept the cars delivered to it by the initial carrier, and it is not thereby rendered liable for any wrongful discrimination of the initial carrier merely because of the adoption of a joint through rate, which in itself is reasonable; nor is such connecting carrier rendered liable for any such wrongful act of the initial carrier by section eight of the Interstate Commerce Act.

137 Fed. Rep. 343, affirmed.

THE plaintiff in error, who was plaintiff below, seeks to review a judgment of the Circuit Court of Appeals for the Third Circuit, 137 Fed. Rep. 343, reversing absolutely and without allowing a writ of "*venire facias de novo*," the judgment of the Circuit Court of the United States for the Western District

of Pennsylvania in favor of the plaintiff company for $8,579, with interest from May 15, 1894; in all, $12,706.92. This sum was made up of the charge of fourteen cents for the weight of the barrel in which oil was transported to Perth Amboy from the Pennsylvania oil fields, from September 3, 1888, the time when such charge commenced, to May 15, 1894, the time when the hearing on the claims was had before the Interstate Commerce Commission.

The proceeding resulting in the petition herein to the Circuit Court was originally commenced before the Interstate Commerce Commission, and thereafter conducted pursuant to §§ 13–16 of the act creating the Commission, February 4, 1887, c. 104, 24 Stat. 379, 384, as amended by the act of March 2, 1889, c. 382, 25 Stat. 855, 859; 3 Comp. Stat. 3165, to obtain relief from certain alleged illegal practices of the railroad companies in the way of overcharges for the transportation of oil for the complainants in the petition, and to obtain reparation therefor.

Three substantially contemporaneous yet also separate petitions were filed with the Commission, two on the fourth of December, 1888, and one on the thirtieth of January, 1889, by the Independent Refiners' Association of Titusville, Pennsylvania, and the Independent Refiners' Association of Oil City, Pennsylvania, against several railroad companies.

The petitioners were associations of some sixteen separate refining companies, operating distinct and separate works in the oil regions of Pennsylvania, near the city of Titusville or Oil City.

The petitions were filed for the purpose of obtaining relief from certain charges made by the defendant companies against the petitioners for the transportation of their oil from those oil fields to tidewater in New Jersey, and specially to Perth Amboy in that State, and described as a point in New York harbor, and also to Boston and points in that vicinity. Their petition relating to the charges for transportation to Perth Amboy is alone involved here.

The ground of complaint in that petition was that the railroads who were therein made defendants, viz., the Western New York and Pennsylvania, and the Lehigh Valley, charged sixty-six cents per barrel of oil, which was alleged to be an excessive, unjust and unreasonably high rate for the transportation of oil to Perth Amboy.

There was no complaint in the petition of the failure of defendants to furnish tank cars for the petitioners for the transportation of their oil to Perth Amboy. There was no averment of unfairness of the rates as between barrel and tank oil. Nor was there any averment that the defendants, by their custom of charging for the gross weight of the oil and barrels, were giving a preferential rate to the tank shippers as against the barrel shipments made by plaintiffs. It was only alleged that the rate for the transportation of oil to Perth Amboy was unreasonably high at sixty-six cents per barrel, the weight of the barrel being included and charged for therein. The averments in the petition, that plaintiffs were subjected to undue prejudice and that an undue advantage was given their competitors in business, among others the Standard Oil Trust, had no relation to discrimination arising from a charge for the weight of the barrel, but was connected with the averment that the charge of sixty-six cents for the carriage of the oil was excessive, and hence worked a disadvantage to the plaintiffs and gave an unreasonable preference to the competitors in plaintiffs' business.

The prayer of the petition was that the Commission direct the defendants to cease their unlawful acts, etc.

The evidence was taken before the Commission in the three cases, with the understanding it should be applied to each or all the cases, so far as applicable therein.

It appears by the evidence before the Commission that the charge of fourteen cents per barrel (in addition to fifty-two cents for its contents) for the transportation thereof to Perth Amboy commenced about September, 1888, and prior to that the charge had been fifty-two cents for the oil and the barrel.

There had been some reasons alleged on account of which the charge had been limited to the total of fifty-two cents before September, 1888. Perth Amboy was the station to which all the petitioners in the proceedings before the Commission, applicable to that port, had consigned their oil for export, and that station had no conveniences for unloading in bulk the oil which was brought there in tank cars. Not one car in a hundred was a tank car. The trade demand at that point was for oil in barrels, and the ocean shipments therefrom by the petitioners were also made in barrels, as there were no vessels from that port carrying oil in bulk. Some of the petitioners in the proceedings before the Commission owned tank cars, but did not use them for the Perth Amboy port for the above reasons. Oil which came to Perth Amboy, intended for export, if it arrived in tank cars, had to be there unloaded and filled in barrels before it could be loaded on ships. The petitioners, including the plaintiffs, therefore, had no use for tank cars to that point. The Lehigh Valley Road did not own tank cars, nor did any of the other railroad companies to any material extent, except the Pennsylvania Railroad, which is not a party to this proceeding. The charges for transportation of oil in tank cars did not include any charge except for the oil. In the transportation of the oil to Perth Amboy *via* Buffalo, the initial carrier was the Western New York and Pennsylvania Railroad Company, the Lehigh Valley Railroad Company taking the oil as delivered to them in barrels in cars at Buffalo, New York, and transporting it to Perth Amboy, the plaintiffs paying therefor a joint through rate, amounting to sixty-six cents per barrel, including the barrel. The defendants had established this joint through rate. The tank cars that were used by others for transportation to other places than Perth Amboy were rented from the owners, who were also shippers of the oil, to the railroad companies, who paid the owners for the use of such tank cars a certain sum, determined by the miles run. Those cars were used exclusively for the transportation of the oil of the owners of the cars.

The Commission ordered the defendants to cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their respective roads or lines from the oil regions of western Pennsylvania to New York and New York harbor points, or, on reasonable notice, promptly furnish tank cars to complainants and others who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor points as the shipper may direct; and that said defendants notify the public accordingly by publication in their tariff of rates and charges, pursuant to the provisions of § 6 of the act to regulate commerce. It was also ordered that the rate on shipments of oil, both in tanks and in barrels, over said roads should be the same, and the said rate from said oil regions to New York points should not exceed sixteen and one-half cents per hundred pounds. The defendants were also required "to refund to the several parties legally entitled thereto, within sixty days after notice of this decision and demand thereof by such parties, all sums received by them for transportation over their roads of the barrel package, on shipments of oil in barrels, *when the use of tank cars had not been open to shippers impartially, and the shipper claiming reparation has been thereby deprived of their use.*"

In its opinion, covering, so far as applicable, the three cases, the Commission said that the unlawful discrimination regarding the charge of fourteen cents for the barrel package, in addition to the fifty-two cents for the carriage of the oil per barrel, as against fifty-two cents per barrel by tank cars, without any charge for the package, lay in the fact that the choice was not open generally to shippers, and that the case was one where both modes of transportation are employed by the carrier and the use of one, the tank cars, is not open to shippers impartially, but is practically limited to one class of shippers, and that the charge for the barrel package in barrel shipments, in the absence of a corresponding charge on tank shipments, resulted in a greater cost of transportation to the

shipper in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, and that it was an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions had been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers.

The order of the Commission was filed November 14, 1892, and the proceedings were kept open for the purpose of ascertaining the amounts which were due the parties plaintiff on the theory adopted by the Commission.

The defendants did not comply with the order, but continued to charge the fourteen cents for the barrel, and the parties seeking reparation—that is, the recovery of the damage which they alleged they had sustained—applied for a hearing before the Commission to ascertain the amount thereof. The Commission proceeded thereafter, on proper notice, to determine the amounts due each of the claimants from September 13, 1888, the time of the commencement of the charge for the barrel transportation, to May 15, 1894, the time of the hearing before the Commission, and found (October 22, 1895) the amount due the plaintiff, the Penn Refining Company, Limited (among many other claimants), to be the amount already stated, arising, as found, from the transportation of barrels containing petroleum oil, shipped and carried by the railroads from Oil City and Titusville to Perth Amboy at fourteen cents per barrel in addition to fifty-two cents for its contents.

The Commission, in its reparation opinion, stated that the carriers had failed to notify the public, by publication in their tariffs of rates and charges, that they would, on reasonable notice, supply shippers who might apply therefor with tank cars for transportation to New York harbor points. The original order, directing the publication of these notices by defendants in their tariffs of rates, was entered November 14,

1892, while the period covered by the reparation order of October, 1895, giving damages, included four years, namely, from September, 1888, to November, 1892, before the making of such order. The Commission in its opinion also stated that tank cars had not been open to the use of shippers generally on the carriers' roads, but there was no statement or finding that plaintiffs had ever applied for such cars or desired them or had been refused. The companies did not comply with the order of reparation, and the Commission then commenced (some time in 1896) a proceeding in its own name in the Circuit Court of the United States, in equity, to enforce all the directions contained in the orders, including the provision for the payment of the money damages found due the various claimants. Upon demurrer that court held that the latter provision could not be enforced in equity, as the railroads were entitled to a jury trial on the issue as to the amount of the money recovery, and that the order in regard to the amount due ought to be enforced by each plaintiff in his own name. *The Interstate Commerce Commission* v. *Western New York & Pennsylvania R. R. Co.*, 82 Fed. Rep. 192, 195.

Thereupon, and in April, 1901, this proceeding by petition was commenced in the United States Circuit Court for the Western District of Pennsylvania by the Penn Refining Company, Limited, to recover the amount of the money reparation directed by the Commission. The Lehigh Valley Company demurred to the petition, which was overruled, and issue was then joined by all the defendants upon the material allegations of the petition, and the case was tried in March, 1902, and a verdict found for the plaintiffs against all the defendants.

Mr. James W. Lee and *Mr. Samuel S. Mehard*, with whom *Mr. Eugene Mackey* and *Mr. M. J. Heyward* were on the brief, for plaintiff in error.

Mr. John G. Johnson, with whom *Mr. Francis I. Gowen* was on the brief, for defendants in error.

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

The questions arising on this writ of error are, in some respects, different in regard to the different railroads who are defendants in error, but as to the matters now to be discussed all occupy the same position.

In their petition to the Commission the petitioners in that proceeding complained of the rate of transportation of oil to Perth Amboy, fixed by the carriers at sixty-six cents per barrel, the weight of the barrel being included and charged for in that amount, which rate, it was asserted, was unreasonable and excessive.

In the opinion of the Commission, filed with its order, in referring to a former charge of fifty-two cents per barrel of oil without charging for the weight of the barrel, from the oil fields to Perth Amboy, it is said: "While this rate is fully as high as it should be in view of the nature of the traffic and the conditions surrounding it, and might possibly be made less without depriving the carriers of a fair remuneration for their service, we do not feel authorized under all the facts and circumstances disclosed by the record and evidence in these cases to order a reduction in addition to the exclusion of the charge for the barrel package" (fourteen cents); "and our conclusion is that the rate to New York points should be not more than $16\frac{1}{2}$ cents per hundred pounds, both in tank and barrel shipments, to be charged, in both cases, only for the weight or quantity of oil carried, exclusive of any charge for the package." Again the Commission, in its opinion, said: "In order to guard against misapprehension the Commission wishes to say that these cases are decided purely upon the facts as set forth in the situation as delineated in the record and by the evidence. It is not intended to hold, nor should this report be construed to hold, that, aside from other controlling circumstances, the carrier, in hauling packages, is not entitled to pay according to the weight thereof. It is simply held that

on account of the peculiar circumstances in these cases to charge for the weight of the barrel places barrel shippers at a disadvantage as against tank shippers, and the practice in these cases, while the circumstances and conditions remain unchanged, should be condemned." Upon referring to the order actually made by the Commission, its language is "that the action of the defendants in charging for the weight of barrels on shipments of refined oil in barrels over the several through lines formed by their respective railroads from Titusville, Oil City, and other points in the oil regions of western Pennsylvania, to New York, and other points in New York harbor, or to Boston and points called and known as Boston points, works unjust discrimination against the shipper of such oil in barrels in favor of shippers of the same commodity in tank cars, while said defendants refuse or neglect to furnish tank cars to complainants and other shippers for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct; that rates per hundred pounds on shipments of oil in tanks or in barrels should be the same, and from said points in the oil regions of western Pennsylvania to New York harbor and Boston points such rates should not exceed $16\frac{1}{2}$ cents and $23\frac{1}{2}$ cents respectively, and that defendants should make reparation to complainants and others in all cases where charges on shipment in barrels between those points have included a charge for the weight of the barrel, and tank cars have not been open impartially to shippers of refined petroleum oil over their lines."

The defendants were also, by order of the Commission, "required to wholly cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their respective roads or lines from the oil regions of western Pennsylvania to New York and New York harbor points, or to Boston and Boston points, *or*, on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for

the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct, and that on or before the ninth of January, 1893, said defendants notify the public accordingly by publication in their tariffs of rates and charges, pursuant to the provisions of § 6 of the act to regulate commerce, and also file copies of said tariffs with this Commission, as required by the provisions of said section; and defendants are further hereby directed and required to refund to the several parties legally entitled thereto, within sixty days," etc., as set forth in the order.

By reference to the foregoing extracts from the opinion of the Commission it appears that they did not hold that the carrier in hauling barrels of oil was not entitled to pay for the weight thereof, including the package, but only that the peculiar circumstances of the case before it made it improper to charge for the weight of the barrel, because by such charge the shippers of oil in barrels were placed at a disadvantage as against shippers by tank cars, and although in one portion of the opinion it is stated that the charge of fifty-two cents per barrel, excluding the weight of the barrel package, was as high as it should be in view of the nature of the traffic and the conditions surrounding it, nevertheless the Commission gave the above quoted precise directions contained in its formal order. It made use of language by which the defendants were required to cease from charging for the transportation of the barrel package, *or*, on reasonable notice promptly furnish tank cars to complainant and other shippers who might apply therefor for the purpose of loading and shipping oil to New York harbor or Boston points, as the shippers might direct. This, of course, amounted and was equivalent to a holding that the charge for the weight of the barrel package of oil was not excessive. If the charge for the carriage of the barrel itself, taken in connection with the charge for the weight of the oil contained therein, made a total charge which was in and of itself excessive or unreasonably high (as was the complaint of the petitioners), of course the Commission would not

have permitted the charge, even if the petitioners had not applied for the use of tank cars. *East Tennessee &c. Railway Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 23; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 190 U. S. 273, 283. This limits the case against the defendants upon the finding of the Commission, to that of discrimination, which was decided to exist under the peculiar circumstances of the case, by reason of the charge for the barrel in which the oil was contained, while in tank cars the charge was limited to the oil carried.

We will therefore inquire what were the peculiar circumstances, as shown by the evidence, which led the Commission to make its order as to discrimination?

They were these:

1. That the railroads owned no tank cars.

2. That they transported oil in tank cars only for those shippers of oil who owned and furnished such cars. That in the case of oil intended for export by such owners it was sent to ports in New York harbor near Perth Amboy; the seaboard, and not Perth Amboy alone, being the place of competition between the plaintiffs and the Standard Oil Trust and others.

3. That the carrier hired tank cars from the shippers of the oil and paid for them a certain sum, measured by the miles run to and from the place of consignment.

4. That the tank cars, thus hired, were used exclusively to carry the oil of the owners of such cars. Other shippers of oil had their oil carried in barrels, in box cars, and a charge was made for the weight of the barrel containing the oil, while the charge for the oil in tank cars was limited to the amount of oil actually carried.

These facts, in the opinion of the Commission, rendered the case an exception to the usual rule as to the right to charge for the weight of package as well as its contents. In the view of the Commission, although it admitted that the transportation in tank cars was more profitable to the carrier in yielding a larger revenue above the cost of service than that in barrels,

yet the case was not presented "of two modes of transportation open indiscriminately to shippers in general, the one at a higher rate than the other, and as to which the shipper may take his choice and pay accordingly, but a case where the cheaper rated and, as claimed by the defendants, the better, mode of transportation was open practically to only a particular class of shippers." When, therefore, as was stated, "the carrier accepts tank cars owned by shippers who can afford to build and furnish them, and has none of his own to furnish to other shippers, but can supply only box cars, in which barrels must be used for oil, the carrier is bound to see that he gives no preference in rates to the tank shipper, and that he subjects the barrel shipper to no disadvantage."

These facts also appeared before the Circuit Court, and that court left it to the jury to find from them whether there was "undue discrimination" in favor of the shipper by tank cars and against the shipper by barrels, although the petition made no such allegation, but only alleged that the rates and charges for the service (sixty-six cents per barrel) were excessive, unjust and unreasonable. Discrimination was not alleged between the tank and the barrel car, for what would seem to be the obvious reason that the plaintiffs could make no use of the tank cars, as they had no facilities for unloading them at Perth Amboy and no vessels to export the oil in bulk, and the trade demand there was for oil in barrels. But, although, without such facilities and not being in position, therefore, to use such cars, the plaintiffs nevertheless demanded that no charge for transportation should be made for the barrel package, although the charge made was a reasonable one, unless a charge for the tank packages was made against those who used tank cars for the carriage of their oil to points adjacent to Perth Amboy, and although the transportation by tank cars was more remunerative to the companies than the transportation by barrels.

The whole theory of this discrimination rests upon the alleged failure to furnish tank cars to shippers demanding

them, while at the same time the defendants leased tank cars from their owners and used them to carry the oil of such owners exclusively, and yet in this case there has been no such failure, because there has been no demand for such cars by the plaintiffs, who, for the reasons stated, had no use for them.

Although in the opinion of the Commission in the reparation proceeding it was stated that the defendants had not notified the public as to supplying shippers with tank cars, as required by the order of November 14, 1892, while at the same time they denied to plaintiffs the use of such cars, yet there is no statement or finding that the plaintiffs had ever asked for such cars for the Perth Amboy station, and the proof is they did not want them for that point. In the course of the opinion some general observations were made in regard to the failure to supply tank cars, and the consequent necessity for the shippers to ship their oil in barrels and pay transportation on the total weight of the oil and the barrels. The opinion was delivered in two different proceedings, in which all the facts were not identical, one regarding Perth Amboy and the other Boston and adjacent points, and we cannot suppose that the Commission meant to include Perth Amboy in the opinion on this point, because the facts already adverted to furnish ample reasons for not demanding or using tank cars.

It is, therefore, apparent that the failure of plaintiffs to use tank cars during substantially all the period covered by the reparation order was not owing to a refusal or omission of the defendants to supply them on demand, but because they, the plaintiffs, did not demand and could not use them economically for the transportation of oil to Perth Amboy. The opinion of the Commission must be read with reference to this evidence, which, although given on the trial before the court, states the facts existing at Perth Amboy during the time of investigation by the Commission.

If it be assumed that it was the duty of the railroads to furnish tank cars to those who demanded them while the

railroads continued to hire that kind of car from owners in which to carry their oil, yet the failure to furnish them to a party that did not desire and had not demanded them certainly ought not to render it necessary for the railroads to carry the barrel package free because no charge was made for the tank package. The Commission said it may be conceded that the amount of paying freight was materially greater in tank than in barrel shipments, and that the tank car, after adding the gross weight of the car and oil, pays slightly more to the carrier per ton than the stock car with its full load of oil barrels. Nevertheless it was stated that the facts already adverted to made out a case of unjust discrimination between the tank and barrel shipper, and it was so adjudged in this case where a shipper did not use or demand a tank car.

We are unable to concur in this view. Because circumstances existed which prevented the economical use of the tank car by plaintiffs (no demand being made for the use of a tank car) is no ground for finding discrimination in the charge for the weight of the barrel package (such charge being in itself not an unreasonable one), while none is made for the tank containing the oil. It might be different if plaintiffs desired tank cars and defendants failed to furnish them on demand.

If the carrier must take off such charge for the weight of the barrel, although tank cars are not demanded, the result is to make the defendants carry the barrels free from freight charges, even while the shippers were unable to use and did not demand tank cars.

It is not incumbent, therefore, upon this court to now decide what would be the duty of the carrier as to furnishing tank cars to those who desired and demanded but did not own them, where the railroads accepted tank cars, owned by other shippers of oil, for the purpose of carrying their oil alone, and to different points than Perth Amboy. We are dealing with a case where such question does not arise.

There are other reasons in addition to the foregoing why the Lehigh Valley should not be held for any discrimination

in this case. That company was but a connecting carrier and took the cars as they were delivered to it by the initial carrier at Buffalo for transportation to Perth Amboy. It was the duty of the connecting carrier to do so, and it was not rendered liable for any alleged wrongful act of the initial carrier merely because of the adoption of a joint through rate from Titusville or Oil City to Perth Amboy, which was in itself reasonable. Nor did the eighth section of the commerce act render it liable for any such alleged wrongful act asserted against the initial carrier.

These views render it unnecessary to consider the objection to the recovery, taken by the defendants in error, based upon the fact that the petition to the Commission asked for relief on the ground that the charges were unreasonably high, while the relief granted was based upon discrimination, a charge not contained in the pleading. For the reasons already stated, the judgment of the Circuit Court of Appeals is

Affirmed.

Mr. Justice Moody, dissenting.

In my opinion there was evidence which tends to support the plaintiff's cause of action, and I think that it should have been, as it was, submitted to the jury. It appeared that the plaintiff was engaged in shipping oil, destined for export, from the oil regions in Pennsylvania to Perth Amboy. Up to September, 1888, the transportation rate was fifty-two cents per barrel, and that rate applied, whether the oil was carried in barrels or in tank cars. At that rate the plaintiff was able to ship oil in competition with other producers. In September, 1888, the rate for shipment in barrels was changed to sixty-six cents per barrel, while the rate was left unchanged where the oil was carried in tank cars. The evidence tended to show that, in view of the number, ownership, and management of all the tank cars in existence, the new rate was practically prohibitory of barrel shipments from the Pennsylvania oil

regions to the seaboard, that it was designed by a competitor who influenced the defendants to impose it to have this effect, and that this was the only method of shipment practically open to the plaintiff. Under these circumstances the plaintiff joined with others in a complaint to the Interstate Commerce Commission. Section 3 of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, makes it "unlawful . . . to subject . . . any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever," as well as to give any person or kind of traffic an undue preference or advantage. The plaintiff might have brought an action for damages under §§ 8 and 9 of the act, but it chose to make complaint to the Commission, thereby electing that as the exclusive remedy. The Commission, after a hearing, adjudged that the sixty-six cent rate worked unjust discrimination against barrel shipments, and ordered the defendants to make reparation to the plaintiff and others. The amount of the reparation was afterwards ascertained. An order prescribing the tariff in the future was made, but its terms do not seem to be material, as the claims for reparation were for the time between the establishment of the discriminating rate and the making of the Commission's order. The order for the future may or may not be a valid and enforceable one. The plaintiff's right under that order, in the absence of a demand for tank cars, may be uncertain. We need not pursue those inquiries. Here the only question is of the right of the plaintiff to recover damages for the alleged discriminatory rate collected from it before and not after the order of the Commission. The defendants declined to make the reparation ordered by the Commission, and the plaintiff sought to recover it by an action, brought under § 17 of the act, in which the defendants were entitled to a trial by jury. On the trial the statute makes "the findings of fact *prima facie* evidence of the matters therein stated." They with other evidence were submitted to the jury. The jury was instructed that whether the plaintiff had been subjected to

undue prejudice was a question of fact. The jury was further instructed as follows:

"In arriving at that conclusion, it is proper to call your attention to this point—that the mere fact that there is or may be a preference or advantage given, where refined oil is shipped in some other way—for example, in tank cars—and that a more favorable rate is given to tank car shippers, does not, in and of itself, show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that the jury, before it can adjudge these companies to have acted unlawfully, to have subjected refined oil in barrels to any undue or unreasonable prejudice or disadvantage, must ascertain the facts and must give due regard to these facts and matters which railroad men, apart from any question arising under the statute, would treat as calling for a preference or advantage to be given—for example, in this case, to oil shipped in such tanks. All such facts may and ought to be considered and given due weight by the jury in forming its judgment, whether such preference or advantage is undue or unreasonable. In the complexity of human affairs, and especially in commercial affairs, absolute uniformity is well-nigh impossible, and some prejudice or disadvantage often occurs where men desire to act with the utmost fairness. It is, however, where such prejudice or disadvantage in interstate commerce reaches the measure of undue or unreasonable that the act makes it unlawful.

"It will be for you, gentlemen, to apply to this question all the evidence before you in this case, in the light of all the facts and proofs, and justly, fairly and impartially to determine the question of whether this rate on refined oil in barrels between Oil City and Titusville and Perth Amboy, so established between these two companies (if you find that to be the fact) did subject the oil shipped in barrels to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"If you so find, you will also determine to what extent was the rate undue and unreasonable, and whatever amount you

so find under the evidence, you would be justified in allowing this plaintiff to recoup or recover upon any shipments it made and on which it has paid the undue and unreasonable amount. You will understand that it is not entitled to recover all the freight it paid, because part of it was undue and unreasonable, but it is only such part of the freight as you find to be undue and unreasonable that the plaintiff is entitled to recover back, and that only upon proof to you of the amount of the shipments made by it upon which the freight was unduly and unreasonably charged."

These instructions seem to me full and appropriate. The jury found a verdict for the plaintiff, thereby affirming that "the particular description of traffic" in which the plaintiff was engaged was subjected to "undue or unreasonable prejudice or disadvantage." I am not persuaded that we can say, as matter of law, that there was not sufficient evidence to be submitted to the jury and to warrant the verdict. Nor do I see any reason why the Lehigh Valley Railroad should not be held responsible. It had, with the other defendant, established a joint tariff for a continuous shipment between the States. That tariff has been found to be discriminatory and unlawful. It has received its share of the unlawful exaction. The eighth section of the act provides that a carrier who "shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful" shall be liable to the full amount of the damages sustained by one injured thereby. I see no escape for this defendant from this provision.

There may have been error committed during the trial which would require that the verdict should be set aside and a new trial granted. It is not necessary for me to consider this question. I go no further than to dissent from the judgment of the court, which in effect denies the right of the plaintiff to recover upon the evidence against any of the defendants.

I am authorized to say that MR. JUSTICE HARLAN concurs in this dissent.

ELDER *v.* WOOD.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 95. Argued January 9, 1908.—Decided January 27, 1908.

A valid subsisting mining location, such as the Comstock lode, or an interest therein, is property distinct from the land itself, vendible, inheritable and taxable as such, by the State, notwithstanding the land may be unpatented by the United States.

When the collection of a tax on such an interest is enforced by sale, the tax deed conveys merely the right of possession and does not affect any interest of the United States, and the construction of the state statutes, and the conformity thereto of the tax levy and sale, are matters exclusively for the state court to determine, and this court is without jurisdiction to review its decision.

Sections 340, 341 of the laws of Colorado of 1881, taxing interests in unpatented mining claims and making the right of possession the subject of levy and sale, are not in conflict with § 4 of the Colorado enabling act of March 3, 1875, 18 Stat. 474, providing that no tax shall be imposed on lands or property of the United States.

Where the Federal question below was whether a tax sale deprived the owner of his property without due process of law because the notice, being published on Sunday, was insufficient, and the state court did not pass on that question but sustained the tax title under the state statutes making tax deeds *prima facie* evidence and of limitations, the non-Federal grounds are adequate to support the judgment and this court is without jurisdiction to review it on writ of error under § 709, Rev. Stat.

37 Colorado, 174, affirmed.

THE facts, which involve the right of a State to tax the possessory right in unpatented mining claims, are stated in the opinion.

Mr. George R. Elder for plaintiffs in error:

The judgment of reversal denied the rights claimed by plaintiffs in error under two clauses of the Constitution of the United States and the similar clause of the constitution of Colorado, and the judgment of reversal could not be entered without finding, in opposition to the enabling act of Congress

and the decision of the District Court below, that United States land, whose title had not vested in the locator by purchase, was taxed. These were claims at the foundation of the entire case and were decided adversely to the rights of plaintiffs in error. The prohibitions of the Fifth and Fourteenth Amendments of the Constitution of the United States, as well as § 25 of Art. 2, constitution of Colorado, extend to any action of the State through its constituted authorities, and therefore include any divestiture of property through tax assessments, levies and tax sales, made without due process of law.

Under the following authorities this court should take jurisdiction to pass upon this writ of error. *Proprietors of Bridges* v. *Hoboken Land & Imp. Co.*, 1 Wall. 116; *Roby* v. *Colehour*, 146 U. S. 153–159; *De Saussure* v. *Gaillard*, 127 U. S. 216; *Brown* v. *Atwell*, 92 U. S. 327; *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Chicago Life Insurance Co.* v. *Needles*, 113 U. S. 574; *Sayward* v. *Denny*, 158 U. S. 180; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *Bells Gap Ry. Co.* v. *Pennsylvania*, 134 U. S. 232.

An advertisement of tax notice upon Sunday exclusively was not a legal notice and due process of law. *Schwed* v. *Hartwitz*, 23 Colorado, 189; *Scammon* v. *City of Chicago*, 40 Illinois, 146; Blackwell, Tax Title (2d ed.), § 210; Blackwell, Tax Titles (5th ed.), § 440; *Ormsby* v. *Louisville*, 79 Kentucky, 199; *Sawyer* v. *Cargile*, 72 Georgia, 290; *Brannin* v. *Louisville*, 4 Ky. Law Rep. 384; *McLaughlin* v. *Wheeler*, 2 S. Dak. 379; *Shaw* v. *Williams*, 87 Indiana, 158.

The United States still owning the fee to the land while the entry remained cancelled, it could not be taxed and sold.

While part of the claim was still owned by the United States after the cancellation, the incorporation of illegal taxes upon this part with other taxes levied upon the other part of the claim, rendered the whole sale void *in toto*.

The Government, through its Land Department, has never completely changed the ownership of this Comstock lode

from itself to the holders of the possessory title. It still retains the entire title, at its own disposition, to be finally parted with after the several contests before the land officers and the courts are at last decided.

There has been no proper segregation of the area of the Comstock lode and issuance of such a muniment of title by the Land Department of the United States to bring it within the purview of the taxing power of the State of Colorado, certainly not up to the twenty-first day of September, 1896, the date of the partial re-instatement of the entry.

The refusal of the Land Department of the Government to confirm the mineral entry of the Comstock lode in its entirety from its first order of cancellation May 2, 1887, up to and until September 21, 1896, a period of nine years and four months, is proof positive that no full equitable title passed to the grantees by those proceedings and that the Government through its Land Department still held full control of the land and by its various rulings established the fact that the right to patent in the location claimants was incomplete. *Kansas P. Ry. Co.* v. *Prescott*, 16 Wall. 603; *Union Pac. R. R. Co.* v. *McShane*, 22 Wall. 444; *Northern Pac. R. R. Co.* v. *Traill Co.*, 115 U. S. 600; *Hunnewell* v. *Cass Co.*, 22 Wall. 464; *Central Colo. I. Co.* v. *Pueblo Co.*, 95 U. S. 259; *Lamborn* v. *Dickinson Co.*, 97 U. S. 181; *Union Pac. R. R. Co.* v. *Dodge Co.*, 98 U. S. 541; *People* v. *Shearer*, 30 California, 645; *Central P. R. R. & Co.* v. *Howard*, 51 California, 229; *Long* v. *Culp*, 14 Kansas, 412; *White* v. *B. & M. R. R. Co.*, 5 Nebraska, 393; *Elling* v. *Thexton*, 7 Montana, 330; *Musser* v. *McRae*, 38 Minnesota, 409; *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *Wisconsin Cent. R. R. Co.* v. *Price Co.*, 133 U. S. 496; *Hussman* v. *Durham*, 165 U. S. 145; *Campbell* v. *Spears*, 120 Iowa, 670; *Duncan* v. *Newcomer*, 9 S. Dak. 375; *Pitts* v. *Clay*, 27 Fed. Rep. 635.

Mr. Aldis B. Browne for defendants in error. *Mr. Charles Cavender* was on the brief:

If it be contended that there was a Federal question which

might have been raised, still it will be found, from an examination of the opinion of the Supreme Court of the State of Colorado, *Wood* v. *McCombe*, 37 Colorado, 174; *S. C.*, 86 Pac. Rep. 319, that the decision is based on a local statute and the construction thereof, and no Federal question was involved therein nor necessarily decided. This court will not review such a decision. *N. Y. Cent. R. R. Co.* v. *City of New York*, 186 U. S. 269; *Mut. Life Ins. Co.* v. *McGrew*, 188 U. S. 291; *S. C.*, 63 L. R. A. 33, and the notes to said case; *Apex Transportation Co.* v. *Garbad*, 32 Oregon, 582; *S. C.*, 62 L. R. A. 513; *Gillis* v. *Stinchfield*, 159 U. S. 658.

Rev. Stat. §§ 2319–2324 vest, in the locator of valid mining claims, the absolute property in the same. And see § 910, Rev. Stat.

By statute the real title and ownership is in the locator, and not in the United States. Such property is real estate and belongs to, and the title is in the locator, although the paramount title might not have passed from the Government, and is capable of conveyance, inheritance and protection at law and in equity, and is also subject to tax levy and sale. It is expressly so declared by the statutes of Colorado and other States in which such property is situated, and is so recognized by state and Federal courts in repeated decisions. *Forbes* v. *Gracey*, 94 U. S. 767; *Belk* v. *Meagher*, 104 U. S. 283; *Manuel* v. *Wolff*, 152 U. S. 505, 511; *St. Louis M. Co.* v. *Montana M. Co.*, 171 U. S. 655; *McFeters* v. *Pierson*, 15 Colorado, 201; *Roseville Co.* v. *Iowa Gulch Co.*, 15 Colorado, 29; *Butte Co.* v. *Frank*, 65 Pac. Rep. 1; *Bakersfield Co.* v. *Kern Co.*, 77 Pac. Rep. 892.

It necessarily follows that the title held by the locator, and the possessory right acquired thereby, are subject to taxation, subject, of course, to the paramount title of the United States, which is not divested by the tax sale, but simply passes the possessory title to the purchaser thereat.

The statute with reference to tax sales, with reference to notice, and the statute of limitations are Colorado statutes and

have been passed upon by the highest court of the State, which has held, as appears from the decision in this case, that the purpose of the statute of limitations was to cure just such defects as are asserted by the plaintiff herein; and that after five years they cannot be availed of. This court is bound by the construction placed upon a local statute by a local court. U. S. Rev. Stat. § 721; *Townsend* v. *Todd et al.*, 91 U. S. 452; *Commercial Bank* v. *Buckingham*, 5 How. 317; *Allen* v. *Massey*, 17 Wall. 351; *Union Pacific R. R. Co.* v. *Reed*, 80 Fed. Rep. 239; *S. C.*, 49 U. S. App. 421 (Eighth Circuit); *Lloyd* v. *Fulton*, 91 U. S. 479; *Jerome* v. *Carbonate Nat. Bank of Leadville*, 22 Colorado, 37; *Perkins* v. *Adams*, 16 Colo. App. 96.

Mr. Justice Moody delivered the opinion of the court.

The plaintiff in error brought this action in a District Court of the State of Colorado to recover from the defendants in error the possession of an undivided interest in the Comstock Lode mining claim, situated in that State. Both parties claimed title under Wilhelmina Gude, who was agreed to have been the owner of the interest in dispute; the defendants under a sale for taxes assessed upon her interest, made August 5, 1889, and a deed in pursuance of the sale made August 8, 1892, and recorded August 11, 1892; the plaintiffs under a quitclaim deed of her interest made April 5, 1894, and duly recorded. The tax title was the earlier, and possession of the interest in dispute was held by those claiming under that title for more than five years, which is the period of the statute of limitations of Colorado applicable to such a case. The plaintiffs, however, insisted that the tax title was void, and the judge of the trial court so found, and entered judgment for the plaintiffs, which was reversed by the Supreme Court of the State and judgment for the defendants ordered, *sub nomine*, *Wood* v. *McCombe*, 37 Colorado, 174. The case is here upon writ of error to the latter court.

The plaintiff's contention is that the tax title was void for two reasons: first, because the property was not subject to

state taxation, as the title to the land was in the United States, and therefore the levy of the tax was a nullity; second, because the notice of the sale for taxes was published only in a Sunday newspaper, and therefore the sale was a nullity. The further contention is then made that the tax deed for these reasons was void and did not afford color of title sufficient for the purpose of the statute of limitations.

The judgment under review, however, determined that the interest of Wilhelmina Gude was liable to taxation under the laws of the State, although the land on which it was located had not been patented to her or entered for patent by her; that the possession was the subject of the assessment, and that the right of possession passed by the tax sale; that a tax deed was by a state statute *prima facie* evidence *inter alia* "that the property was duly and lawfully advertised for sale;" that the tax deed was not void upon its face, and that it constituted a sufficient color of title to satisfy the statute of limitations; and, finally, that as this action was not brought within five years after the delivery of the tax deed it was barred by that statute, which provided that "no action for the recovery of land sold for taxes shall lie unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer."

The question for decision here is only whether this judgment denied to the plaintiffs any Federal rights duly claimed by them in the state court, and we have no right to inquire further.

1. The title to the land on which this mining claim was located was in the United States. It was a part of the public lands, and although proceedings had been begun by the owners of the claim for the acquisition of the title to the land by patent, they were not concluded at the time of the assessment of the tax, and apparently no patent has ever been issued. Obviously the land was not taxable as the property of Wilhelmina Gude. The act by which the people of the Territory of Colorado were enabled to form a State (§ 4 of act approved March 3, 1875, c. 139, 18 Stat. 474) provided that no taxes

should ever be imposed upon lands or property of the United States. The claim of a Federal right was based upon this statute. But, assuming that under this statute a Federal question is raised, there was no taxation of the land in the case at bar. A statute of Colorado authorized the taxation of mining claims, whether patented or entered for patent or not, in these words: "In case the mine or mining claim shall not be patented, or entered for patent, but shall be assessable and taxable under this act, on account of producing gross proceeds, then, and in that case, the possession shall be the subject of the assessment, and if said mining property be sold for taxes levied, the sale for such taxes shall pass the title and right of possession to the purchaser, under the laws of Colorado." Laws 1887, §§ 340–341, Mills' Ann. Stat. §§ 3222–3225. The construction of this statute and the conformity to it of the proceedings of the taxing officials were questions exclusively for the Supreme Court of the State, and we have no authority to review its determination of them. That court held that what was assessed was not the land on which the mining claim was located, but the claim itself, that is to say, the right of possession of the land for mining purposes. It is agreed that the Comstock Lode was a "valid subsisting mining location," and at the time of the assessment of the tax Wilhelmina Gude was the owner of the undivided interest in it which is in controversy here. Such an interest from early times has been held to be property, distinct from the land itself, vendible, inheritable and taxable. *Forbes* v. *Gracey*, 94 U. S. 762; *Bell* v. *Meagher*, 104 U. S. 279, 283; *Manuel* v. *Wulff*, 152 U. S. 505, 510; *St. Louis Mining Co.* v. *Montana Mining Co.*, 171 U. S. 650, 655; 1 Lindley on Mines, §§ 535–542, inclusive. The State therefore had the power to tax this interest in the mining claim and enforce the collection of the tax by sale. The tax deed conveyed merely the right of possession and affected no interest of the United States.

2. The tax deed under which the defendant in error Wood claims title was executed in pursuance of a sale made upon

a notice published only in a Sunday newspaper. This fact does not appear from the deed itself, as an analogous infirmity appeared in the tax deed before the court in *Redfield* v. *Parks*, 132 U. S. 239. The deed upon its face was a valid instrument, and could be impeached only by evidence *aliunde*. The state court did not deem it necessary to consider whether such a notice was sufficient, because it held that a state statute made such a deed *prima facie* evidence of the sufficiency of the notice, and that possession under such a deed for the prescribed period met the requirements of the state statute of limitations. The decision therefore did not reach the only Federal question which can be imagined with respect to this part of the case, namely, that a sale upon such a notice was wanting in due process of law, but rested upon entirely adequate grounds of a non-Federal nature. Whether the decision of the question of state law was right or wrong, we may not consider. It is enough that the judgment proceeded solely upon the state law, and that the state law was adequate to dispose of the case without reaching any Federal question. *Leathe* v. *Thomas*, 207 U. S. 93. We need not, therefore, consider whether this Federal question was properly raised in the court below, or whether a sale upon such a notice would be a denial of due process of law in violation of the Fourteenth Amendment of the Constitution.

The plaintiffs in error have shown no violation of Federal right, and the judgment of the Supreme Court of Colorado is

Affirmed.

MISSOURI VALLEY LAND COMPANY *v.* WIESE.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 101. Argued January 10, 1908.—Decided February 3, 1908.

Where a judge of the highest court of a State, in allowing a writ of error, adds to his signature "Presiding Judge, etc., in the absence of the chief judge from the State;" that recital is *prima facie* evidence that the chief judge is absent and the judge signing is presiding, and, if not controverted, the writ of error is properly allowed and the requirement of § 999, Rev. Stat., that it must be allowed either by the Chief Justice of the state court or a justice of this court, is complied with.

The contention in the state court that plaintiff in error's title rested on a patent to his grantor and that prior to the issuing thereof the legal title had remained in the United States, so that adverse possession could not be obtained, involves a Federal question, and as in this case it was not frivolous, and was necessarily decided by the state court, and such decision was adverse to the title set up under the United States, this court has jurisdiction under § 709, Rev. Stat., to review the judgment.

The rulings of this court that the Union Pacific Railroad main line grant, within place limits, made by the act of July 1, 1862, 12 Stat. 489, and the amendatory act of July 2, 1864, 13 Stat. 356, was *in præsenti*, and that after definite location of its road the grantee company could maintain ejectment and that title could be acquired against it by adverse possession, held in this case to apply to lands embraced within the grant for construction of the Sioux City branch road, notwithstanding such branch was to be constructed by a company to be thereafter incorporated.

Where lands are within the overlap of place limits of two grants, both of which are *in præsenti*, and for which eventually a joint patent is issued to both companies, the occupancy of a portion thereof, under a deed given by one of the companies after definite location, and before the issuing of the joint patent, is adverse to the other company, and not that of a co-tenant; nor, under the circumstances of this case, do the acts of such occupant in acquiring title from the United States, under the remedial act of March 3, 1887, 24 Stat. 556, interfere with his title thereto which had already been established by adverse possession.

THE facts are stated in the opinion.

Mr. Charles A. Clark for plaintiffs in error in this case and in No. 102 argued simultaneously herewith:

The grant for the Sioux City Branch was not *in præsenti*.

It was made by § 17, act of July 2, 1864, to a railway corporation to be *thereafter* designated whether then in existence or afterwards organized and which *shall be entitled to receive* alternate sections for ten miles in width on each side of the same along the whole length of said branch.

The forfeiture imposed for failure to complete the branch was merely "all of the railroad which shall have been constructed by said company;" and did not include all lands as in the case of the main line and other branches under § 17, act of July 1, 1861.

Where it has been held that the grant was *in præsenti* the language was, "that there be and is hereby granted." *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241; *Toltec Ranch Co.* v. *Cook*, 191 U. S. 532; *Iowa Railroad Land Co.* v. *Blumer*, 206 U. S. 482. Where the language of the grant is "shall be granted" as in the act of 1864, it is not a grant *in præsenti* of the legal title. *Minnesota* v. *Hitchcock*, 185 U. S. 392; *United States* v. *Thomas*, 151 U. S. 583; *Beecher* v. *Weatherby*, 95 U. S. 523; *Cooper* v. *Roberts*, 18 How. 179.

There may be a grant *in præsenti* of an inchoate right or title where the legal title does not pass until patent is issued for the land. *Rogers Locomotive Co.* v. *Am. Emigrant Co.*, 164 U. S. 559; *Michigan Lumber Co.* v. *Rust*, 168 U. S. 592.

As to the jurisdiction of the Land Office see *United States* v. *Winona & St. P. Ry.*, 15 C. C. A. 103, 104.

The decision in this case was affirmed on appeal. *United States* v. *W. & St. P. Ry.*, 165 U. S. 463, 474, 475. See also *Moore* v. *Robbins*, 96 U. S. 530, 533; *Minter* v. *Crommelin*, 18 How. 89; *United States* v. *Schurz*, 102 U. S. 401; *French* v. *Fyan*, 93 How. 172; *Quinby* v. *Conlan*, 104 U. S. 420; *Smelting Co.* v. *Kemp*, 104 U. S. 647; *Steel* v. *Refining Co.*, 106 U. S. 452; *Heath* v. *Wallace*, 138 U. S. 585; *Knight* v. *Association*, 142 U. S. 212; *Noble* v. *Railway Co.*, 147 U. S. 174; *Barden* v. *Railway Co.*, 154 U. S. 288.

"The decisions of the Land Department in contest cases are conclusive upon all questions of fact." *Love* v. *Flahive*,

205 U. S. 198; *Gertgens* v. *O'Connor*, 191 U. S. 240, citing *Burfenning* v. *Chicago &c. Ry. Co.*, 163 U. S. 323, and cases there cited; *Johnson* v. *Drew*, 171 U. S. 99; *Gardner* v. *Bonestell*, 180 U. S. 362.

Where a public grant is being administered by the Land Department the courts cannot anticipate its decision by passing upon the title to lands involved in contests before the Department in the administration of such grant. The jurisdiction of the Department is exclusive. *French* v. *Fyan*, 93 U. S. 171.

Courts are not permitted to "render a decree in advance of the action of the Government which would render its patents a nullity when issued." *Marquez* v. *Frisbie*, 101 U. S. 475, and cases cited; *Vance* v. *Burbank*, 101 U. S 509; *Craig* v. *Leitensdorfer*, 123 U. S. 213; *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 69.

The officers of the Land Department were "charged with the duty of administering the land grant and determining what lands did and what did not pass, the only tribunal to which the company could then apply and upon whose ruling it was bound to act." *United States* v. *Winona &c. Ry.*, 165 U. S. 475; *Oregon* v. *Hitchcock*, 202 U. S. 70; *In re Emblen*, 161 U. S. 56, 57; *McDaid* v. *Oklahoma*, 150 U. S. 209; *Bockfinger* v. *Foster*, 190 U. S. 121, 126; *Humbird* v. *Avery*, 195 U. S. 502, 510.

As an action for the possession of the land could not have been maintained by the Sioux City Company, or its grantee, the statute of limitations could not run or toll the right of that company or its grantee under patent for the land when finally issued. *Howard* v. *Perrin*, 200 U. S. 74, 75; *Gibson* v. *Choteau*, 13 Wall. 92; *Iowa Ry. Land Co.* v. *Blumer*, 206 U. S. 495, 496.

It is only in the interest of justice that the fiction of relation is applied by which a legal title is held to relate back to the initiatory step for the acquisition of the land. *United States* v. *Anderson*, 194 U. S. 399, and cases there cited.

Where, as in the case at bar, the application of that rule

would, under a state statute of limitations giving title by prescription, toll the legal title before it passes from the United States, this is not in the interest of justice, and the fiction of relation cannot obtain. *Gibson* v. *Choteau*, 13 Wall. 100; *Howard* v. *Perrin*, 200 U. S. 74, 75.

The writ of error herein was properly issued. See *Butler* v. *Gage*, 138 U. S. 56; *Havnor* v. *New York*, 170 U. S. 411.

The case presents Federal questions clearly giving this court jurisdiction. *Gibson* v. *Choteau*, 13 Wall. 92; *Redfield* v. *Parks*, 132 U. S. 246; *Iowa R. R. Land Co.* v. *Blumer*, 206 U. S. 482.

Mr. James H. Van Dusen, with whom *Mr. Edward F. Colladay* was on the brief, for defendant in error in this case and in No. 102:

The writ of error herein was not properly issued, because it appears that it was not signed by the Chief Justice of the Supreme Court of the State, as required by law. *Havnor* v. *New York*, 170 U. S. 411.

There is no Federal question involved in this case. It is merely a suit to quiet title brought by one of two tenants in common against the other, both of whom base their claims of title upon the same grant from the United States. The case is governed by *Corkran Oil Co.* v. *Arnaudet*, 199 U. S. 182, and *Dibble* v. *Bellingham Bay Land Co.*, 163 U. S. 74.

The acts of Congress of July 1, 1862, and July 2, 1864, were grants *in præsenti* and, under the admission in the pleadings of the completion of the railroads and the compliance with all the terms and conditions of the act prior to January 1, 1870, operated to pass the title of the Government on or prior to that date. *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241; *Toltec Ranch Co.* v. *Cook*, 191 U. S. 291; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Leavenworth L. & G. Ry. Co.* v. *United States*, 92 U. S. 733; *Platt* v. *Union Pac. Ry. Co.*, 99 U. S. 48; *St. Joseph Ry. Co.* v. *Baldwin*, 103 U. S. 426; *St. Paul Ry. Co.* v. *Phelps*, 137 U. S. 528; *Iowa Railroad Land Co.* v. *Blumer*, 206 U. S. 482.

If title passed from the Government, as contended by Wiese, the state statute of limitations operated and proceedings before the Land Department could not toll it. *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241; *Toltec Ranch Co.* v. *Cook*, 191 U. S. 291; *Southern Pac. Ry. Co.* v. *Whitaker*, 109 California, 268; *Sage* v. *Rudnick*, 91 Minnesota, 330; *Iowa Railroad Land Co.* v. *Blumer*, 206 U. S. 482.

There is no evidence in the record showing any controversy before the Land Department over the land in question between the two railway companies, the only contest being between Wiese and the Missouri Valley Land Company. Hence, the contention that there was a contest between the railroad companies as to which was entitled to the land pending before the Land Department is not supported by any evidence.

Whether the application of Wiese to enter the land under the act of Congress of 1887 prevented the running of the state statute of limitations was a question exclusively for the state court, and it held that the statute was not thereby tolled. *Oldig* v. *Fiske*, 53 Nebraska, 159; *Beall* v. *McMenemy*, 63 Nebraska, 70.

The conveyance by the Union Pacific Railroad Company to Japp, and the exclusive possession of Japp and Wiese thereunder, constitute an adverse possession, and this was a question exclusively for the state court.

Mr. Justice White delivered the opinion of the court.

Within the grants of land made to the Union Pacific Railroad Company and the Sioux City and Pacific Railroad Company by the act of Congress of July 1, 1862, c. 120, 12 Stat. 489, and the amendatory act of July 2, 1864, c. 216, 13 Stat. 356, some of the land within place limits overlapped. This controversy concerns the title to a forty-acre tract within an overlap.

We state the salient facts established by the pleadings and

the proofs in order to make clear the contentions which are required to be decided.

The land involved is the northeast ¼ of the northeast ¼ of section 21, township 17, range 11 east, Washington County, Nebraska. At the time of the passage of the granting acts referred to the records of the General Land Office showed a school indemnity selection of the tract now in controversy, made on July 1, 1858. The railroads named, each having complied with all the conditions of the acts of Congress, had become fully entitled to the granted lands prior to January 1, 1870. A joint patent was issued in 1873 to the two roads named for a large quantity of the lands within the common territory. This action of the Land Department was upheld by the Circuit Court for the District of Nebraska in 1876, and the two railroad companies were adjudged to be tenants in common of such lands. *Sioux City & P. R. R. Co.* v. *Union Pacific Railroad Company*, 4 Dill. 307; *S. C.*, Fed. Cas. No. 12,909. As remarked in a footnote to a report of the case, "This decree was acquiesced in by the parties, who subsequently effected an amicable partition of the land." Apparently, however, in consequence of the school indemnity selection referred to, the forty-acre tract now in controversy was not included in such patents. On July 3, 1880, the school indemnity selection was cancelled by the General Land Office because not authorized by statute. See 17 L. D. 43. This cancellation, so far as the record discloses, left the tract free from claims antagonistic to the rights of the railroad companies under the grants of 1862 and 1864. On June 12, 1881, the Union Pacific Railroad Company "listed the land in question, per list No. 4, but the Sioux City and Pacific Railroad Company never listed the same." On December 1, 1882, the Union Pacific Railroad Company sold, and in 1887, after completion of the payment for the same, conveyed the land to John Japp by a warranty deed, purporting to transfer the entire title, and this deed was soon afterwards recorded. Japp went into and remained in open, continuous and adverse possession of the land, farm-

ing the same, until February 28, 1891, when he sold it to Asmus Wiese, the defendant in error. The latter at once recorded his deed, inclosed the land with a wire fence, and maintained an exclusive possession of the land, claiming to be the owner.

Upon the ground that the school indemnity selection referred to, although invalid, was uncancelled when the railroad grants of 1862 and 1864 were made, and that such invalid selection operated to except the tract in question from said grants, the General Land Office on May 19, 1892, cancelled the listing of the tract which had been made by the Union Pacific Railroad Company and rejected a claim "as to this land" made by the Sioux City and Pacific Railroad Company. When such claim was made and its precise character, is not shown by the record.

By § 5 of the act of March 3, 1887, c. 377, 24 Stat. 556, providing for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, etc., it was made lawful for a *bona fide* purchaser of lands forming part of a railroad land grant, but which for any reason had been excepted from the operation of the grant, to make payment to the United States for said lands and obtain patents therefor. Because of the ruling made by the General Land Office, to the effect that the Union Pacific Railroad Company was without title to the land which it had conveyed to Japp, as before stated, Asmus Wiese, on August 10, 1893, began proceedings under the fifth section of the act of 1887 to obtain a patent to the land from the United States, made the required publication and proof, and on September 25, 1893, paid to the register of the proper local land office the sum of $50, the price of the land. A certificate was delivered to Wiese, reciting that he was entitled, on presentation thereof, to receive a patent. On October 17, 1894, presumably while an application of Wiese for patent was pending before the Commissioner, the Sioux City and Pacific Railroad Company filed a protest against the issue of the patent, on the ground that the land affected lay within the

limits of the grant to said company under the act of 1864, that the indemnity school selection then apparently existing was void, and did not cause the land to be excepted from the grant on the definite location of the road, and in consequence that there was no authority of law for the purchase by Wiese. It was further claimed that as the land was within the grant to the Sioux City road, it was a condition precedent to acquiring title under the act of 1887, that it had been purchased from that company, whereas the proof by Wiese was that it had been purchased from the Union Pacific Railroad Company. The protest was dismissed by the Commissioner on the ground that the Sioux City Company was debarred from making the protest, because a claim previously made by that road to the land had been rejected. Thereafter, upon application of the attorneys for the Sioux City Company, this decision of the Commissioner was reviewed by the Secretary of the Interior. On April 28, 1896, applying a prior decision in *Union Pacific Ry. Co.* v. *United States*, 17 L. D. 43, that official held that the school indemnity selection referred to having been made without statutory authority therefor, did not reserve the land so selected from the operation of subsequent grants to the railroads on the definite location of their line or lines, and that the entry made by Wiese in supposed conformity to the act of 1887 was unauthorized. In August following the entry of Wiese was formally cancelled. In September, 1897, a patent from the United States for the tract was issued to the Missouri Valley Land Company as the successor in interest to the Sioux City and Pacific Railroad Company. Following a notification from the Land Office by letter, dated May 17, 1898, that the land had been erroneously patented, as it was within the limits of the grant to the Union Pacific Railroad Company, and a patent should have issued to the companies jointly, the Missouri Valley Land Company by quitclaim deed reconveyed the land to the United States. Finally, on July 24, 1903, a patent for the land was issued by the United States to the Union Pacific Railroad Company, successor in interest to the Union Pacific

Railroad Company and to the Missouri Valley Land Company, successor in interest of the Sioux City and Pacific Railroad Company, jointly.

Prior, however, to the issue of the patent last referred to, and on November 12, 1902, Wiese commenced in the District Court of Washington County, Nebraska, this action to quiet his title to the tract, making defendants to the petition the Union Pacific Railway Company, the Sioux City and Pacific Railroad Company, and the Missouri Valley Land Company. On February 7, 1903, the Union Pacific Railway Company filed a disclaimer of "any and all interest of every kind or nature in and to the subject matter of this action." The issues, however, upon which the case was tried were made by a second amended petition, filed on February 20, 1904, and an answer and cross-petition thereto and a reply to the cross-petition. The only defendants named in this second amended petition were the Missouri Valley Land Company and the Iowa Railroad Land Company. Averments were made in the petition as to the making of the overlapping grants by Congress, the completion of the two railroads prior to January 1, 1870, the sale to Japp in 1882 and by Japp to the plaintiff, the adverse possession of the land by the plaintiff and his grantor, commencing in 1882, absolute ownership of the land by the plaintiff, the issue in 1903 of the joint patent for the land to the successors in interest of the original beneficiaries of the grants made by the acts of 1862 and 1864, and the assertion of conflicting claims to the land by the defendants as successors in interest to the Sioux City and Pacific Railroad Company. The prayer was that the title of plaintiff might be quieted, etc.

We excerpt from the brief of counsel for plaintiffs in error a synopsis of the contents of the claims made by its answer and cross-petition:

"Plaintiff in error set up and claimed by its answer and cross-bill that the title to its interest remained in the United States until the issuance of the patent in 1903; in other words, that the grant for the Sioux City branch was not a grant of

the legal title *in præsenti*. It also specially set up and claimed that the Land Department had jurisdiction to determine whether the land was subject to the grant under acts of 1862 and 1864, and to determine all disputes as to who was entitled to a patent therefor; that it was not adjudged until July 24, 1903, that each company under the grant was entitled to a moiety of the lands. That while the Land Department was holding, as above stated (because of the indemnity school selection), the land in controversy to have been excepted from the grants under the acts of 1862 and 1864, defendant in error was permitted by the local land officers of Nebraska to enter the land under the act of Congress of March 3, 1887, and that this entry was not cancelled until August 25, 1896; that under these rulings and contests, and while the title remained in the United States, up to the issue of the joint patent, the possession of defendant in error was in no sense adverse, but was in subserviency to the title of the United States."

The plaintiff by his reply in substance alleged that the grants were *in præsenti*, and that the effect of the completion of the railroads and compliance with all the terms and conditions of the act prior to January 1, 1870, operated to pass the title of the Government on or prior to that date, and that the General Land Office had not thereafter jurisdiction in respect to such lands, and that the adverse possession of the plaintiff was not affected by the proceedings had in the Land Department concerning such land.

The cause was submitted to the court on the pleadings and evidence, and a decree was entered adjudging that Wiese had a perfect title to the tract. The Supreme Court of Nebraska affirmed the decree (108 N. W. Rep. 175), holding, in substance, that the grant to the two companies of the tract in controversy was *in præsenti*, that the title of the companies attached upon the definite location of their lines of road, and that the adverse possession of Wiese and his grantor, commencing in 1882, had completely barred any claims of the

companies to the property. The case was then brought to this court.

A motion has been filed to dismiss the writ of error because it "was not allowed by the Chief Justice of the Supreme Court of Nebraska, and it does not appear in the record by what authority the judge who allowed the writ styles himself 'Presiding Judge of the Supreme Court of Nebraska,' and because there is no Federal question involved in said cause."

Looking at the record we find that originally the writ of error was signed by "Charles B. Letton, Justice of the Supreme Court of the State of Nebraska," and that subsequently an additional signature was added, viz., "John B. Barnes, Presiding Judge of Supreme Court of Nebraska in absence of Sedgwick, C. J., from this State." Obviously, in procuring the signature of Justice Letton, counsel overlooked the fact that by § 999, Rev. Stat., it was necessary that the writ of error should be allowed by the Chief Justice of the court. The recital made by Justice Barnes following his signature is, however, *prima facie* evidence of the correctness of the statements therein contained, viz., the absence of the Chief Justice from the State and the fact that Justice Barnes was in his absence the Presiding Judge of the Supreme Court of Nebraska, and counsel have not assailed the accuracy of the representations. We are of opinion that the statute was complied with. *Havnor* v. *New York*, 170 U. S. 408, 411.

The contention of the absence of a Federal question is also without merit. In effect, the plaintiffs in error pleaded their right and title to a moiety of the tract in controversy under the joint patent of July 24, 1903, and urged in support thereof the claim that the legal title had not before the date named passed out of the United States, that the land was within the jurisdiction of the General Land Office, and that up to a short time before the execution of the joint deed the department had assumed and exercised jurisdiction over controversies respecting the land. Such a contention cannot be said to be frivolous, and as the state court necessarily decided against

the right or title so specially set up under the United States, we possess jurisdiction.

That the decision of the court below was right, as applied to the land within the place limits of the main line grant made to the Union Pacific Railroad Company by the act of 1862 and the amendatory act of 1864, is not an open question. This is so, since it has been expressly held that the main line grant was one *in præsenti*, that the grantee company had a right to bring ejectment for such land after the definite location of its road, and that consequently from the time of such definite location a possession might be acquired by a third party to land embraced within the grant, which would be adverse, even as to the railroad company, and bar its title if possession was continued for the statutory length of time. *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241; *Toltec Ranch Co.* v. *Cook*, 191 U. S. 532; *Iowa Railroad Land Co.* v. *Blumer*, 206 U. S. 482. In the last-mentioned case, summing up the doctrine, it was said:

"But when the grant is *in præsenti*, and nothing remains to be done for the administration of the grant in the Land Department, and the conditions of the grant have been complied with and the grant fully earned, as in this case, notwithstanding the want of final certification and the issue of the patent, the railroad company had such title as would enable it to maintain ejectment against one wrongfully on the lands, and title by prescription would run against it in favor of one in adverse possession under color of title. *Salt Co.* v. *Tarpey*, and *Toltec Ranch Co.* v. *Cook*, *supra*."

The conclusive effect of these rulings, if applicable, is not denied, but it is insisted that they are not pertinent, because the land in question was not a part of the main line grant, but was embraced within a grant for the construction of a branch road, which is so different from the grant for the construction of the main line, that the branch line grant cannot be held to have been a grant *in præsenti* within the principle of the previous cases. We proceed to consider this contention.

The grants to aid in the construction of branch lines embraced by the act of 1862 are found in §§ 9, 13 and 14 of the act. The grant to the particular branch line with which we are concerned is contained in § 14. By that section the Union Pacific Railroad Company was authorized and required to construct two branch lines of road and telegraph from a point on the western boundary of the State of Iowa and from Sioux City, in the State of Iowa, so as to connect with the line which was to start from the western boundary. The two branch lines referred to in § 14, as also the branch lines referred to in other sections of the act of 1862, were authorized to be constructed "on the same terms and conditions as provided" or "as contained in the act for the construction of the Union Pacific Railroad Company," etc. Section 17 of the act of 1864 amended § 14 of the act of 1862, so that the section read as follows, 13 Stat. 363:

"SEC. 17. *And be it further enacted,* That so much of section fourteen of said act as relates to a branch from Sioux City be, and the same is hereby, amended so as to read as follows: That whenever a line of railroad shall be completed through the States of Iowa, or Minnesota, to Sioux City, such company, now organized or may hereafter be organized under the laws of Iowa, Minnesota, Dakota, or Nebraska, as the President of the United States, by its request, may designate or approve for that purpose, shall construct and operate a line of railroad and telegraph from Sioux City, upon the most direct and practicable route, to such a point on, and so as to connect with, the Iowa branch of the Union Pacific Railroad from Omaha, or the Union Pacific Railroad, as such company may select, and on the same terms and conditions as are provided in this act and the act to which this is an amendment, for the construction of the said Union and Pacific Railroad and telegraph line and branches; and said company shall complete the same at the rate of fifty miles per year; *Provided,* That said Union Pacific Railroad Company shall be, and is hereby, released from the construction of said branch. And said com-

pany constructing said branch shall not be entitled to receive in bonds an amount larger than the said Union Pacific Railroad Company would be entitled to receive if it had constructed the branch under this act and the act to which this is an amendment; but said company shall be entitled to receive alternate sections of land for ten miles in width on each side of the same along the whole length of said branch: *And provided, further,* That if a railroad should not be completed to Sioux City, across Iowa or Minnesota, within eighteen months from the date of this act, then said company designated by the President, as aforesaid, may commence, continue, and complete the construction of said branch as contemplated by the provisions of this act: *Provided, however,* That if the said company so designated by the President as aforesaid shall not complete the said branch from Sioux City to the Pacific Railroad within ten years from the passage of this act, then, and in that case, all of the railroad which shall have been constructed by said company shall be forfeited to, and become the property of, the United States."

It will be observed that there was employed in the act of 1864 similar language to that used in the act of 1862 in regard to the consideration moving from the United States for the construction of the branch in question, viz., that the work should be done "on the same terms and conditions as are provided in this act, and the act to which this is an amendment, for the construction of the said Union Pacific Railroad and Telegraph line and branches." That consideration, among other things, was a grant of lands and also an issue of bonds by the United States. As we must refer to the terms of the main grant to the Union Pacific Railroad Company to determine the nature of like grants of land made in the acts of 1862 and 1864 to aid in the construction of the branch lines, we see no escape from the conclusion that the construction given to the grant of lands within place limits made in aid of the main line must be adopted as to the grants of place lands made in aid of branch roads, and as we have seen the settled construc-

tion is that title to lands within the place limits passed by the main grant on the filing by the road of its map of definite location in the General Land Office. Nor is there merit in the contention that a different construction is rendered necessary by the circumstance that the road which might build up the branch from Sioux City was not or may not have been in existence at the time of the passage of the act of 1864. As well argue that because § 7 of the act of 1862 required the Union Pacific Railroad to file its assent to the act, under the seal of the company, in the Department of the Interior, within one year after the passage of the act, that there was uncertainty as to whether the Union Pacific Company might accept and that the grant therefore could not be said to be one *in præsenti*.

Stress is also laid upon the fact that by § 17 of the act of 1864 it was provided that "said company shall be *entitled to receive* alternate sections of land for ten miles in width on each side of the same along the whole length of said branch," and, in effect, we are asked to treat this as the granting clause of the act. But it is clear that the clause deals only with the quantity of lands to be granted, and that reference must be made elsewhere to ascertain the precise character of the grant. Further, it is urged that the provision of § 17 concerning forfeiture for failure to complete the branch as required, embraces "all of the railroad which shall have been constructed by said company," but did not include the granted lands as in the case of the main line and other branches under § 17 of the act of July 1, 1862. From this it is argued that it was not the intention of Congress that the lands should pass under the grant for the Sioux City branch except as they were earned and duly patented. But whether or not the forfeiture was of the limited character referred to, we think the clause cannot be allowed to impair the force and effect of the operative words of present transfer made in the statutory grant of lands contained in § 3 of the act of 1862, as amended, in reliance upon which, as one of the terms and conditions of the contract with

the Government, the Sioux City and Pacific Railroad Company entered upon the construction of its road.

It results from the foregoing that the grant of the tract of land in controversy made by the act of 1862, and the amendatory act of 1864, to the Union Pacific Railroad Company and the Sioux City and Pacific Railroad Company being a grant *in præsenti*, and third parties on the definite location of the road not having acquired rights in the land, the legal title attached in favor of the two companies on the filing of their maps of definite location as of the date of the grant. Such title attached long prior to the purchase of the land by Japp. When the sale was made to him no contest was pending in respect to the land, and the statutory period of ten years, necessary in Nebraska to sustain a claim of title by adverse possession, ended prior to the various proceedings had in the General Land Office, to which we have heretofore referred, growing out of the invalid school selection and the conflicting adjudications of the office in respect to it.

That the entry and holding of the land by Japp, the grantor of Wiese, under the purchase by Japp in 1882, and the continued possession by Wiese after he acquired the land from Japp, should be deemed to have been adverse to the title and possession of the Sioux City Company, if the possession by Japp was not that of a co-tenant, and such possession was unaffected by the proceedings had in the land office subsequent to 1882, is not questioned. We are clearly of opinion that the possession of Japp and his grantee was adverse in the strictest sense of the term, and the acts of Wiese in seeking to acquire title from the United States under the act of 1887, with the view of removing a cloud upon his title, was not an act of recognition or acknowledgment of a superior title, either in the United States or in the Sioux City Company, operating to interrupt the continuity of his adverse possession, and in any event cannot be held to have destroyed a title which had already become perfect by the expiration of the statutory period in Nebraska for acquiring the legal title to land by adverse possession.

The foregoing considerations, we think, dispose of the various contentions presented to our notice, and, finding no error in the judgment of the Supreme Court of Nebraska, it is, for the reasons stated,

Affirmed.

MISSOURI VALLEY LAND COMPANY *v.* WRICH.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 102. Argued January 10, 1908.—Decided February 3, 1908.

Decided on authority of *Missouri Valley Land Co.* v. *Wiese*, *ante*, p. 234.

THE facts are stated in the opinion.

Mr. Charles A. Clark for plaintiff in error.

Mr. James H. Van Dusen, with whom *Mr. Edward F. Colladay* was on the brief, for defendant in error.[1]

MR. JUSTICE WHITE delivered the opinion of the court.

This case was argued with *Missouri Valley Land Co.* v. *Wiese*, No. 101, of this term, just decided, *ante*, p. 234, and in all essential particulars the two cases are alike. Wrich purchased his land in 1881 from the Union Pacific Railroad Company and received his deed in 1890. The land lay within overlap grants to the Union Pacific Company and the Sioux City and Pacific Railroad Company. Wrich took possession immediately after his purchase, and ever afterwards held and claimed the land as his own. In September, 1893, he under-

[1] For abstracts of arguments see *ante*, p. 234.

took to make a cash entry of the land under the act of 1887, as did his neighbor Wiese. All the questions involved in the *Wiese case* are present in this, and, for the reasons given in the opinion in the former, the judgment of the Supreme Court of Nebraska in this case must be

Affirmed.

MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY *v.* DOUGHTY.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

No. 81. Argued December 17, 1907.—Decided February 3, 1908.

Under the act of March 3, 1875, c. 152, 18 Stat. 482, granting to railroads the right of way through public lands of the United States, such grant takes effect either on the actual construction of the road, or on the approval of the Secretary of the Interior, after the definite location and the filing of a profile of the road in the local land office, as provided in § 4 of the act; and a valid homestead entry made after final survey but before either the construction of the road or the approval by the Secretary of the profile, is superior to the rights of the company. *Jamestown & Northern Railway Co.* v. *Jones*, 177 U. S. 125, explained and followed. 107 N. W. Rep. 971, affirmed.

THE facts are stated in the opinion.

Mr. Alfred H. Bright for plaintiff in error:

The filing of the plat and the approval thereof by the Secretary of the Interior were not conditions precedent to the acquisition of a right of way under the act of March 3, 1875.

It was the intention of Congress to protect the company as well as the settler from the time of entry. It is assumed by Congress that the company must of necessity locate its

line before it could make a filing or build its railway, and that to do this it must have the right to enter and take possession of the land.

The only location mentioned in the act does not depend on the map, that is to say, is not made by the map, because the map, of necessity, follows the location. The map is simply the evidence of the location made as all locations are made, and the right of way may be built upon before the map is approved or even filed. *Jamestown & Northern* v. *Jones*, 177 U. S. 125.

When the company locates its line, it has begun proceedings to acquire the title, which if regularly followed up makes it the first in right as to any unoccupied Government land. *Railroad* v. *Alling*, 99 U. S. 463.

The court should avoid a too rigid and literal or verbal construction of the act in question and should hold not that the word "thereafter" means only after the last act recited has been done, but that it applies to the first thing which the railroad company is required to do, to wit: the location of its road. It refers to the whole group of acts for securing the title and, by the doctrine of relation, when the map is approved the title vests in the railroad company as of the date of the location of its road. *St. Paul &c. Ry.* v. *W. & St. P. Ry.*, 112 U. S. 720; *Sioux City &c. Ry.* v. *C., M. & St. P. Ry.*, 117 U. S. 406; *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 334.

The construction of this statute here contended for invokes the doctrine of relation from the approval of the map to the inception of the equitable title of the railway company, at least as early as the seventeenth day of June. This construction is supported by the Supreme Court of Missouri in the case of *Kinion* v. *Railway Co.*, 118 Missouri, 577; *S. C.*, 24 S. W. Rep. 636; by the Supreme Court of Colorado in *Denver & Rio Grande R. R. Co.* v. *Hanoun*, 19 Colorado, 162; *S. C.*, 34 Pac. Rep. 838, and by the Supreme Court of Utah in *Lewis* v. *Railway*, 54 Pac. Rep. 981.

Counsel is aware of a line of decisions contrary to the views here contended for. *Red River &c.* v. *Sture*, 20 N. W. Rep. 229; *S. C.*, 32 Minnesota, 95; *Spokane &c. Co.* v. *Zeigler*, 61 Fed. Rep. 392; *Lilienthal* v. *So. Cal. Ry. Co.*, 56 Fed. Rep. 701; *Hamilton* v. *Spokane &c.*, 28 Pac. Rep. 408; *Enoch* v. *Spokane &c.*, 33 Pac. Rep. 966; *Denver &c.* v. *Wilson*, 62 Pac. Rep. 843, discussed and said to be in conflict with *Jamestown & Northern* v. *Jones*, 177 U. S. 125. The latter case discussed, and distinguished from the present case.

Mr. S. E. Ellsworth, with whom *Mr. George W. Soliday* was on the brief, for defendant in error:

It was not the intention of the framers of the act of March 3, 1875, that the grant therein mentioned should attach immediately upon the filing of a copy of the railroad company's articles of incorporation. No railroad company can claim to be a grantee of a right of way over the public lands until a profile of its road has been filed and approved as specified in the act, and after that has been done, the grant is not operative upon lands to which private rights had previously attached. *Enoch* v. *Spokane Falls & N. Ry.*, 33 Pac. Rep. 966; *Jamestown & N. Ry. Co.* v. *Jones*, 7 N. Dak. 119; *S. C.*, 76 N. W. Rep. 227. See also *Red River & C. R. Co.* v. *Sture*, 20 N. W. Rep. 229; *Spokane Falls & N. Ry. Co.* v. *Zeigler*, 61 Fed. Rep. 392; aff'd 167 U. S. 65; *Washington & I. Ry. Co.* v. *Osborn*, 160 U. S. 103; *Lilienthal* v. *Southern California Ry. Co.*, 56 Fed. Rep. 701; *Dakota Central R. R. Co.* v. *Downey*, 8 L. D. 115; *Circular of Commissioner Williamson*, 2 Copp's Public Land Laws, 816; *Circular of Commissioner Stockslager*, 12 L. D. 423; *Denver & R. G. R. Co.* v. *Wilson*, 28 Colorado, 6; *S. C.*, 62 Pac. Rep. 843; *Hamilton* v. *Spokane Falls & P. Ry. Co.*, 3 Hasb. (Idaho) 164; *S. C.*, 28 Pac. Rep. 408; *Chicago, K. & N. Ry. Co.* v. *Van Cleave*, 52 Kansas, 665; *S. C.*, 33 Pac. Rep. 472; *Red River &c. R. Co.* v. *Sture*, 32 Minnesota, 95; *S. C.*, 20 N. W. Rep. 229; *Jamestown & N. Ry. Co.* v. *Jones*, 7 N. Dak. 119; *S. C.*, 76 N. W. Rep. 227.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This action was brought by the defendant in error against plaintiff in error in the District Court of Foster County, State of North Dakota, to recover compensation for injury to his land by the construction and operation of the railroad of the plaintiff in error.

Defendant in error has a patent to the land, and the question is whether before his settlement under the homestead laws plaintiff in error acquired a right of way over the land for its railroad under the act of March 3, 1875, c. 152, 18 Stat. 482.

The trial court held (1) That defendant in error was "the owner in absolute fee simple of the land" and that his title related back to July 1, 1892, the date of his settlement. (2) That the railroad "having attempted to acquire a right of way across said land before and in anticipation of the construction of its railroad, in compliance with the provisions of § 4 of the act of Congress, approved March 3, 1875, the filing with the register of the district land office, and approval by the Secretary of the Interior, of the plat or profile of the section of its railroad extending across said land, was a condition precedent to the acquisition or claim on its part to right of way, and any title, estate or interest acquired by it in or to said land dates from said filing and approval." Judgment was entered for the sum of $1,000 damages and costs, and it was adjudged, upon paying the sum, the title to the right of way should vest in the railroad company.

The facts, as recited by the Supreme Court in its opinion, are as follows:

"On June 25, 1892, the plaintiff's application to enter the quarter section in question was presented to and accepted by the register and receiver of the United States land office at Fargo. On July 1, 1892, the plaintiff took up his residence on the land under his homestead entry and in all things complied with the Federal homestead laws. On November 4,

1899, a patent conveying the title to him was issued. That instrument makes no mention of any easement in favor of the railroad.

"The defendant railway company was organized in 1891. Its articles were filed with the Secretary of the Interior on March 26, 1891, and approved by him on April 15, 1891; and it thereby became entitled to the benefit of the act of March 3, 1875.

"In October, 1891, the company made a preliminary survey of its proposed line of railway across the land; and on May 13, 1892, completed its final survey, definitely fixing the line of its proposed road over the quarter section. The line as surveyed was marked by stakes driven into the ground one hundred feet apart, indicating the center of the roadway to be constructed. The definite location of the route as fixed by this survey was approved and adopted by the company's board of directors on June 17, 1892, being eight days before the plaintiff made his homestead filing.

"The map or profile of its road as thus definitely located was filed in the local land office at Fargo on July 20, 1892, and received the approval of the Secretary of the Interior on October 14, 1892. In the latter part of July, 1892, the company constructed its road across the land, on the line as surveyed, and ever since has operated its railway over the roadway so constructed, using and appropriating for that purpose a strip 200 feet wide, 100 feet on each side of the center of the track." 107 N. W. Rep. 975.

On these facts the court affirmed the judgment of the trial court, basing its decision on *Jamestown & Northern Railway Company* v. *Jones*, 177 U. S. 125. The court said that it was a necessary inference from that case "that actual construction is the only sufficient act, other than compliance with § 4, to constitute a definite location, and the right of way does not exist before actual construction unless the company's profile map has been approved by the Secretary, before the settler's rights attached."

It will be necessary, therefore, to consider § 4 of the act and its interpretation in that case.

Section 1 of the act reads: "That the right of way through the public lands of the United States is hereby granted to any railroad company . . . which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization, . . . to the extent of one hundred feet on each side of the central line of said road."

Section 4 reads as follows (18 Stat. 483):

"SEC. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

Did the District Court and the Supreme Court construe this section correctly? The railroad contends against an affirmative answer, and urges that it is the location of its road which initiates a railroad company's right, and which, "if regularly followed up, makes it the first in right as to any unoccupied Government land." And this, it is contended, is a necessary conclusion from other provisions which makes the location the first act, the act from which "everything is reckoned"—the time within which the map must be filed and the time within which the road must be built. And it is further urged that an entry upon the land to locate the road is as necessary as an entry on the land to build the road, and, being there,

the railroad "could not become a trespasser, either as to the Government or as to the plaintiff." In further support of the contention it is pointed out that Congress gave the company twelve months after the location within which to make its filing, and, therefore, in analogy to preëmption and homestead laws Congress intended to protect the location during the time allowed for the filing of the profile or plat. But § 4 gives little play to construction or the analogies which the company invoke. That section determines the priority of rights between railroads and settlers by explicit language. A right of way is granted, but to secure it three things are necessary: (1) location of the road; (2) filing a profile of it in the local land office; and (3) the approval thereof by the Secretary of the Interior, to be noted upon the plats in the local office. It is after these things are done that the statute fixes the right of the railroad and subjects the disposition of the land, under the land laws, to that right. "And thereafter," are the words of the statute, "all such lands over which such right of way shall pass shall be disposed of subject to such right of way." It would be a free construction of these words to give them the meaning for which the railroad company contends. They neither convey an unnatural sense or lead to an unnatural consequence. Unless rights under the act of 1875 and rights under the land laws were to be kept for an indeterminate time in uncertainty and possible conflict, to fix some act or point of time at which they should attach was natural, and to construe language which is apt and adequate by its sense and arrangement to express one time to mean another, would be a pretty free exercise of construction. We admit that the letter of a statute is not always adhered to and words may be transposed, but the necessity for it must be indicated to accomplish the purpose of the legislation. There is always a presumption that the words were intended as written and in the order as written; certainly, when they express a definite sense which would be changed to another with different and opposing legal consequences. The railroad company, how-

ever, contends for that result. We have stated its contentions, and, it is urged, if there is difficulty in accepting them it arises "from a too rigid and literal or verbal construction" of § 4; "that the word 'thereafter' means only after the last act recited has been done. Whereas it is perfectly legitimate to consider that the term 'thereafter' applied to the first thing which the railroad company was required to do, to wit, the location of its road. That it refers to the whole group of acts for securing the title, and that by the doctrine of relation when the map is approved the title vests in the railway company as of the date of the location of its road." And this, it is further urged, is the rule applied to preëmptors on the public lands and which this court has applied to some railway land grants. The contention is supported by *Kinion* v. *Railway Co.*, 118 Missouri, 577; *Lewis* v. *Railway* (Utah), 54 Pac. Rep. 981, and, it is urged, by *Denver & Rio Grande R. R. Co.* v. *Hanoun*, 19 Colorado, 162. It is opposed by *Lilienthal* v. *So. Cal. Ry. Co.*, 56 Fed. Rep. 701; *Larson* v. *Oregon Co.*, 23 Pac. Rep. 974; *Hamilton* v. *Spokane*, 28 Pac. Rep. 408; *Enoch* v. *Spokane*, 33 Pac. Rep. 966; *Denver &c.* v. *Wilson*, 62 Pac. Rep. 843. The simple weight of opinion is against the contention of the railroad, and its counsel meets the fact squarely, and says that those cases "are in their broad scope in clear and unmistakable conflict with the fundamental principle on which" *Jamestown & Northern Railway Co.* v. *Jones*, 177 U. S. 125, was decided, "and rest upon the hard and fixed proposition that no railroad company under this act [act of 1875] could get any right in the land until its map was approved." But counsel, while invoking the "fundamental principle" of *Jamestown & Northern Railway Co.* v. *Jones*, attacks the construction of the statute there made and the reasoning which led us to the principle.

That case decided three propositions: (1) That a railroad company becomes specifically a grantee under the act of 1875 by filing its articles of incorporation and due proof of its organization under the same with the Secretary of the Interior.

(2) That the lands granted were identified by a definite location of the right of way, and, sustaining the contention of the railroad that definite location could be made by actual construction of the road against the decision of the lower courts that such location could only be made by a profile map of the road, we said that the contention gives practical operation to the statute and enables the railroad company to secure the grant by an actual construction of the road, or, in advance of construction, by filing a map as provided in § 4. (3) Actual construction of the road is certainly unmistakable evidence and notice of appropriation.

This, it is now contended or intimated, reads something into the statute which is not there, and that the Jamestown and Northern Railway Company "could only maintain its claim to right of way upon the same construction of the statute as that for which the plaintiff in error contends." In other words, location initiated the company's right, and any other view will put *Jamestown & Northern Railway Company* v. *Jones* in opposition to the decisions in railway land grant cases. The latter proposition was disposed of in the case. The answer to the other is contained in the words of the statute, and the essential difference between a mere location movable at the will of the company and the actual construction of the road necessarily fixing its position and consummating the purpose for which the grant of a right of way was given.

Judgment affirmed.

UNITED DICTIONARY COMPANY *v.* G. & C. MERRIAM COMPANY.

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

No. 129. Argued January 23, 1908.—Decided February 3, 1908.

The requirement of the Copyright Act of June 18, 1874, c. 301, § 1, 18 Stat. 78 (Rev. Stat. § 4962), that notice shall be inserted in the several copies of every edition, does not extend to publications abroad and sold only for use there.

THE facts are stated in the opinion.

Mr. George P. Fisher, Jr., *Mr. James H. Peirce* and *Mr. William Henry Dennis*, for appellant, submitted:

The copyright statute requires the insertion of the copyright notice in editions of a book published abroad by and with the consent of the owner of the American copyright on such book. Rev. Stat. § 4962; *Callaghan* v. *Myers*, 128 U. S. 617 (652); *Thompson* v. *Hubbard*, 131 U. S. 123, and cases there cited. As § 4962 contains no language excepting from its provisions books published in foreign countries, or copyrighted articles manufactured abroad, it applies to all books or like copyrighted articles regardless of the country in which they may be published or made. This is plain when that section is read in connection with other sections of the same act.

Section 4956 of the Revised Statutes specifically provides "that no person shall be entitled to a copyright unless he shall on or before the day of publication in this or any foreign country, deliver to the office of the Librarian of Congress" a printed copy of the title of his book; and the same section further provides as a prerequisite to a valid copyright, that he

shall deliver to the Librarian of Congress two copies of the book "not later than the day of publication thereof in this or any foreign country." The statute thus makes plain the fact that the author may publish his book either here or abroad. See Drone on Copyright, 295, 577; *Boucicault* v. *Wood*, Fed. Cas. No. 1,693; *The "Mikado" Case*, 25 Fed. Rep. 183; *Gandy* v. *Belting Co.*, 143 U. S. 592; Curtis on Patents, par. 98.

By leave of court *Mr. George W. Ogilvie*, President of the United Dictionary Company, filed a brief in behalf of appellant.

Mr. William B. Hale, with whom *Mr. Charles N. Judson*, *Mr. Frank F. Reed* and *Mr. Edward S. Rogers* were on the brief, for appellee:

Appellee's copyright is not invalidated by the failure to insert the notice of the American copyright in the books published in England, but not imported by, or with the consent of appellee into the United States, because the statute has no extra-territorial operation, and therefore does not require such notice to be inserted in such foreign books.

The rule that statutes of a State or Nation have no extra-territorial operation has been applied to the Patent Act which is *in pari materia* with the Copyright Act. *The Apollon*, 9 Wheat. 370; *Bond* v. *Jay*, 7 Cranch, 350; *Brown* v. *Duchesne*, 19 How. 183; *Gandy* v. *Belting Co.*, 143 U. S. 592; *Chase* v. *Fillebrown*, 58 Fed. Rep. 377; *American Sulphite Pulp Co.* v. *Howland Falls Pulp Co.*, 70 Fed. Rep. 986, 992; *Tabor* v. *Commercial National Bank* (C. C. A.), 62 Fed. Rep. 383; *The State of Maine*, 22 Fed. Rep. 734; *Colquohoun* v. *Heddon*, L. R. 25 Q. B. D. 129, 134; *Warren* v. *First National Bank*, 149 Illinois, 9, 25; *Johnson* v. *Mutual Life Ins. Co.*, 180 Massachusetts, 407; *S. C.*, 62 N. E. Rep. 733; *Attorney General* v. *Netherlands Fire Ins. Co.*, 181 Massachusetts, 522; *S. C.*, 63 N. E. Rep. 950; *Carnahan* v. *Western Union Telegraph Co.*, 89 Indiana, 526.

The object of requiring notice is not subserved by insertion in foreign books. *Sarony* v. *Burrow-Giles Co.*, 17 Fed. Rep. 591; *S. C.*, 111 U. S. 53; *Snow* v. *Mast*, 65 Fed. Rep. 995; *American Press Assn.* v. *Daily Story Pub. Co.*, 120 Fed. Rep. 766.

The form of the prescribed notice shows that it was not intended to be inserted in foreign books. Rev. Stat. § 4962; Trade-mark Act of Feb. 20, 1905, § 28.

The owner of the copyright cannot control the foreign publication and should not be penalized for consenting to what he cannot prevent. No statute will be construed to work hardship, injustice, or inequality. *Thompson* v. *Hubbard*, 131 U. S. 123; *American Press Assn.* v. *Daily Story Pub. Co.*, 120 Fed. Rep. 766; *Harper* v. *Donohue & Ogilvie*, 144 Fed. Rep. 491; *Hepburn* v. *Griswold*, 8 Wall. 607; *Lionberger* v. *Rause*, 9 Wall. 475; *Davis* v. *Bohle*, 92 Fed. Rep. 328; *United States* v. *Crawford*, 47 Fed. Rep. 561. See also *Dwight* v. *Appleton*, 8 Fed. Cas. No. 4,215; *Haggard* v. *Waverly Pub. Co.*, 144 Fed. Rep. 490; *Pierce & Bushnell Co.* v. *Werckmeister*, 77 Fed. Rep. 54; *American Tobacco Co.* v. *Werckmeister*, 146 Fed. Rep. 375; *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284; *Boucicault* v. *Wood*, Fed. Cas. No. 1,693.

Importation into the United States of copyright matter without consent of the owner of the American copyright, is and always has been prohibited. Rev. Stat. § 3061 and §§ 4964, 4956, as amended.

Sections 4964 and 4965 are penal statutes. *McDonald* v. *Hearst*, 95 Fed. Rep. 656; *Schriver* v. *Sharpless*, 6 Fed. Rep. 175, 179; *S. C.*, 110 U. S. 76; *Taylor* v. *Gilman*, 24 Fed. Rep. 634; *Wheeler* v. *Cobby*, 70 Fed. Rep. 487.

What is made penal is prohibited. *Opinion Attorney General Knox*, 23 Op. A. G. 445; and as to double prohibition of importation, see §§ 4964–4965, Rev. Stat.

The importation of the book by appellant was illegal because made for the purpose of reproduction and sale of such reproduction, and hence not authorized by the exception in

the statute which permits importation of not more than two copies of a book at any one time "for use and not for sale." Treasury Decision, No. 16,046; *Opinion Solicitor-General Conrad*, 21 Op. A. G. 159.

By leave of court, *Mr. Stephen H. Olin* filed a brief herein as *amicus curiæ* on behalf of the American Copyright League supporting the contention of defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the appellee to restrain the infringement of copyright in a book entitled "Webster's High School Dictionary." The appellee, a Massachusetts corporation, took out copyrights at the same time in England and here. It published and sold the book in this country with the statutory notice of copyright, and made a contract with English publishers, under which it furnished them with electrotype plates of the work, and they published it in England, omitting notice of the American copyright. The English work has a different title, "Webster's Brief International Dictionary," and has some other differences on the first three and last thirty-four pages, but otherwise is the same. The appellant, an Illinois corporation, sent for the English book with intent to reprint it, and was about to publish it when restrained. The English publishers agreed not to import any copies of their work into this country, and also to use all reasonable means to prevent an importation by others, so that the appellee cannot be said to have assented to the appellant's act. So far as appears, the only copies that have been brought over are the one above mentioned and another, purchased for use but not for sale, by the president and manager of the appellant. The question is whether the omission of notice of the American copyright from the English publication, with the assent of the appellee, destroyed its rights, or, in other words, whether the requirement of the act of June 18, 1874, c. 301, § 1, 18 Stat. 78 (Rev. Stat. § 4962), that notice shall be in-

serted "in the several copies of every edition published" extends to publications abroad. The Circuit Court sustained the defendant's contention and dismissed the bill. 140 Fed. Rep. 768. The Circuit Court of Appeals reversed this decision, 146 Fed. Rep. 354; *S. C.*, 76 C. C. A. 470, and the case is brought to this court by appeal.

Notwithstanding the elaborateness of the arguments addressed to us and the difference of opinion in the courts below, there is not a great deal to be said, and the answer seems to us plain. Of course, Congress could attach what conditions it saw fit to its grant, but it is unlikely that it would make requirements of personal action beyond the sphere of its control. Especially is it unlikely that it would require a warning to the public against the infraction of a law beyond the jurisdiction where that law was in force. The reasons for doing so have not grown less, yet in the late statute giving copyright for foreign publications the notice is necessary only in "all copies of such books sold or distributed in the United States." Act of March 3, 1905, c. 1432, 33 Stat. 1000, amending Rev. Stat. § 4952. So it is decided that the section punishing a false notice, which naturally would be coextensive with the requirement of notice, did not extend to false statements affixed abroad. *McLoughlin* v. *Raphael Tuck Co.*, 191 U. S. 267. The same conclusion would follow from the form prescribed for the notice, which would be inapt in foreign lands.

It is said that the act of 1905 cannot affect the construction of the law under which the parties' rights were fixed, and it cannot, beyond illustrating a policy that has not changed. But the age of the condition affords another reason for confining it as the later condition is confined. When it first was attached, in 1802, there was little ground to anticipate the publication of American works abroad. As late as 1820 Sydney Smith, in the Edinburgh Review, made his famous exclamation, "In the four quarters of the globe, who reads an American book?" If, however, there was a publication abroad, importation without the consent of the owner was

forbidden in general terms, a fact giving another reason for the narrower construction of § 4962. If that was the true construction once, it is the construction still. Again, when the present act was passed, there was no foreign copyright for an American author, and Congress knew and he knew, as he knows now, if he contents himself with home protection, that his work might be reprinted without notice of any sort. Such reprints rather inconsistently are called piracies in argument. But whatever the moral aspects may be, the piracy is a legal right, and as such its exercise must be contemplated by the author. It does not matter whether he does so with regret at the loss of money or with joy at the prospect of fame, and it is difficult to see any greater difference between giving consent to the foreign publication and intentionally creating the opportunity, the inducement and the right. But it hardly would be argued that because no copyright had been taken out in England and therefore the reprint there was lawful, an American copyright could be defeated by importing the English book and reprinting from that. *Thompson* v. *Hubbard*, 131 U. S. 123, 150. It would be even bolder to say that the American author would have stood worse if in the days before he could get a copyright in England he had made an arrangement with English publishers to secure some payment from them. Yet that is the logic of the appellant's case.

If a publication without notice of an American copyright did not affect the copyright before the days when it was possible to get an English copyright also, it is not to be supposed that Congress, by arranging with England for that possibility, gave a new meaning to the old § 4962, increasing the burden of American authors, and attempted to intrude its requirements into any notice that might be provided by the English law. The words of the section remained unchanged, notwithstanding the grant of a limited liberty of importation, while other sections were amended where there was reason for a change.

It may be that in most cases the importation of a pirated English copy of an American book would be unlawful, whereas

it is argued that the importation was lawful in the case at bar. The appellee makes a strong argument that the appellant's importation was wrong. But it is hard to see how the right to copy a book, whether lawfully or unlawfully imported, can be affected by the mode in which it got here. The analogies of the law are the other way. A person is subject to the jurisdiction, even if he was brought there by wrong. *Pettibone* v. *Nichols*, 203 U. S. 192. A document is admissible in evidence, although it was improperly obtained. *Commonwealth* v. *Tucker*, 189 Massachusetts, 457, 470; 3 Wigmore, Evidence, § 2183. The argument for the appellant dwells somewhat fancifully on the possibilities of innocence being led astray. All those possibilities might exist if a pirated volume should be smuggled into the United States. Moreover the appellant argues, with the support of the opinion of an Attorney General and a Solicitor General, that under § 4956 and its amendments two copies of an unauthorized edition lawfully might be imported for use. 21 Op. Atty. Gen. 159, 162. The statutes cannot be expected to do more than to secure the author and the public so far as is reasonably practicable. The obvious plan is not to be distorted by the chance that ingenuity may find some way to slip through the law uncaught.

As we are satisfied that the statute does not require notice of the American copyright on books published abroad and sold only for use there, we agree with the parties that it is unnecessary to discuss nice questions as to when a foreign reprint may or may not be imported into the United States under the present provisions of our law.

Decree affirmed.

DONNELL *v.* HERRING-HALL-MARVIN SAFE COMPANY.

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

No. 106. Argued January 14, 15, 1908.—Decided February 3, 1908.

A stockholder, even though also an officer, of a corporation bearing his family name does not necessarily lose his right to carry on the business of manufacturing the same commodity under his own name because that corporation sold its good will, trade name, etc., and as a stockholder and officer he participated in the sale. He is not entitled, however, to use, and may be enjoined by the purchaser from using, any name, mark or advertisement indicating that he is the successor of the original corporation or that his goods are the product of that corporation or of its successor, nor can he interfere in any manner with the good will so purchased.

THE facts are stated in the opinion.

Mr. George P. Merrick and *Mr. S. S. Gregory* for petitioner:

A family surname is incapable of exclusive appropriation by anyone as against others of the same name, who are using it legitimately in their own business.

In the absence of contract, fraud or estoppel any man may use his own name in all legitimate ways and as the whole or part of a corporate name.

One corporation is not entitled to restrain another from using in its corporate title the name to which others have a common right.

The essence of the wrong in unfair competition, consists in the sale of the goods of one manufacturer or vendor, for those of another. And if competition is so conducted as not to mislead the public nor palm off the goods of one as those of another, no wrong exists.

The right of the individual to use his own name, reputation

and experience in that business or occupation for which he is best fitted, is important to the public as well as to the individual, and to deprive him of that right is in restraint of trade and against public policy.

The stockholders of a corporation which has sold its property, business and good will and has been dissolved, may, in the absence of individual contracts not to engage in competition, or after the expiration of such contracts by limitation, engage in competition to the same extent as anyone else. *Howe Scale Co.* v. *Wyckoff et al.*, 198 U. S. 118; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169; *Elgin National Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665; *Goodyear India Rubber Mfg. Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598; *Canal Co.* v. *Clark*, 13 Wall. 311; *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537; *McLean* v. *Fleming*, 96 U. S. 645; *Coats* v. *Merrick Thread Co.*, 149 U. S. 562; *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64.

Mr. Charles H. Aldrich and *Mr. Lawrence Maxwell, Jr.*, with whom *Mr. Henry S. McAuley* was on the brief, for respondents:

The corporation is a distinct entity separate from its stockholders. But the theory of corporate entity is not allowed to protect fraudulent conduct, hide the truth or defeat the ends of public or private justice. *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Anthony* v. *American Glucose Co.*, 146 N. Y. 407; *State* v. *Standard Oil Co.*, 49 Ohio St. 137, 177; *McKinley* v. *Wheeler*, 130 U. S. 630, 636; *Myers* v. *Kalamazoo Buggy Co.*, 54 Michigan, 215; 1 Purdy's Beach on Corporations, 6.

Stockholders are bound by those acts of their corporation which can only be taken with their assent, and to which they give assent by affirmative vote or acquiescence. Cook on Corporations, § 670, and cases cited; *Holmes, Booth & Hayden* v. *Holmes, Booth & Atwood Co.*, 37 Connecticut, 278, 294;

Richmond Nervine Co. v. *Richmond*, 159 U. S. 293; *Le Page Company* v. *Russia Cement Co.*, 51 Fed. Rep. 941; *Cement Co.* v. *Le Page*, 147 Massachusetts, 206; *Penberthy Injector Co.* v. *Lee* (Mich.), 78 N. W. Rep. 1074.

The name "Hall" having been so long identified with the safe business as to acquire a secondary meaning, the sale of that business as a going concern, including the trade rights and good will, passed to the purchaser the exclusive right to use the name in that business as against all parties participating in the sale. *Le Page Co.* v. *Russia Cement Co.*, 51 Fed. Rep. 941; *C. S. Higgins Co.* v. *Higgins Soap Co.*, 144 N. Y. 462; *Russia Cement Co.* v. *Le Page*, 147 Massachusetts, 206; *Menedez* v. *Holt*, 128 U. S. 514; *Hoxey* v. *Chaney*, 143 Massachusetts, 592; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 548; *Richmond Co.* v. *Richmond*, 159 U. S. 293; Hopkins, Unfair Trade, 109, 110; *Dodge Stationery Co.* v. *Dodge*, 78 Pac. Rep. 879; *Myers* v. *Kalamazoo Buggy Co.*, 54 Michigan, 215.

The Hall's Safe Company, composed of the Halls who sold the original Hall's Safe and Lock Company to the respondent's predecessor, should be enjoined from the use of the word Hall in the safe business because: they have been paid for the name; they are estopped to assert a right to it; their use of the name Hall constitutes a fraud upon respondent. *Howe Scale Company* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118; *Peck Bros. & Co.* v. *Peck Bros. Co.*, 113 Fed. Rep. 291; *Chickering et al.* v. *Chickering & Sons*, 120 Fed. Rep. 69; *Royal Baking Powder Co.* v. *Royal*, 122 Fed. Rep. 337; *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 163 U. S. 169; *Singer Manufacturing Co.* v. *Brent*, 163 U. S. 205; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *The Le Page Company* v. *Russia Cement Co.*, 51 Fed. Rep. 941; *Russia Cement Co.* v. *Le Page*, 147 Massachusetts, 206; *Hoxie* v. *Chaney*, 143 Massachusetts, 592; *McLean* v. *Fleming*, 96 U. S. 245; *Frazer* v. *Frazer Lubricator Co.*, 121 Illinois, 147; *Charles S. Higgins Co.* v. *Higgins Soap Co.*, 144 N. Y. 462; *Levy* v. *Walker*, L. R. 10 Ch. D. 436; *Garrett*

v. *T. H. Garrett & Co.*, 78 Fed. Rep. 472; *Meyers* v. *Kalamazoo Buggy Co.*, 54 Michigan, 215.

Even if the Halls were at liberty to use their name in the safe business, the decree of the court below should be affirmed because of petitioner's fraudulent conduct, which has rendered any qualified use of the name by him an injury to the respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This suit was brought in the Superior Court of Cook County, Illinois, by the Hall Safe and Lock Company against the Herring-Hall-Marvin Safe Company, and was removed by the latter to the United States Circuit Court. The bill sought to enjoin the defendant from representing itself to be the successor of the Hall Safe and Lock Company and otherwise, as need not be stated in detail. The defendant answered, denying the plaintiff's rights and setting up its own. At the same time it filed a cross-bill to which it made the petitioner Donnell, the president of the plaintiff company, a party, and by which it sought to enjoin the plaintiff and Donnell from carrying on the safe business under any name of which the word Hall is a part, or marking or advertising their safes with any such name, etc., unless made by the defendant or its named predecessors in business. The bill was dismissed by the Circuit Court, no appeal was taken, and it is not in question here. On the cross-bill an injunction was issued as prayed and an account of profits ordered. This decree was affirmed by the Circuit Court of Appeals. 143 Fed. Rep. 231; *S. C.*, 74 C. C. A. 361. Subsequently an injunction was granted by the Circuit Court of Appeals for the Sixth Circuit, but in much more limited form, after a consideration of the present case. 146 Fed. Rep. 37; *S. C.*, 76 C. C. A. 495. Later still a certiorari was issued by this court.

The facts are as follows: About sixty years ago Joseph L. Hall started a business of constructing safes, and in time at-

tached a reputation to his name. In 1867 he and his partners organized an Ohio corporation by the name of Hall's Safe and Lock Company, which went on with the business. (This was not the plaintiff, which is an Illinois corporation of much later date.) Hall was the president, a part or the whole of the time, until he died in 1889. He owned the greater part of the stock and his children the rest. In 1892 the Ohio company sold all its property, including trade-marks, trade rights and good will, and its business as a going concern, to parties who conveyed on the same day to the Herring-Hall-Marvin Company. Subsequently this company's property was sold to the Herring-Hall-Marvin Safe Company, the party to this suit. In its conveyance the Ohio Company agreed to go out of business and get wound up, which it did with the assent, it may be assumed, of all the stockholders. The stock belonged to the Hall family, and connections, and they, of course, ultimately received the consideration of the sale. A part consisted of stock in the new company, which was distributed to them at once, and a part was money paid to the selling company about to be dissolved. By election and under a contract made on the day of the sale Edward C. Hall, a son of the founder, became president of the purchasing corporation, the contract reciting that it was made as part of the inducement to the purchase, and he agreeing in it to hold the office until May 2, 1897, to devote all his time to the interests of the corporation, and, so long as it might desire to retain his services as stipulated, not to engage in any competing business east of the Mississippi River. Another son became treasurer under a nearly similar contract, and a son-in-law secretary.

Both sons resigned and left the service of the corporation August 1, 1896, and both were released, in writing, from their obligations under their contract. The next month the sons organized an Ohio corporation, under the name of Hall's Safe Company, which is party to the litigation in the Sixth Circuit, but is not a party here. The petitioner Donnell had been a selling agent of the original company, and afterwards of the

company that bought it out, having a place in Chicago, with a large sign, "Hall's Safes," on the front. In 1898 he, with others, organized the plaintiff, Hall Safe and Lock Company, the name differing from that of the original corporation only by not using the possessive case. This company does business in the petitioner's old place, with the old sign, and sells the safes of the present Ohio corporation as Hall's safes. It has accepted a decree forbidding it to go on under the above name. The question before us is upon the scope of the injunction finally issued, as we have stated, upon the cross-bill. That the petitioner contends is too broad, while the Herring-Hall-Marvin Safe Company contends that as against the Hall family and anyone selling their safes or standing in their shoes it has the sole right to the very valuable name Hall upon or for the sale of safes.

It no longer is disputed that the Herring-Hall-Marvin Safe Company is the successor of the original Hall's Safe and Lock Company, or that it has the right to use the word Hall. But it is denied that it has the exclusive right. The name does not designate a specific kind of safe, and yet may be assumed to have commercial value as an advertisement even when divorced from the notion of succession in business,—a sort of general good will, owing to its long association with superior work. So far as it may be used to convey the fact of succession it belongs, of course, to the Herring-Hall-Marvin Safe Company, and the narrower decree, made in the Sixth Circuit, was intended to prevent the present Ohio company from using any name or mark indicating that it is the successor of the original company, or that its goods are the product of that company or its successor, or interfering with the good will bought from it. But, as we have said, we presume that the word may have value, even when that idea is excluded, and when there is no interference with the good will or the trade name sold.

The good will sold was that of Hall's Safe and Lock Company. There is nothing to show that while that company was

going the sons of Joseph L. Hall could not have set up in business as safe makers under their own name and could not have called their safes by their own name, subject only to the duty not to mislead the public into supposing when it bought from them that it was buying their father's safes. Therefore it could not be contended that merely by a sale the father's company could confer greater rights than it had. But it was said that if a partnership had sold out by a conveyance in like terms the members would have given up the right to use their own names if they appeared in the firm name, that in this case the Halls received the consideration for the good will they had attached to their name, that they ratified the sale and necessarily assented to it, since otherwise the corporation could not have sold its property or have carried out its agreement to dissolve, and that under such circumstances a court ought to look through the corporation to the men behind it.

Philosophy may have gained by the attempts in recent years to look through the fiction to the fact and to generalize corporations, partnerships and other groups into a single conception. But to generalize is to omit, and in this instance to omit one characteristic of the complete corporation, as called into being under modern statutes, that is most important in business and law. A leading purpose of such statutes and of those who act under them is to interpose a nonconductor, through which in matters of contract it is impossible to see the men behind. However it might be with a partnership, *Russia Cement Co.* v. *Le Page*, 147 Massachusetts, 206, 211, when this corporation sold its rights everybody had notice and knew in fact that it was not selling the rights personal to its members, even if, as always, they really received the consideration, or, as usual, they all assented to its act. That it contracted for such assent, if it did, by its undertaking to dissolve, does not make the contract theirs. But the case does not stop there. The purchasing company had the possibility of competition from the Halls before its mind and gave

the measure of its expectations and demands by the personal contracts that it required. Those contracts were limited in time and scope and have been discharged.

A further argument was based on the confusion produced by the petitioner through his use of signs and advertisements calculated to make the public think that his concern was the successor of the first corporation and otherwise to mislead. This confusion must be stopped, so far as it has not been by the decree in force, and it will be. But it is no sufficient reason for taking from the Halls the right to continue the business to which they were bred and to use their own name in doing so. An injunction against using any name, mark or advertisement indicating that the plaintiff is the successor of the original company, or that its goods are the product of that company or its successors, or interfering with the good will bought from it, will protect the right of the Herring-Hall-Marvin Safe Company, and is all that it is entitled to demand. See *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118; *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 163 U. S. 169.

Decree reversed.

LOEWE *v.* LAWLOR.

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

No. 389. Argued December 4, 5, 1907.—Decided February 3, 1908.

After the Circuit Court of Appeals has certified questions to this court and this court has issued its writ of certiorari requiring the whole record to be sent up, it devolves upon this court under § 6 of the Judiciary Act of 1891, to decide the whole matter in controversy in the same manner as if it had been brought here for review by writ of error or appeal.

The Anti-Trust Act of July 2, 1890, 26 Stat. 209, has a broader application than the prohibition of restraints of trade unlawful at common law.

It prohibits any combination which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business; and this includes restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of interstate trade except on conditions that the combination imposes.

A combination may be in restraint of interstate trade and within the meaning of the Anti-Trust Act although the persons exercising the restraint may not themselves be engaged in interstate trade, and some of the means employed may be acts within a State and individually beyond the scope of Federal authority, and operate to destroy intrastate trade as interstate trade, but the acts must be considered as a whole, and if the purposes are to prevent interstate transportation the plan is open to condemnation under the Anti-Trust Act of July 2, 1890. *Swift* v. *United States*, 196 U. S. 375.

The Anti-Trust Act of July 2, 1890, makes no distinction between classes. Organizations of farmers and laborers were not exempted from its operation, notwithstanding the efforts which the records of Congress show were made in that direction.

A combination of labor organizations and the members thereof, to compel a manufacturer whose goods are almost entirely sold in other States, to unionize his shops and on his refusal so to do to boycott his goods and prevent their sale in States other than his own until such time as the resulting damage forces him to comply with their demands, is, under the conditions of this case, a combination in restraint of interstate trade or commerce within the meaning of the Anti-Trust Act of July 2, 1890, and the manufacturer may maintain an action for threefold damages under § 7 of that act.

THE facts are stated in the opinion.

Mr. James M. Beck and *Mr. Daniel Davenport* for plaintiffs in error:

The complaint must be considered as an entirety. A combination so great in scope, and complex in its operations necessarily contains elements, which in and by themselves are either innocent or beyond Federal jurisdiction. The complaint must stand, if, *as a whole*, it substantially sets forth a combination, whose purpose and effect is to restrain interstate trade. It is impossible for the plaintiffs to set forth all the defendants' secret operations with definiteness and particularity. *Swift* v. *United States*, 196 U. S. 375.

The Anti-Trust Act is not limited to restraints of interstate

trade or commerce that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy or monopoly upon such trade or commerce. *Northern Securities Case*, 193 U. S. 197, 331. The burden is on whoever seeks to read for their own benefit an exception into this sweeping and all-comprehensive language.

It matters not that the defendants were members of labor unions and were not themselves engaged in carrying on any form of interstate trade; nor that their operations also embraced restraint of trade within a State; nor that they did not, in addition to the other steps taken by them to effect their purpose, resort to the actual seizure of the plaintiffs' hats while in transit or otherwise physically obstruct their transportation; nor that they combined to restrain and destroy the plaintiffs' interstate trade as a means to compel them to "unionize" their factory, as a step in their broader conspiracy to force all hat manufacturers to do so; these circumstances were urged upon the trial court by the defendants, and it erroneously attached some importance to them in reaching its conclusion.

Congress has power to declare and has declared, that all interstate trade shall be absolutely free from all direct restriction through combinations, and every such combination stands condemned in the express terms of the statute. A combination to restrain and prevent the plaintiffs from selling and disposing of their product to customers in other States and to restrain and prevent such customers in other States from buying them, is a combination in restraint of interstate trade as much as a combination to prevent by physical violence their transportation from State to State. It does not matter that it also embraces trade wholly within a State. Indeed, if the destruction of trade within a State is the means resorted to, to prevent the customers in that State from buying from the manufacturer or dealer in another State, it is prohibited by the Sherman Anti-Trust law.

Liability under the Anti-Trust law does not depend upon any physical obstruction of interstate transportation. Com-

merce is something more than mere transportation. It also consists in traffic and in that even larger field of interstate communication to which Marshall gave the all-embracing term of commercial "intercourse."

The field of interstate commerce includes all essential acts antecedent to physical transportation and subsequent thereto, where necessary to preserve the free flow of such commerce. *Swift & Co.* v. *United States*, 196 U. S. 375.

It is equally well settled that the Federal power does not end with the mere physical delivery of the article transported in the State of destination. The Federal power is coextensive with the subject on which it acts and cannot be stopped at the external boundary of the State, but must enter the interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. *Leisy* v. *Hardin*, 135 U. S. 100. See also *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489.

In *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, an agreement which, prior to any act of transportation, limited the prices at which pipe could be sold after transportation, was held by this court to be a violation of the Anti-Trust Act. In *Chattanooga Foundry Co.* v. *City of Atlanta*, 203 U. S. 390, this court sustained a recovery under § 7 of the Sherman Anti-Trust law in a suit growing out of the combination which was declared invalid in the *Addyston Pipe case* (*supra*).

The court clearly recognized that to prevent a dealer from making any sale to a customer in another State, and therefore preventing altogether the possible transportation of the merchandise, was as much within the law as to enhance the price of a commodity which had actually been purchased and shipped.

Similarly in the case at bar the avowed object and necessary result of the labor combination was to prevent altogether purchases from the plaintiffs by their customers in other States. The total prevention of interstate sales, whereby no act of interstate transportation takes place, is as much within the statute

as a physical restraint of transportation when it actually commences.

In the case of *Montague* v. *Lowry*, 193 U. S. 38, this court held that an obstruction to the purchase of tiles, a fact antecedent to physical transportation, was within the prohibition of the Sherman Anti-Trust law.

Under the pleadings in the case at bar, the court must conclude that there was an existing interstate traffic between the plaintiff and citizens of other States and that for the direct purpose of destroying such interstate traffic the defendants combined not merely to prevent him from manufacturing articles then and there intended for transportation beyond the State, but also to prevent the vendees from either reselling the hats, which they had imported from Connecticut, or from further negotiating with the plaintiffs for the purchase and incidental transportation of such hats from Connecticut to the various places of destination. It is true that some of the means whereby the interstate traffic was to be destroyed, were, when detached, acts within a State and that some of them were in themselves and apart from their obvious purpose and necessary effect, acts beyond the scope of Federal authority. The acts must be considered as a whole and defendants' contention in this case, that because the means, which they adopted to destroy the plaintiffs' interstate traffic, operated at one end before physical transportation commenced and at the other end after physical transportation ended, is wholly unimportant, if the purposes of the combination were to prevent any interstate transportation at all.

Defendants' claim is not supported by the *Stock Yards cases* (*Hopkins* v. *United States*, 171 U. S. 578, and *Anderson* v. *United States*, 171 U. S. 604).

In those cases it was held that there was no purpose to obstruct or restrain interstate commerce, that the combination related to purely local business.

The combination as an unreasonable one and criminal at common law falls under the opinion of Mr. Justice Brewer in

the *Northern Securities case*, which possibly foreshadows a ruling by this court that the statute extends only to those cases in which the restraint is unreasonable, or unlawful at common law. American and English Decisions in Equity, Vol. 7, page 562; *Martin* v. *McFall*, 55 Atl. Rep. 465; *Callan* v. *Wilson*, 127 U. S. 540; *Arthur* v. *Oakes*, 63 Fed. Rep. 310.

To the same effect are *Toledo A. A. & N. M. R. Co.* v. *Penn. Co.*, 54 Fed. Rep. 730, per TAFT, J., and the following cases: *Purington* v. *Hinchcliff*, 219 Illinois, 159, 167; *Chicago W. & V. Coal Co.* v. *People*, 214 Illinois, 421; *Doremus* v. *Hennessy*, 176 Illinois, 608; *State* v. *Donaldson*, 3 Vroom, 151; *State* v. *Stewart*, 59 Vermont, 293; *Sherry* v. *Perkins*, 147 Massachusetts, 212; *Crump* v. *Com.*, 84 Virginia, 927; *Erdman* v. *Mitchell*, 207 Pa. St. 79; *Gatzow* v. *Bruening*, 106 Wisconsin, 1; *Old Dominion S. S. Co.* v. *McKenna*, 30 Fed. Rep. 48; *Reg* v. *Rowlands*, 17 A. and E. (N. S.) 671, 685; *Loewe* v. *California State Federation of Labor*, 139 Fed. Rep. 71.

Members of a combination or conspiracy under the Anti-Trust law are not exempt because they are not engaged in interstate transportation.

They contend that the Sherman law is inapplicable because the defendants are not themselves engaged in interstate commerce.

Congress did not provide that one class in the community could combine to restrain interstate trade and another class could not. It had no respect for persons. It made no distinction between classes. It provided that "every" contract, combination or conspiracy in restraint of trade was illegal.

The legislative history of the Sherman Anti-Trust law clearly shows that its applicability to combinations of labor as well as of capital was not an oversight.

After the Sherman law was enacted bills were introduced in the 52d Congress, H. R. 6,640, § 1; 55th Congress, Senate 1,546, § 8; H. R. 10,539, § 7; 56th Congress, H. R. 11,667, § 7; 57th Congress, S., 649, § 7; H. R. 14,947, § 7, to amend the Sherman Anti-Trust law so that it would be inapplicable to labor

organizations, and while one of these (H. R. 10,539, § 7) passed the House in the 56th Congress, none ever became a law.

Congress, therefore, has refused to exempt labor unions from the comprehensive provisions of the Sherman law against combinations in restraint of trade, and this refusal is the more significant, as it followed the recognition by the courts that the Sherman Anti-Trust law applied to labor organizations. *United States* v. *Workingmen's Amalgamated Council*, 54 Fed. Rep. 994; *Waterhouse* v. *Comer*, 55 Fed. Rep. 149; *United States* v. *Elliott*, 62 Fed. Rep. 801; *Thomas* v. *Cincinnati Ry. Co.*, 62 Fed. Rep. 803; *In re Debs*, 158 U. S. 564; *United States* v. *Freight Association*, 166 U. S. 356.

In the following cases the combination was held valid: *United States* v. *Knight*, 156 U. S. 1; *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604; *Bement* v. *Harrow*, 186 U. S. 70; *Chicago Board* v. *Christie*, 198 U. S. 236; *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179.

In the following cases the combination was held invalid: *In re Debs*, 158 U. S. 564; *United States* v. *Trans-Missouri Ass'n*, 166 U. S. 290; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505; *United States* v. *Addyston Pipe Co.*, 175 U. S. 211; *Montague* v. *Lowry*, 193 U. S. 38; *United States* v. *Northern Securities*, 193 U. S. 197; *United States* v. *Swift*, 196 U. S. 375; *City of Atlanta* v. *Chattanooga*, 203 U. S. 390.

Mr. John Kimberly Beach and *Mr. John H. Light*, with whom *Mr. Robert DeForest* and *Mr. Howard W. Taylor* were on the brief, for defendants in error:

On general principles the complaint states no cause of action which falls within the Federal jurisdiction over controversies between citizens of the same State.

As there is no suggestion of any sale or attempt to sell the plaintiffs' hats in original packages, the manufacture of the plaintiffs' hats in Connecticut, and their disposition in the State of destination after delivery to the consignee, are matters which are exclusively within state power of regulation, even

though such regulation might necessarily diminish the volume of the plaintiffs' interstate business. *Coe* v. *Erroll*, 116 U. S. 517, 525; *Kidd* v. *Pierson*, 128 U. S. 1, 24.

And see the *License Cases*, 5 How. 504, and *Leisy* v. *Hardin*, 135 U. S. 116.

Federal jurisdiction cannot include combinations of persons whose operations restrain interstate commerce only indirectly, and incidentally to the direct effect of the combination on the manufacture of the plaintiffs' hats in Connecticut, or on the disposition of such hats in other States after the breaking up of the original package of importation. A combination of persons to restrict the manufacture of the plaintiffs' hats in Connecticut, or to restrict their sale in California after the original package of importation has been broken is a combination which, on general principles, is to be dealt with by the several States, respectively, and not by the United States. *Hopkins* v. *United States*, 171 U. S. 578, 594; *United States* v. *Knight*, 156 U. S. 1.

In the cases relied upon by the plaintiffs in error there has been present the element of a direct restraint by legislation, contract or physical interference, of some transaction or operation admittedly belonging to interstate, as distinguished from intrastate, commerce; and it has been held that the Federal jurisdiction was not ousted because such legislation, contract or interference also affected other operations and transactions admittedly belonging to intrastate commerce.

The converse of this proposition must be equally true, namely, that if the direct restraint of legislation, contract or interference is confined to operations admittedly belonging to intrastate commerce, the state jurisdiction will not be ousted, because such legislation, contract or interference also affects other operations relating to the same general transaction, which admittedly belong to interstate commerce.

The complaint fairly alleges a diversion of plaintiffs' trade by inducing customers in another State not to buy his goods. So long as it is understood that the means employed for diverting this trade are means operating on the customer and not

operating directly upon the course of commerce, it is immaterial whether the means employed be lawful or unlawful.

It is plain from the whole complaint that the defendants have no ultimate design upon interstate commerce as such, and that their real design is to unionize the plaintiffs' factory, or to bring all hat factories in the United States under union conditions. True, that fact will not protect them, if in the pursuit of such design they employ means which directly obstruct the course of interstate commerce; but it will protect them unless the use of such means is specifically alleged.

Again, the conspiracy stated is not among persons who are themselves engaged in interstate commerce, and therefore its operation on the business of a non-member is not incidental to its internal effect upon interstate commerce among the members of the combination. *Montague* v. *Lowry*, 193 U. S. 38; *Chattanooga Foundry* v. *City of Atlanta*, 203 U. S. 390; the *Beef Trust Case*, 195 U. S. 375, distinguished. In these cases there was a sufficient proof of an agreement to regulate the interstate commerce of the parties to the combination, and it was held that other allegations of domestic transactions in furtherance of such main purpose were properly pleaded as part of the general scheme.

The complaint states no cause of action under the Sherman Act as construed by this court, including those reviewed in the *Northern Securities Co. Cases*, 193 U. S. 197, as follows: *United States* v. *Knight*, 156 U. S. 1; *Hopkins* v. *United States*, 171 U. S. 578; *Addyston Pipe & Steel Case*, 175 U. S. 211; *Anderson* v. *United States*, 171 U. S. 604; *Montague* v. *Lowry*, 193 U. S. 27; *Swift* v. *United States*, 195 U. S. 375; *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 391.

Taking these cases together, they furnish the logical rule that a combination within the act must either appear to be a combination whose object is in restraint of interstate commerce, or if the combination be formed for some other object, that some one of the means employed must appear to be in itself a direct restraint upon interstate commerce.

The design of the defendants is not to restrain interstate commerce, but to unionize plaintiffs' factory, and none of the means for carrying out this design constitutes in itself a direct restraint upon interstate commerce. Strikes in local factories, the publication of false statements as to the plaintiffs' attitude toward organized labor, etc., and the restraint of domestic sales by retail dealers in different States, are not in themselves in restraint of interstate commerce. The case at bar cannot be distinguished in principle from the *Anderson Case*, 171 U. S. 602, in which it was decided that a boycott of the business of a person engaged in interstate commerce was not in direct restraint of interstate commerce, when it was entered into for the purpose of compelling the individual in question to join the yard traders' association. In principle, that decision must control the question whether a boycott of the plaintiffs' business for the purpose of compelling them to unionize their factory is in direct restraint of interstate commerce.

By leave of court, *Mr. Thomas Care Spelling* filed a brief herein on behalf of The American Federation of Labor and others.

Mr. Chief Justice Fuller delivered the opinion of the court.

This was an action brought in the Circuit Court for the District of Connecticut under § 7 of the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, claiming threefold damages for injuries inflicted on plaintiffs by a combination or conspiracy declared to be unlawful by the act.

Defendants filed a demurrer to the complaint, assigning general and special grounds. The demurrer was sustained as to the first six paragraphs, which rested on the ground that the combination stated was not within the Sherman Act, and this rendered it unnecessary to pass upon any other questions in the case; and upon plaintiffs declining to amend their complaint the court dismissed it with costs. 148 Fed. Rep. 924; and see 142 Fed. Rep. 216; 130 Fed. Rep. 633.

The case was then carried by writ of error to the Circuit Court of Appeals for the Second Circuit, and that court, desiring the instruction of this court upon a question arising on the writ of error, certified that question to this court. The certificate consisted of a brief statement of facts, and put the question thus: "Upon this state of facts can plaintiffs maintain an action against defendants under section 7 of the Anti-Trust Act of July 2, 1890?"

After the case on certificate had been docketed here plaintiffs in error applied, and defendants in error joined in the application, to this court to require the whole record and cause to be sent up for its consideration. The application was granted and the whole record and cause being thus brought before this court it devolved upon the court, under § 6 of the Judiciary Act of 1891, to "decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."

The case comes up, then, on complaint and demurrer, and we give the complaint in the margin.[1]

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[1] The complaint alleged that the defendants were residents of the District of Connecticut and that complainants resided in Danbury, in that district, were copartners and located and doing business as manufacturers and sellers of hats there; that they had "a factory for the making of hats, for sale by them in the various States of the Union, and have for many years employed, at said factory, a large number of men in the manufacture and sale of said hats, and have invested in that branch of their business a large amount of capital, and in their business of selling the product of their factory and filling orders for said hats, have built up and established a large interstate trade, employing more than two hundred and thirty (230) persons in making and annually selling hats of a value exceeding four hundred thousand ($400,000) dollars.

"4. The plaintiffs, deeming it their right to manage and conduct their business without interference from individuals or associations not connected therewith, have for many years maintained the policy of refusing to suffer or permit any person or organization to direct or control their said business, and in consequence of said policy, have conducted their said business upon the broad and patriotic principle of not discriminating against any person seeking employment because of his being or not being connected with any labor or other organization, and have refused to enter into agreement with any person or organization whereby the rights and privileges, either of them-

The question is whether upon the facts therein averred and admitted by the demurrer this action can be maintained under the Anti-Trust Act.

The first, second and seventh sections of that act are as follows:

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selves or any employé, would be jeopardized, surrendered to or controlled by said person or organization, and have believed said policy, which was and is well known to the defendants, to be absolutely necessary to the successful conduct of their said business and the welfare of their employés.

"5. The plaintiffs, for many years, have been and now are engaged in trade and commerce among the several States of the Union, in selling and shipping almost the whole of the product of their said factory by common carriers, from said Danbury to wholesale dealers residing and doing business in each of the States of Maine, Massachusetts, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Virginia, Ohio, Illinois, Michigan, Wisconsin, Missouri, Nebraska, Arkansas, California and other States, to the amount of many hundreds of thousands of dollars, and in sending agents with samples from said Danbury into and through each of said States to visit said wholesale dealers at their places of business in said several States, and solicit and procure from them orders for said hats, to be filled by hats to be shipped from their said factory at said Danbury, by common carriers to said wholesale dealers, to be by them paid for after the delivery thereof at their several places of business.

"6. On July 25, 1902, the amount of capital invested by the plaintiffs in said business of making and selling hats, approximated one hundred and thirty thousand dollars, and the value of the hats annually sold and shipped by them in previous years, to said dealers in States other than Connecticut, exceeded four hundred thousand dollars, while the value of hats sold by them in the State of Connecticut did not exceed ten thousand dollars.

"7. On July 25, 1902, the plaintiffs had made preparations to do a large and profitable business with said wholesale dealers in other States, and the condition of their business was such as to warrant the full belief that the ensuing year would be the most successful in their experience. Their factory was then running to its full capacity in filling a large number of orders from such wholesale dealers in other States. They were then employing about one hundred and sixty men in the making and finishing departments, a large number in the trimming and other departments, whose work was dependent upon the previous work of the makers and finishers, and they then had about one hundred and fifty dozens of hats in process of manufacture, and in such condition as to be perishable and ruined if work was stopped upon them.

"8. The plaintiffs then were and now are almost wholly dependent upon the sale and shipments of hats as aforesaid, to said dealers in States other than Connecticut, to keep their said factory running and to dispose of its product and their capital in said business profitably employed, and the restraint, curtailment and destruction of their said trade and commerce with

1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such

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their said customers in said States other than Connecticut, by the combination, conspiracy and acts of the defendants, as hereinafter set forth, have been and now are of serious damage to the property and business of the plaintiffs, as hereinafter set forth.

"9. The individual defendants, named in this writ, are all members of a combination or association of persons, styling themselves The United Hatters of North America, and said combination includes more than nine thousand persons, residing in the several States of Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Indiana, Illinois, Missouri, California, and the Province of Ontario in the Dominion of Canada. The said combination is subdivided into twenty subcombinations, each of which is by themselves styled a local union of The United Hatters of North America. Six of said subcombinations are in the State of Connecticut, and known as local Unions 1 and 2, 10 and 11, and 15 and 16 of The United Hatters of North America, and have an aggregate membership of more than three thousand persons residing in the State of Connecticut.

"10. Said combination of persons, collectively known as The United Hatters of North America, owns, controls, edits, publishes, and issues a paper styled The Journal of the United Hatters of North America, in which are published reports of many of the acts of its agents, hereinafter mentioned, which circulates widely among its members and the public, and which affords a ready, convenient, powerful and effective vehicle for the dissemination of information to its members and the public as to boycotts declared and pushed by them, and of the acts and measures of its members and agents for carrying such boycotts into effect, and was so used by them in connection with the acts of the defendants hereinafter set forth.

"11. Said combination owns and absolutely controls the use of a certain label or distinguishing mark, which it styles the Union Label of the United Hatters of North America, which mark, when so used by them, affords to them a ready, convenient and effective instrument and means of boycotting the hats of any manufacturer against whom they may desire to use it for that purpose.

"12. The defendants in this suit are also all members of a combination or association of persons calling themselves and known as The American Federation of Labor, which includes more than a million and four hundred thousand members residing in the several States and Territories of the Union, and in the Dominion of Canada, and in all the places in the several States, where the wholesale dealers in hats, hereinbefore mentioned, and their customers reside, and do business. Said combination is subdivided in subordinate groups, or combinations, comprising one hundred and ten national and international unions and combinations, of which the said combinations of persons

contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

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styling themselves The United Hatters of North America is one, composed of twelve thousand local unions, twenty-eight State federations or combinations, more than five hundred central labor unions or combinations, and more than two thousand local unions or combinations, which are not included in the above-mentioned national and international combinations.

"13. Said combination of persons collectively known as The American Federation of Labor owns, controls, edits, publishes, and issues a paper or magazine called The American Federationist, which it declares to be its official organ and mouthpiece, which has a very wide circulation among its members and others, and which affords a ready, convenient, powerful and effective vehicle and instrument for the dissemination of information, as to persons, their products and manufactures, boycotted or to be boycotted, by its members, and as to measures adopted and statements to be published, detrimental to such persons and to the sale of their manufactures and for boycotting such persons, their manufactures, and said paper has been and now is constantly used, printed and distributed for said purposes among its members and the public and was so used by the defendants and their confederates in boycotting the products of the firm of F. Berg & Co., of Orange, New Jersey, and H. H. Roelofs & Co., of Philadelphia, Pa., hat manufacturers, to their very great injury and until the said firms successively yielded to their demands in pursuance of the general scheme of the defendants hereinafter set forth.

"14. The persons united in said combination, known as The American Federation of Labor, including the persons in said subcombination known as The United Hatters of North America, constantly employ more than one thousand agents in the States and Territories of the United States, to push, enforce and carry into effect all boycotts declared by the said members, including those in aid of the combined scheme, purpose and effort hereinafter stated, to force all the manufacturers of fur hats in the United States, including the plaintiffs, to unionize their factories by restraining and destroying their interstate trade and commerce, as hereinafter stated, all of which said agents act under the immediate supervision and personal direction of one Samuel Gompers, who is chief agent of the said combination of persons for said purpose, and of each of the said combinations, and the said agents make monthly reports of their doings in pushing and enforcing and causing to be pushed and enforced said boycotts, and publish the same monthly in said paper known as The American Federationist, of which he is the editor, appointed by the said members, which said paper in connection with said statement or summary, is declared to be the authorized and official mouthpiece of each of said subcombinations, including the said United Hatters of

2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty

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North America. Said statement is declared by the defendants to be a faithful record of the doings of said agents, and each of said statements, made during the period covered by the acts of the defendants against the plaintiffs herein stated, contains the announcement to the members of said combination and the public, that all boycotts declared by them are being by them and their agents pushed, enforced and observed.

"15. Said combination of persons collectively known as The American Federation of Labor, of which the defendants are members, was by the defendants and their other members formed for the purpose among others, of facilitating the declaration and successful maintenance of boycotts, by and for said combination of persons known as The United Hatters of North America, acting through the said Federation of Labor and its other component parts or members, and it and its component parts have frequently declared boycotts, at the request of the defendants, against the business and product of various hat manufacturers, and have vigorously prosecuted the same by and through the powerful machinery at their command as aforesaid, in carrying out their general scheme herein stated, to the great damage and loss of business of said manufacturers, and particularly during the years of 1901 and 1902, they declared, prosecuted and waged, at the request of the defendants and their agents, a boycott against the hats made by and the business of H. H. Roelofs & Co., of Philadelphia, Pa., until, by causing them great damage and loss of business, they coerced them into yielding to the demand of the defendants and their agents, that the said factory of said Roelofs & Co. be unionized, as termed by the defendants, and into agreeing to employ, and employing exclusively, members of their said combination in the making and finishing departments of said factory, and in large measure surrendering to the defendants and their agents the control of said factory and business, all of which was well known to the plaintiffs, their customers, wholesale dealers and the public, and was, by the defendants and their agents, widely proclaimed through all their agencies above mentioned, in connection with their acts against the plaintiffs, as hereinafter set forth, for the purpose of intimidating and coercing said wholesale dealers and their customers from buying the hats of the plaintiffs, by creating in their minds the fear that the defendants would invoke and put into operation against them, all said powerful means, measures and machinery, if they should handle the hats of the plaintiffs.

"16. The defendants, together with the other persons united with them in said combination, known as The United Hatters of North America, have been for many years, and now are, engaged in a combined scheme and effort to force all manufacturers of fur hats in the United States, including the plaintiffs, against their will and their previous policy of carrying on their

of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

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business, to organize their workmen in the departments of making and finishing, in each of their factories, into an organization, to be part and parcel of the said combination known as The United Hatters of North America, or as the defendants and their confederates term it, to unionize their shops, with the intent thereby to control the employment of labor in and the operation of said factories, and to subject the same to the direction and control of persons, other than the owners of the same, in a manner extremely onerous and distasteful to such owners, and to carry out such scheme, effort and purpose, by restraining and destroying the interstate trade and commerce of such manufacturers, by means of intimidation of and threats made to such manufacturers and their customers in the several States, of boycotting them, their product and their customers, using therefor all the powerful means at their command as aforesaid, until such time as from the damage and loss of business resulting therefrom, the said manufacturers should yield to the said demand to unionize their factories.

"17. The defendants and other members of said United Hatters of North America, acting with them and in pursuance of said general combined scheme and purpose, and in carrying the same into effect against said manufacturers, including the plaintiffs, and by use of the means above stated, and the fear thereof, have within a very few years, forced the following named manufacturers of hats in the United States to yield to their demand, and unionize their factories, viz.: [Here follow 70 names of corporations and individuals.] and until there remained, according to the statements of the defendants, only twelve hat factories in the United States which had not submitted to their said demands, and the defendants, in pursuing their warfare against the plaintiffs, as hereinafter set forth, and in connection with their said acts against them, have made public announcement of that fact and of the firms so coerced by them, in order thereby to increase the effectiveness of their acts in intimidating said wholesale dealers and their customers in States other than Connecticut, from buying hats from plaintiffs, as hereinafter set forth.

"18. To carry out said scheme and purpose, the defendants have appointed and employed and do steadily employ, certain special agents to act in their behalf, with full and express authority from them and the other members of said combination, and under explicit instructions from them, to use every means in their power, to compel all such manufacturers of hats to so unionize their factories, and each and all of the defendants in this suit did the several acts hereinafter stated, either by themselves or their agents, by them thereto fully authorized.

"19. On or about March 1, 1901, in pursuance of said general scheme and purpose, the defendants and the other members of said combination, The

7. "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in

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United Hatters of North America, through their agents, the said John A. Moffit, Martin Lawlor, John Phillips, James P. Maher and Charles J. Barrett, who acted for themselves and the other defendants, demanded of the plaintiffs that they should unionize their said factory, in the making and finishing departments, and also thereby acquire the right to use and use the said union label, subject to the right of the defendants to recall the same at pleasure, in all hats made by them, and then notified the plaintiffs that if they failed to yield to said demand, the defendants and all the other members of the said combination known as The United Hatters of North America, would resort to their said usual and well-known methods to compel them so to do. After several conferences, and in April, 1901, the plaintiffs replied to the said demand of the defendants as follows:

"'Firmly believing that we are acting for the best interests of our firm, for the best interests of those whom we employ, and for the best interests of Danbury, by operating an independent or open factory, we hereby notify you that we decline to have our shop unionized, and if attacked, shall use all lawful means to protect our business interests.'

"The plaintiffs were then employing many union and non-union men, and their said factory was running smoothly and satisfactorily both to the plaintiffs and their employés. The defendants, their confederates and agents, deferred the execution of their said threat against the plaintiffs until the conclusion of their attack made in pursuance of the same general scheme and purpose against H. H. Roelofs & Co., which resulted in the surrender of Roelofs & Co., on July 15, 1902, except that the defendants, their confederates and agents, in November, 1901, caused the said American Federation of Labor to declare a boycott against any dealer or dealers who should handle the products of the plaintiffs.

"20. On or about July 25, 1902, the defendants individually and collectively, and as members of said combinations and associations, and with other persons whose names are unknown to the plaintiffs, associated with them, in pursuance of the general scheme and purpose aforesaid, to force all manufacturers of fur hats, and particularly the plaintiffs, to so unionize their factories, wantonly, wrongfully, maliciously, unlawfully and in violation of the provisions of the 'Act of Congress, approved July 2, 1890,' and entitled 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies,' and with intent to injure the property and business of the plaintiffs by means of acts done which are forbidden and declared to be unlawful, by said act of Congress, entered into a combination and conspiracy to restrain the plaintiffs and their customers in States other than Connecticut, in carrying on said trade and commerce among the several States and to wholly prevent them from engaging in and carrying on said trade and com-

which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

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merce between them and to prevent the plaintiffs from selling their hats to wholesale dealers and purchasers in said States other than Connecticut, and to prevent said dealers and customers in said other States from buying the same, and to prevent the plaintiffs from obtaining orders for their hats from such customers, and filling the same, and shipping said hats to said customers in said States as aforesaid, and thereby injure the plaintiffs in their property and business and to render unsalable the product and output of their said factory, so the subject of interstate commerce, in whosoever's hands the same might be or come, through said interstate trade and commerce, and to employ as means to carry out said combination and conspiracy and the purposes thereof, and accomplish the same, the following measures and acts, viz:

"To cause, by means of threats and coercion, and without warning or information to the plaintiffs, the concerted and simultaneous withdrawal of all the makers and finishers of hats then working for them, who were not members of their said combination, The United Hatters of North America, as well as those who were such members, and thereby cripple the operation of the plaintiffs' factory, and prevent the plaintiffs from filling a large number of orders then on hand, from such wholesale dealers in States other than Connecticut, which they had engaged to fill and were then in the act of filling, as was well known to the defendants; in connection therewith to declare a boycott against all hats made for sale and sold and delivered, or to be sold or delivered, by the plaintiffs to said wholesale dealers in States other than Connecticut, and to actively boycott the same and the business of those who should deal in them, and thereby prevent the sale of the same by those in whose hands they might be or come through said interstate trade in said several States; to procure and cause others of said combinations united with them in said American Federation of Labor, in like manner to declare a boycott against and to actively boycott the same and the business of such wholesale dealers as should buy or sell them, and of those who should purchase them from such wholesale dealers; to intimidate such wholesale dealers from purchasing or dealing in the hats of the plaintiff by informing them that the American Federation of Labor had declared a boycott against the product of the plaintiffs and against any dealer who should handle it, and that the same was to be actively pressed against them, and by distributing circulars containing notices that such dealers and their customers were to be boycotted; to threaten with a boycott those customers who should buy any goods whatever, even though union made, of such boycotted dealers, and at the same time to notify such wholesale dealers that they were at liberty to deal in the hats of any other non-union manufacturer of similar quality to those made by the plaintiffs, but must not deal in the hats made by the

In our opinion, the combination described in the declaration is a combination "in restraint of trade or commerce among the several States," in the sense in which those words are used in the act, and the action can be maintained accordingly.

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plaintiffs under threats of such boycotting; to falsely represent to said wholesale dealers and their customers, that the plaintiffs had discriminated against the union men in their employ, had thrown them out of employment because they refused to give up their union cards and teach boys, who were intended to take their places after seven months' instruction, and had driven their employés to extreme measures 'by their persistent, unfair and un-American policy of antagonizing union labor, forcing wages to a starvation scale, and given boys and cheap, unskilled foreign labor preference over experienced and capable union workmen,' in order to intimidate said dealers from purchasing said hats by reason of the prejudice thereby created against the plaintiffs and the hats made by them among those who might otherwise purchase them; to use the said union label of said The United Hatters of North America as an instrument to aid them in carrying out said conspiracy and combination against the plaintiffs' and their customers' interstate trade aforesaid, and in connection with the boycotting above mentioned, for the purpose of describing and identifying the hats of the plaintiffs, and singling them out to be so boycotted; to employ a large number of agents to visit said wholesale dealers and their customers, at their several places of business, and threaten them with loss of business if they should buy or handle the hats of the plaintiffs, and thereby prevent them from buying said hats, and in connection therewith to cause said dealers to be waited upon by committees representing large combinations of persons in their several localities to make similar threats to them; to use the daily press in the localities where such wholesale dealers reside, and do business, to announce and advertise the said boycotts against the hats of the plaintiffs and said wholesale dealers, and thereby make the same more effective and impressive, and to use the columns of their said paper, The Journal of the United Hatters of North America, for that purpose, and to describe the acts of their said agents in prosecuting the same.

"21. Afterwards, to wit, on July 25, 1902, and on divers days since hitherto, the defendants, in pursuance of said combination and conspiracy, and to carry the same into effect, did cause the concerted and simultaneous withdrawal, by means of threats and coercion made by them, and without previous warning or information thereof to the plaintiffs, of all but ten of the non-union makers and finishers of hats then working for them, as well as all of their union makers and finishers, leaving large numbers of hats in an unfinished and perishable condition, with intent to cripple and did thereby cripple the operation of the plaintiffs' factory until the latter part of October, 1902, and thereby prevented the plaintiffs from filling a large number of orders then on hand from such wholesale dealers in States other than Connecticut, which they had engaged to fill and were then in the act of filling, as

And that conclusion rests on many judgments of this court, to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business.

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well known to the defendants, and thereby caused the loss to the plaintiffs of many orders from said wholesale dealers in other States, and greatly hindered and delayed them in filling such orders, and falsely representing to said wholesale dealers, their customers, and the public generally in States other than Connecticut, that the plaintiffs had discriminated against the union men in their employ, and had discharged or thrown out of employment their union men in August, 1902; that they had driven their employés to extreme measures by their persistent, unfair and un-American policy of antagonizing union labor, forcing wages down to a starvation scale and giving boys and cheap, unskilled foreign labor preference over experienced and capable workmen; that skilled hatters had been discharged from said factory for no other cause than their devotion and adherence to the principles of organized labor in refusing to give up their union cards, and to teach the trade to boys who were intended to take the place of union workmen after seven months' instruction, and that unable to submit longer to a system of petty tyrannies that might be tolerated in Siberia but could not be borne by independent Americans, the workmen in the factory inaugurated the strike to compel the firm to recognize their rights, in order to prejudice, and did thereby prejudice the public, against the plaintiffs and their product, and in order to intimidate, and did thereby intimidate said wholesale dealers and their customers, in States other than Connecticut, from purchasing hats from the plaintiffs by reason of the fear of the prejudice created against said hats; and in connection therewith declared a boycott against all hats made for and so sold and delivered, and to be so sold and delivered to said wholesale dealers, in States other than Connecticut, and actively boycotted the same and the business of those who dealt in them in such other States, and thereby restrained and prevented the purchase of the same from the plaintiffs, and the sale of the same by those in whose hands they were, or might thereafter be, in the course of such interstate trade, and caused and procured others of said combinations united with them in the said American Federation of Labor to declare a boycott against the plaintiffs, their product and against the business of such wholesale dealers in States other than Connecticut, as should buy or sell them, and of those who should purchase from such wholesale dealers any goods whatever, and further intimidated said wholesale dealers from purchasing or dealing in hats made by the plaintiffs, as aforesaid, by informing them that the American Federation of Labor had declared a boycott against the hats of the plaintiffs and against any dealer who should handle them, and that said boycott was to be actively pressed against them, and by sending agents and committees from various of said labor organizations, to threaten said wholesale dealers and their customers with a boycott from them if they

The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes; and there is no doubt

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purchased or handled the goods of plaintiffs, and by distributing in San Francisco, California, and other places, circulars containing notices that such dealers, and their customers were to be boycotted, and threatened with a boycott, and did actively boycott the customers who did or should buy any goods whatever, even though union made, of such wholesale dealers so boycotted, and used the daily press to advertise and announce said boycott and the measures taken in pursuance thereof by said labor organizations, particularly The San Francisco Bulletin, in its issues of July 2 and July 4, 1903, and a daily paper published in Richmond, Virginia, on December 10, 1902, and notified such wholesale dealers in States other than Connecticut, that they were at liberty to deal in the hats of any other non-union hat manufacturer of similar quality to those of the plaintiffs, but they must not deal in hats made by the plaintiffs, under threats of being boycotted for so doing, and used the said union label of the United Hatters of North America as an instrument to aid them in carrying out said combination and conspiracy against the plaintiffs' and their customers' interstate trade, as aforesaid, and in connection with such boycotting by using the same and its absence from the hats of the plaintiffs, as an insignia or device to indicate to the purchaser that the hats of the plaintiffs were to be boycotted, and to point them out for that purpose, and employed a large number of agents to visit said wholesale dealers and their customers at their several places of business in each of said States, particularly Philadelphia and other places in the State of Pennsylvania, in Baltimore in the State of Maryland, in Richmond and other places in the State of Virginia, and in San Francisco and other places in the State of California, to intimidate and threaten them, if they should continue to deal in or handle the hats of the plaintiffs, and among many other instances of like kind, the said William C. Hennelly and Daniel P. Kelly in behalf of all said defendants, and acting for them, demanded the firm of Triest & Co., wholesale dealers in hats, doing business in said San Francisco, that they should agree not to buy or deal in the hats made by the plaintiffs, under threats made by them to said firm of boycotting their business and that of their customers, and upon their refusing to comply with such demand and yield to such threats, the defendants by their said agents caused announcement to be made in the newspapers of said city that said Triest & Co. were to be boycotted therefor, and that the labor council of San Francisco would be addressed by them for that purpose, and that they had procured a boycott to be declared by said labor council, and thereupon the defendants, through their said agents, Hennelly and Kelly, printed, published, issued and distributed to the retail dealers in hats, in several States upon the Pacific coast, the following circular, to wit:

that (to quote from the well-known work of Chief Justice Erle on Trade Unions) "at common law every person has individually, and the public also has collectively, a right to require that the course of trade should be kept free from unreasonable

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" 'San Francisco Labor Council,
" 'Affiliated with the American Federation of Labor,
" 'Secretary's Office, 927 Market Street,
" 'Rooms 405, 406, 407 Emma Spreckel's Building,
" 'Meets every Friday, at 1159 Mission St.
" 'Telephone South 447.
" 'Address all communications to 927 Market Street.

" 'San Francisco, July 3, 1903.

" 'To whom it may concern:

" 'At a special meeting of the San Francisco Labor Council held on the above date, the hat jobbing concern known as Triest & Co., 116 Sansome St., San Francisco, was declared unfair for persistently patronizing the unfair hat manufacturing concern of D. E. Loewe & Co., Danbury, Connecticut, where the union hatters have been on strike, for union conditions, since August 20, 1902. Triest & Co. will be retained on the unfair list as long as they handle the product of this unfair hat manufacturing concern. Union men do not usually patronize retail stores who buy from unfair jobbing houses or manufacturers. Under these circumstances, all friends of organized labor, and those desiring the patronage of organized workers, will not buy goods from Triest & Co., 116 Sansome St., San Francisco.

" 'Yours respectfully, G. B. BENHAM,
" '*President S. F. Labor Council.*
" 'T. E. ZANT,
" '*Secretary S. F. Labor Council.* [L. S.]
" 'W. C. HENNELLY,
" 'D. F. KELLY,
" '*Representing United Hatters of North America.*'

"Also the following, to wit:

" 'San Francisco Labor Council,
" 'Affiliated with American Federation of Labor,
" 'Secretary's Office, 927 Market Street,
" 'Rooms 405, 406, 407 Emma Spreckel's Building,
" 'Meets every Friday, at 1159 Mission St.
" 'Telephone South 447.
" 'Address all communications to 927 Market Street.

" 'San Francisco, July 14, 1903.

" 'Messrs. ——— ———.

" 'Gentlemen: We beg leave to call your attention to the following products which are on the unfair list of the American Federation of Labor.

" 'We do this in order that you refrain from handling these goods, as the

obstruction." But the objection here is to the jurisdiction, because, even conceding that the declaration states a case good at common law, it is contended that it does not state one within the statute. Thus, it is said, that the restraint alleged would operate to entirely destroy plaintiffs' business and thereby include intrastate trade as well; that physical obstruc-

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patronage of the firms named below is taken by the organized workers as an evidence of a desire to patronize those who are opposed to the interests of organized labor. The declaration of unfairness regarding the firms mentioned is fully sanctioned and will be supported to the fullest degree by the San Francisco Labor Council.

" 'Trusting that you will be able to avoid the handling of these goods in the future, we are,

" 'Yours respectfully, G. B. BENHAM, *President.*

" 'T. E. ZANT, *Secretary.* [L. S.]

" 'Unfair List.

" 'Loewe & Co., Danbury, Conn., and Triest & Co., 116 Sansome St., San Francisco, Hat Manufacturers;

" 'Cluett, Peabody & Co., Shirts and Collars, Troy, New York, and 562 Mission St., San Francisco, Cal.;

" 'United Shirt and Collar Co., Troy, New York, and 25 Sansome St., San Francisco, Cal.;

" 'Van Zandt, Jacobs & Co., Troy, New York; Greenbaum, Weil & Michaels, Selling Agents, 27 Sansome St., San Francisco, Cal.'

and caused said circulars to be mailed to and personally delivered to the retail dealers in hats, and the other customers of said Triest & Co., upon the Pacific coast, and to many others, thereby causing the loss of many orders and customers to said Triest & Co., and to the plaintiffs, for the purpose of intimidating and coercing said Triest & Co. not to deal with the plaintiffs, and thereby cause the loss of many orders and customers to said Triest & Co., and to the plaintiffs.

"22. By means of each and all of said acts done by the defendants in pursuance of said combination and conspiracy, they have greatly restrained, diminished, and, in many places, destroyed the trade and commerce of the plaintiffs with said wholesale dealers, in said States other than Connecticut, by the loss of many orders and customers directly resulting therefrom, and the plaintiffs have been injured in their business and property by reason of said combination and conspiracy, and the acts of the defendants done in pursuance thereof, and to carry the same into effect, which are declared to be unlawful by said act of Congress, to the amount of eighty thousand ($80,000) dollars, to recover threefold which damages, under section 7 of said act this suit is brought."

tion is not alleged as contemplated; and that defendants are not themselves engaged in interstate trade.

We think none of these objections are tenable, and that they are disposed of by previous decisions of this court.

United States v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; and *Northern Securities Company* v. *United States*, 193 U. S. 197, hold in effect that the Anti-Trust law has a broader application than the prohibition of restraints of trade unlawful at common law. Thus in the *Trans-Missouri Case*, 166 U. S. 290, it was said that, "assuming that agreements of this nature are not void at common law, and that the various cases cited by the learned courts below show it, the answer to the statement of their validity is to be found in the terms of the statute under consideration;" and in the *Northern Securities Case*, 193 U. S. 331, that, "the act declares illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be the parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States."

We do not pause to comment on cases such as *United States* v. *Knight*, 156 U. S. 1; *Hopkins* v. *United States*, 171 U. S. 578; and *Anderson* v. *United States*, 171 U. S. 604; in which the undisputed facts showed that the purpose of the agreement was not to obstruct or restrain interstate commerce. The object and intention of the combination determined its legality.

In *Swift* v. *United States*, 196 U. S. 375, a bill was brought against a number of corporations, firms and individuals of different States, alleging that they were engaged in interstate commerce in the purchase, sale, transportation and delivery, and subsequent resale at the point of delivery, of meats; and that they combined to refrain from bidding against each other in the purchase of cattle; to maintain a uniform price at which the meat should be sold; and to maintain uniform charges in delivering meats thus sold through the channels of interstate trade to the various dealers and consumers in other States.

And that thus they artificially restrained commerce in fresh meats from the purchase and shipment of live stock from the plains to the final distribution of the meats to the consumers in the markets of the country.

Mr. Justice Holmes, speaking for the court, said (pp. 395, 396, 398):

"Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.

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"The general objection is urged that the bill does not set forth sufficient, definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are and from their nature must be so extensive in time and space, that something of the same impossibility applies to them.

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"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is

suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as parts of a single plan. The plan may make the parts unlawful."

And the same principle was expressed in *Aikens* v. *Wisconsin*, 195 U. S. 194, 205, involving a statute of Wisconsin prohibiting combinations "for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever," etc., in which Mr. Justice Holmes said:

"The statute is directed against a series of acts, and acts of several, the acts of combining, with intent to do other acts, 'The very plot is an act in itself.' *Mulcahy* v. *The Queen*, L. R. 3 H. L. 306, 317. But an act, which in itself is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

In *Addyston Pipe and Steel Company* v. *United States*, 175 U. S. 211, the petition alleged that the defendants were practically the only manufacturers of cast iron within thirty-six States and Territories, that they had entered into a combination by which they agreed not to compete with each other in the sale of pipe, and the territory through which the constituent companies could make sales was allotted between them. This court held that the agreement which, prior to any act of transportation, limited the prices at which the pipe could be

sold after transportation, was within the law. Mr. Justice Peckham, delivering the opinion, said (p. 242): "And when Congress has enacted a statute such as the one in question, any agreement or combination which directly operates not alone upon the manufacture but upon the sale, transportation and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce."

In *Montague & Company* v. *Lowry*, 193 U. S. 38, which was an action brought by a private citizen under § 7 against a combination engaged in the manufacture of tiles, defendants were wholesale dealers in tiles in California and combined with manufacturers in other States to restrain the interstate traffic in tiles by refusing to sell any tiles to any wholesale dealer in California who was not a member of the association except at a prohibitive rate. The case was a commercial boycott against such dealers in California as would not or could not obtain membership in the association. The restraint did not consist in a physical obstruction of interstate commerce, but in the fact that the plaintiff and other independent dealers could not purchase their tiles from manufacturers in other States because such manufacturers had combined to boycott them. This court held that this obstruction to the purchase of tiles, a fact antecedent to physical transportation, was within the prohibition of the act. Mr. Justice Peckham, speaking for the court, said (p. 45), concerning the agreement, that it "restrained trade, for it narrowed the market for the sale of tiles in California from the manufacturers and dealers therein in other States, so that they could only be sold to the members of the association, and it enhanced prices to the non-member."

The averments here are that there was an existing interstate traffic between plaintiffs and citizens of other States, and that for the direct purpose of destroying such interstate traffic defendants combined not merely to prevent plaintiffs from manufacturing articles then and there intended for transportation beyond the State, but also to prevent the vendees from reselling the hats which they had imported from Connecticut, or from

further negotiating with plaintiffs for the purchase and inter-transportation of such hats from Connecticut to the various places of destination. So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a State, and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of Federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced and at the other end after the physical transportation ended was immaterial.

Nor can the act in question be held inapplicable because defendants were not themselves engaged in interstate commerce. The act made no distinction between classes. It provided that "every" contract, combination or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us.

In an early case, *United States* v. *Workingmen's Amalgamated Council*, 54 Fed. Rep. 994, the United States filed a bill under the Sherman act in the Circuit Court for the Eastern District of Louisiana, averring the existence of "a gigantic and widespread combination of the members of a multitude of separate organizations for the purpose of restraining the commerce among the several States and with foreign countries," and it was contended that the statute did not refer to combinations of laborers. But the court, granting the injunction, said:

"I think the Congressional debates show that the statute had its origin in the evils of massed capital; but, when the Congress came to formulating the prohibition, which is the yardstick for measuring the complainant's right to the injunction,

it expressed it in these words: 'Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal.' The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor, as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them. It is true this statute has not been much expounded by judges, but, as it seems to me, its meaning, as far as relates to the sort of combinations to which it is to apply, is manifest, and that it includes combinations which are composed of laborers acting in the interest of laborers.

* * * * * * * *

"It is the successful effort of the combination of the defendants to intimidate and overawe others who were at work in conducting or carrying on the commerce of the country, in which the court finds their error and their violation of the statute. One of the intended results of their combined action was the forced stagnation of all the commerce which flowed through New Orleans. This intent and combined action are none the less unlawful because they included in their scope the paralysis of all other business within the city as well."

The case was affirmed on appeal by the Circuit Court of Appeals for the Fifth Circuit. 57 Fed. Rep. 85.

Subsequently came the litigation over the Pullman strike and the decisions, *In re Debs*, 64 Fed. Rep. 724, 745, 755; *S. C.*, 158 U. S. 564. The bill in that case was filed by the United States against the officers of the American Railway Union, which alleged that a labor dispute existed between the Pullman Palace Car Company and its employés; that thereafter the four officers of the railway union combined together and with others to compel an adjustment of such dispute by creating a boycott against the cars of the car company; that to make such boycott effective they had already prevented cer-

tain of the railroads running out of Chicago from operating their trains; that they asserted that they could and would tie up, paralyze and break down any and every railroad which did not accede to their demands, and that the purpose and intention of the combination was "to secure unto themselves the entire control of the interstate, industrial and commercial business in which the population of the city of Chicago and of other communities along the lines of road of said railways are engaged with each other, and to restrain any and all other persons from any independent control or management of such interstate, industrial or commercial enterprises, save according to the will and with the consent of the defendants."

The Circuit Court proceeded principally upon the Sherman Anti-Trust law, and granted an injunction. In this court the case was rested upon the broader ground that the Federal Government had full power over interstate commerce and over the transmission of the mails, and in the exercise of those powers could remove everything put upon highways, natural or artificial, to obstruct the passage of interstate commerce, or the carrying of the mails. But in reference to the Anti-Trust Act the court expressly stated (158 U. S. 600):

"We enter into no examination of the act of July 2, 1890, c. 647, 26 Stat. 209, upon which the Circuit Court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed."

And in the opinion, Mr. Justice Brewer, among other things, said (p. 581):

"It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within

the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?"

The question answers itself, and in the light of the authorities the only inquiry is as to the sufficiency of the averments of fact. We have given the declaration in full in the margin, and it appears therefrom that it is charged that defendants formed a combination to directly restrain plaintiffs' trade; that the trade to be restrained was interstate; that certain means to attain such restraint were contrived to be used and employed to that end; that those means were so used and employed by defendants, and that thereby they injured plaintiffs' property and business.

At the risk of tediousness, we repeat that the complaint averred that plaintiffs were manufacturers of hats in Danbury, Connecticut, having a factory there, and were then and there engaged in an interstate trade in some twenty States other than the State of Connecticut; that they were practically dependent upon such interstate trade to consume the product of their factory, only a small percentage of their entire output being consumed in the State of Connecticut; that at the time the alleged combination was formed they were in the process of manufacturing a large number of hats for the purpose of fulfilling engagements then actually made with consignees and wholesale dealers in States other than Connecticut, and that if prevented from carrying on the work of manufacturing these hats they would be unable to complete their engagements.

That defendants were members of a vast combination called The United Hatters of North America, comprising about 9,000 members and including a large number of subordinate unions, and that they were combined with some 1,400,000 others into another association known as The American Federation of

Labor, of which they were members, whose members resided in all the places in the several States where the wholesale dealers in hats and their customers resided and did business; that defendants were "engaged in a combined scheme and effort to force all manufacturers of fur hats in the United States, including the plaintiffs, against their will and their previous policy of carrying on their business, to organize their workmen in the departments of making and finishing, in each of their factories, into an organization, to be part and parcel of the said combination known as The United Hatters of North America, or as the defendants and their confederates term it, to unionize their shops, with the intent thereby to control the employment of labor in and the operation of said factories, and to subject the same to the direction and control of persons, other than the owners of the same, in a manner extremely onerous and distasteful to such owners, and to carry out such scheme, effort and purpose, by restraining and destroying the interstate trade and commerce of such manufacturers, by means of intimidation of and threats made to such manufacturers and their customers in the several States, of boycotting them, their product and their customers, using therefor all the powerful means at their command, as aforesaid, until such time as, from the damage and loss of business resulting therefrom, the said manufacturers should yield to the said demand to unionize their factories."

That the conspiracy or combination was so far progressed that out of eighty-two manufacturers of this country engaged in the production of fur hats seventy had accepted the terms and acceded to the demand that the shop should be conducted in accordance, so far as conditions of employment were concerned, with the will of the American Federation of Labor; that the local union demanded of plaintiffs that they should unionize their shop under peril of being boycotted by this combination, which demand defendants declined to comply with; that thereupon the American Federation of Labor, acting through its official organ and through its organizers, declared a boycott.

The complaint then thus continued:

"20. On or about July 25, 1902, the defendants individually and collectively, and as members of said combinations and associations, and with other persons whose names are unknown to the plaintiffs, associated with them, in pursuance of the general scheme and purpose aforesaid, to force all manufacturers of fur hats, and particularly the plaintiffs, to so unionize their factories, wantonly, wrongfully, maliciously, unlawfully and in violation of the provisions of the 'Act of Congress, approved July 2, 1890,' and entitled 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies,' and with intent to injure the property and business of the plaintiffs by means of acts done which are forbidden and declared to be unlawful, by said act of Congress, entered into a combination and conspiracy to restrain the plaintiffs and their customers in States other than Connecticut, in carrying on said trade and commerce among the several States, and to wholly prevent them from engaging in and carrying on said trade and commerce between them and to prevent the plaintiffs from selling their hats to wholesale dealers and purchasers in said States other than Connecticut, and to prevent said dealers and customers in said other States from buying the same, and to prevent the plaintiffs from obtaining orders for their hats from such customers, and filling the same, and shipping said hats to said customers in said States as aforesaid, and thereby injure the plaintiffs in their property and business and to render unsalable the product and output of their said factory, so the subject of interstate commerce, in whosoever's hands the same might be or come, through said interstate trade and commerce, and to employ as means to carry out said combination and conspiracy and the purposes thereof, and accomplish the same, the following measures and acts, viz:

"To cause, by means of threats and coercion, and without warning or information to the plaintiffs, the concerted and simultaneous withdrawal of all the makers and finishers of hats then working for them, who were not members of their said

combination, The United Hatters of North America, as well as those who were such members, and thereby cripple the operation of the plaintiffs' factory, and prevent the plaintiffs from filling a large number of orders then on hand, from such wholesale dealers in States other than Connecticut, which they had engaged to fill and were then in the act of filling, as was well known to the defendants; in connection therewith to declare a boycott against all hats made for sale and sold and delivered, or to be so sold or delivered, by the plaintiffs to said wholesale dealers in States other than Connecticut, and to actively boycott the same and the business of those who should deal in them, and thereby prevent the sale of the same by those in whose hands they might be or come through said interstate trade in said several States; to procure and cause others of said combinations united with them in said American Federation of Labor, in like manner to declare a boycott against and to actively boycott the same and the business of such wholesale dealers as should buy or sell them, and of those who should purchase them from such wholesale dealers; to intimidate such wholesale dealers from purchasing or dealing in the hats of the plaintiffs by informing them that the American Federation of Labor had declared a boycott against the product of the plaintiffs and against any dealer who should handle it, and that the same was to be actively pressed against them, and by distributing circulars containing notices that such dealers and their customers were to be boycotted; to threaten with a boycott those customers who should buy any goods whatever, even though union made, of such boycotted dealers, and at the same time to notify such wholesale dealers that they were at liberty to deal in the hats of any other non-union manufacturer of similar quality to those made by the plaintiffs, but must not deal in the hats made by the plaintiffs under threats of such boycotting; to falsely represent to said wholesale dealers and their customers, that the plaintiffs had discriminated against the union men in their employ, had thrown them out of employment because they refused to give up their union cards and

teach boys, who were intended to take their places after seven months' instruction, and had driven their employés to extreme measures 'by their persistent, unfair and un-American policy of antagonizing union labor, forcing wages to a starvation scale, and given boys and cheap, unskilled foreign labor preference over experienced and capable union workmen,' in order to intimidate said dealers from purchasing said hats by reason of the prejudice thereby created against the plaintiffs and the hats made by them among those who might otherwise purchase them; to use the said union label of said The United Hatters of North America as an instrument to aid them in carrying out said conspiracy and combination against the plaintiffs' and their customers' interstate trade aforesaid, and in connection with the boycotting above mentioned, for the purpose of describing and identifying the hats of the plaintiffs and singling them out to be so boycotted; to employ a large number of agents to visit said wholesale dealers and their customers, at their several places of business, and threaten them with loss of business if they should buy or handle the hats of the plaintiffs, and thereby prevent them from buying said hats, and in connection therewith to cause said dealers to be waited upon by committees representing large combinations of persons in their several localities to make similar threats to them; to use the daily press in the localities where such wholesale dealers reside, and do business, to announce and advertise the said boycotts against the hats of the plaintiffs and said wholesale dealers, and thereby make the same more effective and oppressive, and to use the columns of their said paper, The Journal of the United Hatters of North America, for that purpose, and to describe the acts of their said agents in prosecuting the same."

And then followed the averments that the defendants proceeded to carry out their combination to restrain and destroy interstate trade and commerce between plaintiffs and their customers in other States by employing the identical means contrived for that purpose; and that by reason of those acts

plaintiffs were damaged in their business and property in some $80,000.

We think a case within the statute was set up and that the demurrer should have been overruled.

Judgment reversed and cause remanded with a direction to proceed accordingly.

LEWIS *v.* HERRERA, RECEIVER OF THE INTERNATIONAL BANK IN NOGALES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 79. Submitted December 13, 1907.—Decided February 24, 1908.

The construction of the statute of a Territory by the local courts is of great, if not of controlling, weight; and in this case this court follows the construction given by the Supreme Court of Arizona to Par. 725, Rev. Stat. of Arizona of 1901, to the effect that a deed or conveyance of real property to be valid as against third parties must be signed and acknowledged by the grantor and that until acknowledged it is ineffectual to convey title. 85 Pac. Rep. 245, affirmed.

THE facts are stated in the opinion.

Mr. Webster Street and *Mr. J. L. B. Alexander* for appellants:

Some States have passed statutes requiring all instruments before they become operative in any way to be completed by acknowledgment, and where such statutes exist they become a part and portion of the potentiality of the deed, but no such statute exists or ever has existed in Arizona, and a common law deed is effectual as a conveyance. The courts of other States have said that the acknowledgment is not a part of the deed. See *Sicards* v. *Davis*, 6 Peters, 124.

Paragraph 220, Rev. Stat., Arizona, which was changed into par. 725 in the revision of 1901, was copied from article 630 of the statutes of Texas, after that statute had received a con-

struction by the Supreme Court of Texas as to its effect upon instruments of conveyance, holding that an instrument of conveyance without acknowledgment was as much of a deed between grantor and grantee as though it were accompanied by an acknowledgment. *McLain* v. *Canales*, 25 S. W. Rep. 29, 30; *Frank* v. *Frank*, 25 S. W. Rep. 819; *Kimmarle* v. *Houston & T. C. Ry. Co.*, 12 S. W. Rep. 698, 700; *Rodgers* v. *Burchard*, 34 Texas, 442, 443, 452; *Corgell* v. *Holmes*, Posey's Unreported Cases, Vol. II.

Paragraph 2697 has no application in this case, for the reason that it only applies where the gift or conveyance is made with intent to delay, hinder or defraud creditors, or purchasers, or other persons of or from what they are or may be lawfully entitled to; and in this case the agreed statement of facts admits that there was no intentional fraud.

Under par. 2707, no conveyance is to be deemed fraudulent, solely because not founded on valuable consideration.

This paragraph was taken from the statutes of California, and when it was incorporated in the Code of Arizona, the California courts had construed it; and since its incorporation in our statute the Supreme Court of Arizona has also given it a construction in keeping with the construction given it by the Supreme Court of California. *Windhouse* v. *Boots*, 28 Pac. Rep. 557; *Thelkel* v. *Scott*, 26 Pac. Rep. 879; *Emmons* v. *Barton*, 42 Pac. Rep. 305; *Hall* v. *Warren*, 5 Arizona, 127, 134.

Paragraph 2698, as well as the whole title on "Fraudulent Conveyances" contained in the Revised Statutes of 1887, was taken from the statutes of Texas, except par. 2707, which was taken from the statutes of California. This title on "Fraudulent Conveyances" was carried into the Revised Statutes of 1901 with additional provisions.

See also the construction of par. 2698, by the Supreme Court of Texas prior to its adoption, in 1887, by Arizona, holding that no third party can question the validity of a conveyance from the husband to the wife unless he was a creditor of the husband before the conveyance was made or was a subsequent pur-

chaser without notice. *Garcia* v. *Galvan*, 55 Texas, 53; *Cole* v. *Terrel*, 9 S. W. Rep. 668; *S. C.*, 71 Texas, 556; *Willis & Bro.* v. *Smith*, 65 Texas, 656; *Lewis* v. *Simon*, 72 Texas, 470.

The appellee in this case is neither a prior creditor nor a subsequent purchaser, but a subsequent creditor; and under the authorities last cited cannot be heard to complain of a voluntary conveyance from husband to wife from the mere fact that he is a subsequent creditor. Before he can have the conveyance set aside, he must show that the conveyance was made with intent to defraud subsequent creditors. *Cole* v. *Terrel*, 9 S. W. Rep. 671. See also *Hageman* v. *Buchanan*, 14 Am. St. Rep. 732, and *Lewis* v. *Simon*, 72 Texas, 470.

Mr. William Herring for appellee:

A deed or conveyance of real property, to be valid, under the law of Arizona, must be signed and acknowledged by the grantor. Par. 725, Rev. Stat., Arizona, 1901.

This statute has been construed by the Supreme Court of Arizona to mean that the deed or conveyance must be acknowledged by the grantor, as well as signed by him, and that until acknowledged the deed or conveyance is ineffectual to convey title. *Lewis* v. *Herrera*, 85 Pac. Rep. 245, 246.

The construction of this statute by the local court is of great, if not of controlling weight. *Copper Queen Consolidated Mining Company* v. *Territorial Board of Equalization*, 206 U. S. 474, 482; *Sweeney* v. *Lomme*, 22 Wall. 208; *Northern P. R. Co.* v. *Hambly*, 154 U. S. 349, 361; *Fox* v. *Haarstick*, 156 U. S. 674, 679.

Similar statutes have been so construed by other courts. *Clark* v. *Graham*, 6 Wheat. 577; *Summers* v. *White*, 71 Fed. Rep. 106; *Herndon* v. *White*, 52 Alabama, 597; *Chadwick* v. *Carson*, 78 Alabama, 116; *Carlisle* v. *Carlisle*, 78 Alabama, 542; *French* v. *French*, 62 N. H. 234; *Merwin* v. *Camp*, 3 Connecticut, 35; *Heelan* v. *Hoagland*, 10 Nebraska, 511; *Hout* v. *Hout*, 20 Ohio, 124; *Smith* v. *Hunt*, 13 Ohio, 260; *Allston* v. *Thompson*, Cheves (S. Car.), 271.

The two deeds from Lewis to his wife were, therefore, not effective as conveyances until January 9, 1904, and as on that date Lewis was indebted to the bank, he was not then possessed of property in Arizona sufficient to pay his debts and the deeds were without valuable consideration. Therefore, as to the bank, a prior creditor, the deeds were void. Par. 2698, Rev. Stat., Arizona, 1901.

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

This was a suit by the receiver of the bank as a judgment creditor in the District Court of the Third Judicial District of the Territory of Arizona, in and for the county of Maricopa, to set aside two deeds executed by Lewis, the debtor, to his wife, and have the property therein described subjected to the payment of his judgment.

The case was tried upon an agreed statement of facts. The District Court held the deeds to be void as against complainant. Defendants appealed to the Supreme Court of Arizona, which affirmed the judgment of the lower court. 85 Pac. Rep. 245. From that judgment this appeal was taken.

The facts were sufficiently stated by counsel for appellee as follows:

"On August 25 1903, while appellants, R. Allyn Lewis and Laetitia M. Lewis, his wife, were in Germany, Lewis signed and delivered to his wife a deed conveying to her certain property situate in Phœnix, Maricopa County, Arizona, the consideration being love and affection. The execution of the deed was not acknowledged by Lewis before any officer authorized to take acknowledgments until January 9, 1904, when he did acknowledge the same before a notary in the State of New York. On December 19, 1903, in the State of New York, Lewis signed and delivered to his wife a second deed, conveying to her the same property, but with a more accurate description; the consideration therefor being also love and affection.

This second deed was likewise not acknowledged by Lewis before any officer authorized to take acknowledgments, until January 9, 1904.

"After Lewis had signed the first deed, but before he had acknowledged it, and before he had either signed or acknowledged the second deed, to wit, between November 5, 1903, and December 15, 1903, he became indebted in a large sum to the International Bank in Nogales, a bank doing business in Nogales, Arizona, which indebtedness was thereafter reduced to judgment in an action before the District Court in Arizona, brought by Fred Herrera, receiver for the bank. Execution was issued under this judgment; it was returned unsatisfied." The judgment remained unpaid.

"At the time Lewis signed the first deed to his wife, he was solvent and was not indebted to the said bank in any sum whatsoever; but at the time he signed the second deed, and on January 9, 1904, when for the first time, he acknowledged before the notary the execution of both the first and second deeds, he was indebted to said bank, and he was not possessed of property within the Territory of Arizona, subject to execution, sufficient to pay his existing debts."

It was admitted that there was no fraud in fact, and no intent in the mind of Lewis to defraud his creditors in the transfers made. Paragraph 2698 of the Revised Statutes of Arizona, 1901, is as follows:

"Every gift, conveyance, assignment, transfer or charge made by a debtor which is not upon consideration deemed valuable in law shall be void as to prior creditors, unless it appear that such debtor was then possessed of property within this Territory, subject to execution, sufficient to pay his existing debts; but such gift, conveyance, assignment, transfer or charge shall not on that account merely be decreed to be void as to subsequent creditors or purchasers."

Paragraph 725 of the Revised Statutes of Arizona, 1901, reads thus:

"725. Every deed or conveyance of real estate must be

signed by the grantor and must be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration."

As to the second deed, it was both signed and acknowledged after Lewis became indebted to the bank; as it was a gift, and as it did not appear that at the date of signing he was possessed of property in Arizona subject to execution sufficient to pay his debts, it followed that under paragraph 2698 of the Revised Statutes of Arizona the deed was void as to his prior creditor, the bank, and Herrera, the receiver.

The first deed, however, was signed by Lewis before he became so indebted. But if, as is contended, that deed did not become effective as a conveyance until it was acknowledged, namely, on January 9, 1904, on which day Lewis was already indebted to the bank, the deed was void as to it, a prior creditor. And that makes the only question in this case to be whether or not under the statutes of Arizona a deed signed, but not acknowledged, was valid as a conveyance of real property as to third parties.

The courts below held that a deed or conveyance of real property to be valid under the law of Arizona must be signed and acknowledged by the grantor, and that until acknowledged a deed or conveyance was ineffectual to convey title.

The construction of the statute by the local courts is of great, if not of controlling, weight. *Sweeney* v. *Lomme*, 22 Wall. 208; *Northern Pacific Railroad Company* v. *Hambly*, 154 U. S. 349.

This principle was applied in *Copper Queen Consolidated Mining Company* v. *Territorial Board of Equalization of the Territory of Arizona*, 206 U. S. 474, in which it was argued that a statute of Arizona in reference to the territorial board of equalization of that Territory had been taken almost *verbatim* from one of Colorado, and as that had been construed by the Supreme Court of that State contrary to the view taken by the Supreme Court of Arizona in the present case it should be followed, and we declined to do so, although various other

considerations were stated to sustain the ruling. In this case the same point is urged as respects paragraph 725, as having been transferred from the statutes of Texas in that regard, and having been construed differently from the judgment of the Supreme Court of Arizona here. But paragraph 220 of the Revised Statutes of Arizona of 1887, which was in the exact language of the Texas statute, and as follows: "220. Every deed or conveyance of real estate must be signed or acknowledged by the grantor in the presence of at least two credible subscribing witnesses thereto; or must be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration," was changed in the Arizona Revised Statutes of 1901, paragraph 725, so as to read: "725. Every deed or conveyance of real estate must be signed by the grantor and must be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration." Thus the legislative assembly of Arizona of 1901, so far from adopting the construction of the Texas statute, changed the language entirely and made it imperative that the deed should be signed and acknowledged before a proper officer. It made the acknowledgment by the grantor before a proper officer a prerequisite to the validity of the deed as much as the signing.

Paragraph 732 of the Revised Statutes of Arizona of 1901 is as follows:

"When an instrument in writing, which was intended as a conveyance of real estate, or some interest therein, shall fail, either in whole or in part, to take effect as a conveyance by virtue of the provisions of this title, the same shall, nevertheless, be valid and effectual as a contract upon which a conveyance may be enforced, as far as the rules of law will permit."

But it is unnecessary to consider here whether the unacknowledged deed of Lewis to his wife might under the provisions of this section be claimed to be good as a contract, as that is not a question in this case. These deeds were finally and properly acknowledged, but the bank was then a prior

creditor, and as to a prior creditor the deeds, being gifts, were void, it not being made to appear that Lewis was then possessed of property in Arizona sufficient to pay his existing debts.

Judgment affirmed.

CLEVELAND TERMINAL AND VALLEY RAILROAD COMPANY *v.* CLEVELAND STEAMSHIP COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 84. Argued December 17, 18, 1907.—Decided February 24, 1908.

The admiralty does not have jurisdiction of a claim for damages caused by a vessel to a bridge or dock which, although in navigable waters, is so connected with the shore that it immediately concerns commerce upon land. *The Plymouth*, 3 Wall. 20, followed, and *The Blackheath*, 195 U. S. 361, distinguished.

THIS is an appeal from a final decree of the United States District Court for the Northern District of Ohio, Eastern Division, in admiralty, dismissing appellants' libel on the appellee's exception thereto, on the ground that the court had not jurisdiction of the subject matter. It comes here directly on a certificate as to the jurisdiction under § 5 of the act of 1891.

The libel was *in rem* against the steam propeller William E. Reis, owned by appellee, and was based on injuries inflicted to the center pier of the swinging or draw bridge spanning the Cuyahoga River, a navigable stream at Cleveland, Ohio; to the protecting piling work surrounding such center pier, and one of the shore abutments of such bridge; and to a dock or wharf next below such bridge, all caused as described in the libel in substance, as follows:

The steamer Reis, during a heavy flood, broke from her

winter moorings and, drifting down the river, struck the merchant propeller Moore at her moorings, forcing her against the steamer Eads, putting her adrift, the three being carried down with the current. The Cleveland Terminal and Valley Railroad Company owned and operated a bridge across the Cuyahoga River below the mooring point of the above-named vessels, the bridge being equipped with a swinging span, supported by a center abutment or pier in the navigable channel. Surrounding the center abutment was piling intended to protect vessels from damage. The railroad company and the Detroit and Cleveland Navigation Company jointly owned a dock below, constructed on piles driven in the bed of the stream and on the shore. It was floored over, but open underneath. As the vessels drifted down the Moore struck and damaged this dock, for which claim is made. The Eads stern brought up against a pier below the bridge. The Moore brought up against the dock abreast the Eads, and the Reis, drifting stern first, entered between the Eads and the Moore, and it is said in so doing forced the Eads into collision with the center pier of the railroad company's bridge, thereby damaging the protection piling about the same, for which damages were claimed. It was also averred that as the three vessels were wedged together at the bridge the stream was partially dammed, causing the water to rise, increasing the velocity of the current underneath the keels of the Eads and the Reis, so that the current undermined the center pier and shore abutment and carried away some of the protection piling, and for restoring that piling and the support under the center pier and the pier damages were claimed. And it was further claimed that by reason of the disaster the railroad company was deprived of the use of its bridge for a period of ten days, and necessarily incurred expense to a large amount.

The usual process issued, the vessel was arrested, and later claimed and bonded by appellee, which subsequently filed its exception to the libel. On the hearing the District Court sustained the exception and dismissed the libel "on the ground

that, although the property injured by said disaster, said dock, said center pier and said protection piling work stood in the navigable water of said river, yet it does not appear from the allegations of the libel that any part of said property so injured was either an instrument of or an aid to navigation, for which reason there is no authority for sustaining the jurisdiction of a court of admiralty over the wrong complained of and the cause of action set forth in the libel."

Mr. Roger M. Lee, with whom *Mr. Virgil Kline* was on the brief, for appellants:

Under the holdings already made by this court, our case falls within admiralty jurisdiction in tort, because both the wrong and the injuries complained of were wholly consummated in navigable water. *The Blackheath,* 195 U. S. 361. This case seems quite sufficient authority for sustaining the jurisdiction in the case at bar. Neither the fact that the beacon in the *Blackheath case* was owned by the Government nor that it was an aid to navigation can be considered such a test of jurisdiction. *The Plymouth,* 3 Wall. 20; *Johnson* v. *Chicago & Pac. Elevator Co.,* 119 U. S. 388; *Homer Ramsdell Co.* v. *Comp. Gen. Trans.,* 182 U. S. 406, and other cases can be distinguished.

The constitutional grant of admiralty jurisdiction should be construed to cover the case made in this libel. In fact, every case of physical injury to person or property, caused by the negligent act of a ship, while such ship is in navigable water, should be held to fall within the jurisdiction of admiralty, regardless of the locality of the person or property so injured.

This should be held to be the rule in view of all the considerations, which have heretofore aided this court in its constructions of the Federal grant of admiralty jurisdiction; in view of the jurisdiction exercised anciently in England, as well as in this country during the Colonial period, and until the adoption of our Constitution, over the banks, shores and bottom soil of inland rivers and creeks and property located thereon; and in view also of the evident intent of the framers

of the Constitution, the words of the grant, the purposes of a separate system of maritime law and admiralty courts, and the objects on account of which admiralty jurisdiction was conferred upon the Federal courts, as well as the principles underlying the creation of the maritime lien, and the demands of reason and convenience.

Mr. Harvey D. Goulder and *Mr. Frank S. Masten,* with whom *Mr. S. H. Holding* was on the brief, for appellee.

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

The certificate below included the libel in full and certified four questions; but we are not called upon to answer them *seriatim,* and must determine the case on our conclusion as to whether the record discloses a maritime tort justifying the exercise of admiralty jurisdiction.

In *The Plymouth,* 3 Wall. 20, Mr. Justice Nelson, delivering the opinion of the court, said that the true meaning of the rule of locality in cases of maritime torts was that the wrong must have been committed wholly on navigable waters, or, at least, the substance and consummation of the same must have taken place upon those waters to be within the admiralty jurisdiction. A substantial cause of action arising out of the wrong must be complete within the locality on which the jurisdiction depended. *Ex parte Phenix Insurance Company,* 118 U. S. 610.

In *Johnson* v. *Chicago & Pacific Elevated Company,* 119 U. S. 388, the jib-boom of a vessel towed by a steam tug in the Chicago River, at Chicago, struck a building on land through the negligence of the tug and caused damage to it, and it was held that the cause of action was not a maritime tort of which the admiralty court of the United States would have jurisdiction. And Mr. Justice Blatchford said (p. 397): "Under the decisions of this court in *The Plymouth,* 3 Wall. 20, and in *Ex parte Phenix Insurance Company,* 118 U. S. 610, at the

present term, it must be held that the cause of action in this case was not a maritime tort of which a District Court of the United States, as a court of admiralty, would have jurisdiction; and that the remedy belonged wholly to a court of common law; the substance and consummation of the wrong having taken place on land, and not on navigable water, and the cause of action not having been complete on such waters."

It is unnecessary to cite the numerous cases to the same effect to be found in the books. The rule stated has been accepted generally by bench and bar, and has never been overruled, though counsel express the hope that it may be because of our decision in *The Blackheath*, 195 U. S. 361. In that case Mr. Justice Brown, in concurring, announced the view that the effect of the decision was to overrule what had previously been laid down in the cases we have cited. But the court held that the opinion was not opposed to the prior adjudications, and, without entering into the elements of distinction between that case and *The Plymouth*, said (p. 367): "It is enough to say that we now are dealing with an injury to a Government aid to navigation from ancient times subject to the admiralty, a beacon emerging from the water, injured by the motion of the vessel, by a continuous act beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea."

The case was a libel *in rem* against a British vessel for the destruction of a beacon, number 7, Mobile ship channel lights, caused by the alleged negligent running into the beacon by the vessel. The beacon stood fifteen or twenty feet from the channel of Mobile River, or bay, in water twelve or fifteen feet deep, and was built on piles driven firmly into the bottom. The damage was to property located in navigable waters, solely an aid to navigation and maritime in nature, and having no other purpose or function.

In the present case damage to shore dock, and to bridge, protection piling and pier, by a vessel being forced against

each of them by the vessel proceeded against, as well as damage to shore dock, abutment, protection piling, pier and dock foundation by a wash said to be due to the increased current arising from partial damming of the stream by the three vessels, brought into such position by the alleged fault of the vessel proceeded against, was sought to be recovered. But the bridges, shore docks, protection piling, piers, etc., pertained to the land. They were structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such.

The proposition contended for is that the jurisdiction of the admiralty court should be extended to "any claim for damages by any ship," according to the English statute; but we are not inclined to disturb the rule that has been settled for so many years because of some supposed convenience.

Unless we do that, this decree must be affirmed and

It is so ordered.

THE TROY.[1]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

No. 232. Submitted December 20, 1907.—Decided February 24, 1908.

Cleveland Terminal Co. v. *Steamship Co.*, *ante*, p. 316, followed to effect that the admiralty does not have jurisdiction of a claim for damages to a bridge which, although in navigable waters, is so connected with the land that it immediately concerns commerce on land.

THE facts are stated in the opinion.

[1] Docket title, No. 232, Duluth & Superior Bridge Company *v.* Steamer "Troy," her Boilers, Engines, etc.

Mr. Charles E. Kremer and *Mr. John A. Murphy* for appellant.

Mr. Harvey D. Goulder, Mr. Frank S. Masten, Mr. H. A. Kelley, Mr. H. R. Spencer and *Mr. S. H. Holding* for appellee.

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

The Duluth and Superior Bridge Company owned and operated a bridge between the cities of Duluth, Minnesota, and Superior, Wisconsin, over the St. Louis River, a navigable stream. The bridge was equipped with a swinging span, supported on a turntable resting on a base of stone and piles driven into the bottom of the river, leaving a space for the passage of vessels on either side of the supporting structure. When closed its ends rested upon permanent abutments, forming a passageway over the stream for street cars and foot passengers, and when opened allowing the passage of the largest lake steamers.

On August 11, 1906, the merchant steamer Troy, inbound, struck the center pier protection and glanced into the draw of the bridge, inflicting heavy damage. The bridge company filed a libel against the Troy in the District Court for the Western District of Wisconsin in admiralty, claiming large damages. The Western Transit Company, owner of the Troy, filed exceptions to the libel, as follows:

"1st. That it appears from the averments of the libel that the bridge alleged to have been injured was a structure on land, for purposes of land travel and convenience exclusively, not erected, maintained or operated in any sense or in any degree in aid of navigation, but, on the contrary, an obstruction and impediment to the navigation of a public navigable water channel and highway, a part of the public waters of the United States, then and there navigable to ships engaged in commerce and navigation.

"2d. That whatever of damage came to the bridge occurred

on land, and no part of the same occurred or was suffered on water in place or manner within the jurisdiction of an admiralty court of the United States.

"3d. That the claim of damage propounded in the libel fails to show a case within the admiralty jurisdiction of this honorable court, according to the grant of such jurisdiction in the Constitution of the United States and the course and practice in admiralty courts of the United States."

The court sustained the exceptions and dismissed the libel with costs, whereupon the case was brought by appeal to this court, the question of jurisdiction being certified.

The Cleveland Terminal & Valley Railroad Company v. *The Cleveland Steamship Company, ante,* p. 316, just decided, involved substantially the same questions of jurisdiction that are involved in this case. There the steamer Reis collided with the center protection of a bridge located in the navigable channel of the Cuyahoga River and injured it, and at the same time the abutment or shore end of the bridge, and the wharf or dock in the vicinity. In that case the bridge itself was not injured, while in this case the center protection and bridge were both injured. The views we have expressed in that case must govern the disposition of this case, and the

Decree is affirmed.

ARMSTRONG, AS LIQUIDATOR OF BOYSEN & COMPANY, *v.* FERNANDEZ.

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

No. 114. Submitted January 17, 1908.—Decided February 24, 1908.

The power of the bankruptcy court over amendments is undoubted and rests in the discretion of the court. In this case that discretion was not abused in allowing amendments adding the name of the place to the jurat of the justice of the peace taking the verification, and an averment that the person proceeded against in bankruptcy did not come within the excepted classes of persons who may not be declared bankrupts.

Where the record of a proceeding to have a person declared a bankrupt shows that detailed findings of the commission of acts of bankruptcy could have been supported by the evidence, the presumption is that such findings would have been made had appellant so requested; and, in the absence of such a request, the general finding that the party could be declared, and was adjudged, a bankrupt is sufficiently broad to cover any question involved upon the evidence as to the bankrupt's occupation and the commission of acts of bankruptcy.

APPELLEES, residing in Juana Diaz, Porto Rico, filed on the twenty-ninth day of March, A. D. 1906, their petition in duplicate, praying that Pascasio Alvarado, also of Juana Diaz, be adjudged a bankrupt. They averred that Alvarado had, for the greater portion of six months next preceding the filing of the petition, his principal place of business at Juana Diaz, and owed debts to the amount of a thousand dollars, and that petitioners were his creditors and had provable claims amounting in the aggregate, in excess of securities held by them, to the sum of five hundred dollars, the nature and amount of each of said claims being specified.

The petition further stated "that said Pascasio Alvarado is insolvent, and that within four months next preceding the date of this petition the said Pascasio Alvarado committed an act of bankruptcy, in that he did heretofore, to wit, on the

twenty-eighth day of February, A. D. 1906, permit and suffer several of his creditors, to wit, Alberto Armstrong *et al.* to secure and obtain an advantage through legal proceedings over his creditors, in that he suffered and permitted the said —— to attach all of his properties and interest, real and personal, by virtue of a writ of *fieri facias* issued out of the United States District Court for Porto Rico on January 20, A. D. 1906, on a judgment rendered in the above said court at the January Term, A. D. 1906, in favor of the said Alberto Armstrong *et al.* and against the said Pascasio Alvarado. And your petitioners further represent that within four months next preceding the date of this petition, the said Pascasio Alvarado did commit another act of bankruptcy in that he did, heretofore, to wit, on the fourteenth day of March, 1906, in a letter addressed to Eduardo Fernandez, one of the petitioners, admit his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

Alvarado was served with process March 30, returnable April 13, and on April 24 an order was made by the clerk of the court reciting the absence of the judge from the division of the district, and referring the petition to a referee in bankruptcy in the city of Ponce and District of Porto Rico.

On the twenty-eighth of April counsel for Armstrong, as liquidator of the firm of Boysen & Company, creditors of Alvarado, moved the referee to dismiss the petition because of the defectiveness of verification. The alleged defect was because the justice of the peace who took the jurat had omitted to attach to his signature of "justice of the peace" the words "of Juana Diaz, Porto Rico."

On the eighth of May the referee overruled a motion to amend and dismissed the petition with costs. Afterwards he filed in the clerk's office an order, dated July 6, stating that a motion for rehearing had been granted, and setting aside the order of dismissal, at the same time directing that the amendment might be made.

Thereafter, July 16, 1906, motion was made by counsel for

Armstrong and others in the District Court, before the judge thereof, to set aside the order of the referee dated July 6, whereupon the court set aside the clerk's order of reference and ordered the case back for further proceedings. And then the court denied the motion of counsel for Armstrong *et al.*, and gave the petitioning creditors until the eighteenth to amend their petition in the matter of the verification. On the seventeenth of July the amendment was made by inserting after the words "justice of the peace," at the close of the verification, the words "of Juana Diaz, Puerto Rico;" and the justice of the peace so certifying.

July 18, Armstrong's attorneys again moved to dismiss on the ground that the petition did not make the averment that the alleged bankrupt did not come within the excepted classes of persons who might not be declared bankrupt. This motion was denied by the court, and the petitioning creditors were allowed to amend in the particular named.

The amendment was made so as to aver that Pascasio Alvarado "is not a wage earner nor a person engaged chiefly in farming or the tillage of the soil, and who is chiefly engaged in commercial business."

July 19, Armstrong and others by answer denied "the allegations of the involuntary petition that the alleged bankrupt does not come within the excepted classes of the bankruptcy act and that he has committed the acts of bankruptcy therein alleged."

On the same day the court heard the testimony of the petitioning creditors, Fernandez *et al.*, "upon the issue raised by said answer." At its conclusion counsel for opposing creditors moved that the petition be dismissed, which motion was denied. Then the court heard "the testimony offered by the opposing creditors, and at the conclusion of all the testimony overrules said answer and denial, and directs that a proper order of adjudication and reference be prepared, to which counsel for Armstrong *et al.* except."

The order of adjudication was thereupon entered.

An appeal to this court was prayed and allowed, and errors assigned to the effect that the referee in bankruptcy erred in granting a rehearing by his order of July 6; that error was committed in refusing to annul that order of the referee; that the court also erred in overruling the motion of July 18, to dismiss the petition; and that the court erred in adjudicating Alvarado a bankrupt.

The district judge filed findings of fact and conclusions of law under General Order XXXVI as follows:

"On July 16, 1906 when the present incumbent of this bench held his first term of court at Ponce in this district, the above-entitled matter came on for hearing, and it developed that the petition for involuntary bankruptcy had theretofore been duly filed and sent out to the referee, who, it appears, had first dismissed the petition for informality as to the verification thereof, but thereafter rescinded his order in that regard and permitted the petition to stand. On this state of affairs, Armstrong & Company, in open court, moved that the petition be dismissed for improper verification, in accordance with the first action of the referee. Other creditors resisted this motion. The court thereupon entered an order recalling the matter from the hands of the referee, and in open court permitted the verification *nunc pro tunc* to be corrected and the petition to be considered as filed, as thus amended. Then the question as to whether or not the defendant was a person 'engaged chiefly in agriculture or the tillage of the soil' was raised by Armstrong & Co., and on the decision of which would depend the right of the court to declare him a bankrupt at all. On this question the court gave the parties opportunity to procure evidence, and set the case down for a succeeding day for that purpose, and did, at the time fixed, hear evidence pro and con on the subject. From the evidence thus adduced the following facts appear:

"That Pascasio Alvarado is now a feeble old man living at Juana Diaz near said Ponce with his sons, one of whom conducts his business, which it appears is being wound up;

that for more than twenty-five years last past he has been engaged in conducting a large mercantile business at said place, and that he kept a stock of goods ranging from twenty-five thousand dollars upwards, continuously, and was well known to the wholesale merchants of Europe, and perhaps of the United States; that during the last two years he has been, or at least his sons for him have been, engaged in selling out the remainder of his stock of goods and in endeavoring to collect the debts belonging to the estate, in cash and in coffee and other products; that at the time the business was put into liquidation and his son took charge of it, and since, the estate was in possession, or *quasi* possession, of several pieces of land under mortgage, which it collected payments from in the way of portions of the coffee and other crops raised, and perhaps the estate was the absolute owner of some small portion of land itself, on which some coffee is raised. Most of the evidence thus taken is transmitted herewith, duly certified. The court, of course, had the benefit of the full record of the case and of the arguments of counsel and statements made in open court at the time.

"The court held on this evidence, that the defendant was not a 'wage earner or a person chiefly engaged in the tillage of the soil,' but that he was, and is, a merchant, and that all the debts he owes, were created as a merchant, and that he could, therefore, be declared a bankrupt, and so held. From this action of the court, Armstrong & Co., who have some attachment or other liens on some of his estate, not four months old at the time of the filing of the petition, have appealed."

Mr. N. B. K. Pettingill and *Mr. Harry P. Leake* for appellant:

Neither the referee nor the court had any jurisdiction to reinstate the cause after the order of dismissal made by the referee on May 8, 1906, which was as authoritative and final as though made by the judge himself. *Neustadter* v. *Chicago &c. Co.*. 96 Fed. Rep. 830; *In re T. L. Kelly Dry Goods Co.*, 102 Fed. Rep. 747; *In re Rosenburg*, 116 Fed. Rep. 402.

The court below should have granted the motion of appellant, made July 18, 1906, to dismiss the amended petition of appellees.

As evidence was taken on the first ground set out in the motion and the court found as a fact that the petition had been filed in duplicate and ordered its records amended accordingly, this court will not review that ground. The second ground of the motion, however, was well taken. While at the beginning one or two decisions leaned toward the position that the exception of the statute regarding the occupation of the alleged bankrupt need not be negatived in the petition, the great weight of later authorities is with our contention. *In re Mero*, 128 Fed. Rep. 630; *In re Callison*, 130 Fed. Rep. 987; *In re Brett*, 130 Fed. Rep. 981; *In re White*, 135 Fed. Rep. 199; *Rise* v. *Bordner*, 140 Fed. Rep. 566; *In re Taylor*, 42 C. C. A. 1.

The court below erred in its determination of the issue raised by the answer of appellant to the creditors' petition. Three issues were made in appellant's answer:

Whether the bankrupt was within the exceptions of the statute, that is, was a wage-earner or a person engaged chiefly in farming or the tillage of the soil; whether he had committed an act of bankruptcy by permitting appellant to obtain an execution against him; and whether he had committed an act of bankruptcy by admitting his inability to pay his debts and his willingness to be adjudged a bankrupt.

Upon this issue it devolved upon the petitioning creditors to prove the negative of the first proposition—and the affirmative of either the second or the third.

The burden of proof is on the petitioning creditors to prove the allegations of their petition. *In re Pilger*, 118 Fed. Rep. 206; *In re McLaren*, 125 Fed. Rep. 835; *In re Doddy, Jourdan & Co.*, 127 Fed. Rep. 771; *Jones* v. *Burnham et al.*, 71 C. C. A. 240.

The allegations touching the second proposition were altogether insufficient to constitute an act of bankruptcy, even if proved, because not only must it be alleged that execution has

been issued against the bankrupt's property, but that it is within five days of sale thereunder, and the bankrupt has not yet vacated or discharged it. *Seaboard Co.* v. *W. R. Trigg Co.*, 124 Fed. Rep. 75; *In re Vastbinder*, 126 Fed. Rep. 417.

There is neither finding nor evidence that the alleged bankrupt had committed either act of bankruptcy alleged or any act of bankruptcy whatever. In the absence of such proof, which it was the duty of petitioning creditors to furnish, there could have been but one proper finding, that Alvarado was not a bankrupt.

No counsel appeared for the appellees.

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

This is an appeal from a court of bankruptcy, "not within any organized circuit of the United States," from a judgment adjudging Pascasio Alvarado, a bankrupt under § 24*a* and § 25*a* of the bankruptcy act, and General Order XXXVI, 3.

The errors assigned in reference to the action of the referee and of the court in permitting the amendment of the verification and other amendments we regard as without merit. The power of a court of bankruptcy over amendments is undoubted and rests in the sound discretion of the court. We think there was no abuse of discretion here and that the court was fully justified in its orders in reference to amendments.

Nor do we see any reason to question the conclusion of the District Court "that the defendant was not a 'wage earner or a person chiefly engaged in the tillage of the soil,' but that he was, and is, a merchant, and that all the debts he owes were created as a merchant, and that he could therefore be declared a bankrupt."

The appellant Armstrong now contends, however, that the petitioning creditors "lost sight of every controversy except that as to the occupation of the bankrupt, and that the court

later also made the same error, as there is neither finding nor evidence that the alleged bankrupt had committed either act of bankruptcy alleged, or any act of bankruptcy whatever."

The acts alleged were that Alvarado permitted Armstrong to obtain an execution against him; and also that Alvarado admitted in a letter addressed to Fernandez "his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

And the record shows that the court heard testimony on behalf of Fernandez and others, petitioning creditors, as to the commission of the acts of bankruptcy as well as to the occupation of the bankrupt. The court then denied Armstrong and others' motion to dismiss, and heard testimony on their behalf, and at the conclusion of all the testimony directed the order of adjudication. From that order of adjudication this appeal was prayed, but it nowhere appears that Armstrong and others objected to the want of proof of the acts of bankruptcy or asked any findings in respect thereto, or objected to the findings that were made for deficiencies in that regard. In other words, Armstrong and others permitted the findings to be made as they were, and now say that other findings should have been made in relation to proof of acts of bankruptcy, without having objected that they were not made, or that the findings as made were on that account fatal to the judgment. The presumption is that if such a suggestion had been made to the court, the alleged deficiencies, if really existing, could have been supplied and would have been supplied. But the record and the certificate of the judge leave no doubt that the petition as to acts of bankruptcy was sustained by the facts.

The last error assigned is that the District Court erred in finding from the evidence offered on July 19, 1906, "upon the issue between said petitioning creditors and these opposing creditors that said Pascasio Alvarado should be adjudged a bankrupt and in so adjudging him," and that, of course, was broad enough to cover any question involved upon the evi-

dence; but we think that that was intended to cover the finding as to Alvarado's being a merchant and not a wage earner, etc., and therefore susceptible of being declared a bankrupt.

The findings of fact and conclusions of law made by the district judge for transmission to this court, under the general order in that regard, set forth, among other things, that, after the petition was amended, "Then the question as to whether or not the defendant was a person 'engaged chiefly in agriculture or the tillage of the soil' was raised by Armstrong & Co., and on the decision of which would depend the right of the court to declare him a bankrupt at all. On this question the court gave the parties opportunity to procure evidence, and set the case down for a succeeding day for that purpose, and did, at the time fixed, hear evidence pro and con on the subject." And from that evidence the court stated the facts which appeared, and his finding and conclusion that Alvarado was a merchant, etc.

It seems clear that the acts of bankruptcy had been previously determined as committed and that the case was only contested on the other point, and hence that this contention is an afterthought, which ought not to be entertained, let alone that from the findings that were made it is obvious enough that Alvarado was in liquidation and might properly be adjudged a bankrupt.

Decree affirmed.

UNITED STATES v. LARKIN, INTERVENOR AND CLAIMANT.

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

No. 356. Argued January 7, 8, 1908.—Decided February 24, 1908.

Where the Circuit Court of Appeals has already affirmed the judgment of the District or Circuit Court, a writ of error from this court to the District or Circuit Court to review the judgment on the jurisdictional ground cannot be maintained unless the proceedings in the Circuit Court of Appeals were absolutely void.

Ordinarily a formal certificate is essential and it must be made at the same term at which the judgment is rendered; but where the record shows that the only matter tried and decided, and sought to be reviewed, was one of the jurisdiction of the court, the question of jurisdiction is sufficiently certified.

District Courts of the United States are the proper courts to adjudicate forfeitures, and where the plea to the jurisdiction is simply whether the particular court has jurisdiction, by reason of the locality in which the goods were seized, the question involved is not the jurisdiction of the United States court as such, and the question cannot be certified to this court under § 5 of the Judiciary Act of 1891; but the case is appealable to the Circuit Court of Appeals.

When the question of the jurisdiction of the District or Circuit Court as a court of the United States is in issue, and is certified to this court under § 5 of the Judiciary Act of 1891, no other question can be considered and the jurisdiction of this court is exclusive; as to the other classes of cases enumerated in § 5 the act of 1891 does not contemplate separate appeals or writs of error on the merits in the same case and at the same time to two appellate courts.

THIS was an informtion filed on behalf of the United States, June 8, 1905, in the District Court for the Northern District of Ohio, for the forfeiture of certain jewels which, it was set forth, had been fraudulently imported into the United States without the payment of duty, and that, upon May 19, 1905, the jewels so smuggled had been seized by Charles F. Leach, collector of the District of Ohio, within the said district.

July 5, 1905, Adrian H. Larkin, being interested as a claim-

ant, came in and, entering his appearance specially, filed his plea therein to the jurisdiction of the court below to adjudicate the forfeiture of said jewels. To this plea a demurrer was filed, which, upon argument, was overruled. A reply to the plea was then filed, and to this reply Larkin demurred, and the demurrer was sustained. The Government, declining to amend its reply or plead further, the court, May 22, 1906, sustained the plea and dismissed the information.

The district judge expressed the opinion that "considering the circumstances under which the collector of customs obtained possession of the articles of jewelry which are the subject of this action, as shown by the statement of facts, and especially by the receipt which the collector gave for them, it is quite apparent that no seizure of them could be made in this district."

The United States prayed an appeal to the United States Circuit Court of Appeals for the Sixth Circuit, which was allowed, and the appeal was duly prosecuted. April 5, 1907, a judgment was entered by that court affirming the decision of the United States District Court, and an opinion was filed, which is reported in 153 Fed. Rep. 113. The mandate from the Circuit Court of Appeals and the opinion of that court were filed below May 7, 1907.

On the same day Larkin applied to the District Court for an order for the delivery of the property to him. Before this was acted on the United States, May 21, 1907, petitioned that court for a writ of error from the Supreme Court of the United States, which was allowed notwithstanding the proceedings and judgment in the Circuit Court of Appeals, and the court certified "that the judgment and decree herein was based solely on the ground that the District Court of the United States for the Northern District of Ohio, on the facts as they appear by the record, had no jurisdiction in the premises."

It appeared from the pleadings that the articles against which this proceeding in forfeiture was begun were illegally imported through the port of New York, and were subse-

quently found in the State of New York and in the possession of Larkin as bailee. They had been pledged to one Friend, and he, learning that a claim had been made that the articles had been illegally and surreptitiously imported through the port of New York, visited the Secretary of the Treasury and disclosed his possession of the same and his rights, and agreed with the Secretary that the same should be kept in the city of New York, open to the inspection and examination of any official of the department. Friend, not being himself a resident of New York, placed them in the custody of Larkin as bailee and attorney, with authority to conduct any transactions with the Treasury Department growing out of the claim that they had been fraudulently imported.

At the request of the department, Mr. Leach, collector of customs at Cleveland, went to New York for the purpose of examining the articles and determining by inspection whether they had been illegally imported and whether they were subject to seizure and forfeiture. He applied to Larkin to be allowed an inspection and this was permitted.

The plea then stated that Leach informed said Larkin that certain of said jewelry had not been wrongfully imported and that he did not care to make further examination thereof, but that certain of said pieces he was in doubt about and would like to exhibit them to a person located in New York City, who was expert in such matters, for his opinion, and asked permission to take the jewelry away from Larkin's office for that purpose, he agreeing to return the same to Larkin at his office, in New York City, on the afternoon of that day. Thereupon Larkin, relying upon the promise and agreement of Leach, delivered the property into his possession and custody, receiving from Leach a receipt therefor in writing, which read: "New York, March 14, 1905. Received of A. H. Larkin, attorney for J. W. Friend, the following pieces of jewelry, for examination and identification:" (Then followed list of jewelry.) The receipt was signed "Chas. F. Leach, Collector of Customs."

The plea then averred that Leach, in violation of his agree-

ment, carried the articles to Cleveland. That from there he returned certain articles to Larkin as not subject to seizure, and assumed to seize the remainder at Cleveland, and then caused this proceeding in forfeiture to be instituted in the District Court for the Northern District of Ohio. After demurrer to the plea had been overruled the district attorney replied, but in the view taken of the case it is unnecessary to restate the contents of that reply. The district judge said: "An examination of the reply discloses practically the same question as that which was heretofore presented on the demurrer to the plea." The Circuit Court of Appeals held the reply to be evasive and not to deny the substantial averments of the plea, and said: "We quite agree with the court below that under the circumstances of this case, these jewels were not subject to seizure in Cleveland, but should have been seized in the District of New York. The articles were found in the latter district, and should have been seized there."

Mr. Assistant Attorney General Sanford, with whom *The Solicitor General* was on the brief, for plaintiff in error:

Upon the record in this case it is not essential to a review of the jurisdictional question by this court that the court below should have certified the question of jurisdiction at the term at which the judgment was rendered.

Where the judgment and record below, upon its face, makes it clearly apparent that the only question tried and decided below and brought to this court for review, is one of jurisdiction, no certificate is necessary, and in such case the writ of error or appeal may be prosecuted at any time within two years from the date of final judgment. *Excelsior Company* v. *Bridge Company,* 185 U. S. 285; *Petri* v. *Lumber Company,* 199 U. S. 487. *Colvin* v. *Jacksonville,* 158 U. S. 456, distinguished.

The jurisdiction of the court below was in issue within the meaning of § 5 of the Judiciary Act of March 3, 1891.

The District Court sustained the demurrer to the reply to the plea to the jurisdiction and dismissed the suit on the spe-

cific ground that no lawful seizure had been made in the northern district of Ohio. In an action *in rem* brought to enforce the forfeiture of merchandise seized upon the land, it is essential that it shall have been seized within the district in which the proceedings are brought, irrespective of the place in which the cause of forfeiture arose, and that unless seized within the district the court has no jurisdiction of the action. *Keene* v. *United States*, 5 Cranch, 303; *The Brig Ann*, 9 Cranch, 288; *The Abby*, 1 Mason, 360; *S. C.*, Fed. Cas. 14; *The Little Ann*, 1 Paine, 40; *S. C.*, Fed. Cas. 8,397; *The Octavia*, 1 Gall. 488; *S. C.*, Fed. Cas. 10,422; *The Washington*, 4 Blatchf. 101; *S. C.*, Fed. Cas. 17,221.

This rule is analogous to the well settled rule that in actions *in personam*, the question whether the court acquired jurisdiction of the defendant by proper service of process is one involving the jurisdiction of the court within the meaning of section 5 of the Judiciary Act of 1891. *Shepard* v. *Adams*, 168 U. S. 618; *Remington* v. *Railroad Company*, 198 U. S. 95; *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424.

The present writ of error is not affected by the former appeal to the Circuit Court of Appeals.

Where the jurisdiction of the court below was the sole question in issue, and this issue was decided in favor of the defendant, thus disposing of the entire case, the plaintiff's appeal or writ of error must be taken under § 5 of the act of March 3, 1891, directly to this court, and if taken to the Circuit Court of Appeals the proceedings in that court are a nullity. *United States* v. *Jahn*, 155 U. S. 109; *Excelsior Company* v. *Bridge Company*, 109 Fed. Rep. 497; *S. C.*, 185 U. S. 282; *Petri* v. *Lumber Company*, 127 Fed. Rep. 1021; *S. C.*, 199 U. S. 487; *Union and Planters' Bank* v. *Memphis*, 189 U. S. 71; *In re Aspinwall*, 90 Fed. Rep. 675.

Mr. H. H. McKeehan for defendant in error. *Mr. A. C. Dustin* was on the brief.

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

The question is presented at the threshold of the case as to whether or not the proceedings in the Circuit Court of Appeals for the Sixth Circuit and the judgment therein rendered were absolutely void for want of jurisdiction. If they were not, this writ of error cannot be maintained, as judgments of the Circuit Courts of Appeals cannot be reviewed in this way.

Plaintiffs in error grounded their application as coming within the first of the classes of cases enumerated in § 5 of the Judiciary Act of 1891, c. 517, 26 Stat. 826, 827, in which appeals or writs of error may be taken directly to this court, and which reads: "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

The word "jurisdiction," as used in that paragraph, is, as Judge Taft said, in *United States* v. *Swan*, 65 Fed. Rep. 647, 649, applicable to "initial questions of the jurisdiction of a United States District or Circuit Court, whether in law or equity, over the subject matter and parties, and not to questions whether a court of equity or of law is the proper forum for the working out of rights properly within the particular Federal jurisdiction for adjudication;" and it has long been settled that it is the jurisdiction of the United States courts as such which is referred to. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Blythe* v. *Hinckley*, 173 U. S. 501; *Mexican Central Railroad Company* v. *Eckman*, 187 U. S. 429, 432.

Ordinarily a formal certificate is essential, and it must be made at the same term as that at which the judgment is rendered. *Maynard* v. *Hecht*, 151 U. S. 324; *Colvin* v. *Jacksonville*, 158 U. S. 456. But where the record shows that the only matter tried and decided in the Circuit Court was one of jurisdiction, and the petition upon which the writ of error was allowed asked only for a review of the judgment that the court

had no jurisdiction of the action, the question of jurisdiction alone is sufficiently certified. *Shields* v. *Coleman*, 157 U. S. 168; *Interior Construction & Improvement Company* v. *Gibney*, 160 U. S. 217; *Smithers* v. *Smith*, 204 U. S. 632; *Petri* v. *Creelman Lumber Company* 199 U. S. 487; *Wetmore* v. *Rymer*, 169 U. S. 115. The formal certificate in this case was not made at the term at which judgment was rendered, and came too late; but the judgment itself was rendered upon the holding that there was no lawful seizure in the Cleveland district, and there must be such a seizure in order to sustain the jurisdiction of that particular District Court. Rev. Stat. § 734. Doubtless this was no case for a certificate, and the judgment itself proceeded on the ruling as to the existence of seizure at Cleveland. District Courts are the proper courts of the United States to adjudicate forfeiture, and the question involved was not the jurisdiction of the United States courts as such, but whether this District Court had jurisdiction or the District Court for the Southern District of New York.

It was not, and could not be, contended that some District Court of the United States was not the proper court to adjudicate on the question of forfeiture, but to make a case within the jurisdiction of a particular District Court there must be a lawful seizure within that district. The District Court held here that there was no seizure in the Cleveland district and dismissed the information for that reason. That question was submitted on error to the Circuit Court of Appeals for the Sixth Circuit, and the judgment of the District Court was affirmed. The question, therefore, of the right of the collector to seize these particular goods in Cleveland has been finally determined, and no reason is perceived for holding that the Circuit Court of Appeals did not have jurisdiction to render its judgment. Whether that judgment was correct or not is therefore not open to consideration on this writ.

Where the question of the jurisdiction of the Circuit or District Court of the United States as a court of the United States is in issue, and is certified to this court under § 5 of the act of

1891, whereby no other question can be considered, our jurisdiction is exclusive, *American Sugar Refining Company* v. *New Orleans*, 181 U. S. 277, but this is not necessarily so as to the other classes of cases enumerated in that section. And as to these classes it has been repeatedly held that the act of 1891 did not contemplate several separate appeals or writs of error on the merits in the same case and at the same time to two appellate courts. *McLish* v. *Roff*, 141 U. S. 661; *Robinson* v. *Caldwell*, 165 U. S. 359; *Columbus Construction Company* v. *Crane Company*, 174 U. S. 600; *Cincinnati, Hamilton & Dayton Railroad Company* v. *Thiebaud*, 177 U. S. 615; *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472.

Inasmuch as in our opinion the controversy here did not involve the jurisdiction of the District Court as a Federal court, the case was appealable to the Circuit Court of Appeals, and the writ of error from this court directly cannot be maintained.

Writ of error dismissed.

DICK *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

No. 62. Submitted December 3, 1907.—Decided February 24, 1908.

While a State, upon its admission to the Union, is on an equal footing with every other State and, except as restrained by the Constitution, has full and complete jurisdiction over all persons and things within its limits, Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of the State within whose limits are Indian tribes.

Where fundamental principles of the Constitution are of equal dignity, neither must be so enforced as to nullify or substantially impair the other.

While the prohibition of § 2139, Rev. Stat., as amended in 1892, against introducing intoxicating liquors into Indian country does not embrace any body of territory in which the Indian title has been unconditionally extinguished, that statute must be interpreted in connection with whatever special agreement may have been made between the United States

and the Indians in regard to the extinguishment of the title and the retention of control over the land ceded by the United States.

It is within the power of Congress to retain control, for police purposes, for a reasonable and limited period, over lands, the Indian title to which is extinguished, and which are allotted in severalty, notwithstanding that the Indians may be citizens and the land may be within the limits of a State; and twenty-five years is not an unreasonable period.

Under the agreement of May 1, 1893, ratified, 28 Stat. 286, 326, between the United States and the Nez Perce Indians, the United States retained control over the lands ceded for the purpose of controlling the use of liquor therein for twenty-five years, and during that period § 2139, Rev. Stat., remains in force, notwithstanding such lands are within the State of Idaho.

By indictment returned in the District Court of the United States for the District of Idaho, the plaintiff in error, Dick, was charged with the offense of having unlawfully and feloniously introduced intoxicating liquor, whiskey, into the Indian country, to wit, into and upon the Nez Perce Indian Reservation, in the county of Nez Perce, State of Idaho.

The indictment was based upon § 2139 of the Revised Statutes as amended and reënacted by the act of July 23, 1892, 27 Stat. 260, c. 234. That amended section reads: "No ardent spirits, ale, beer, wine or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the *Indian country*. Every person who sells, exchanges, gives, barters or disposes of any ardent spirits, ale, beer, wine or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the *Indian country* shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. . . ."

The accused demurred to the indictment upon the following

among other grounds: That at the time charged in the indictment there was no Indian country within the county of Nez Perce or within the District of Idaho, known or designated as the Nez Perce Indian Reservation; that the jurisdiction of the United States over all the country and territory embraced within the former reservation known and designated as the Nez Perce Indian Reservation was, by the act admitting Idaho as a State into the Union, relinquished to the State of Idaho, excepting only that jurisdiction was retained in the United States over such Indian reservation until the Indians' title to the lands included within the boundary of such reservation should be extinguished; that the Indian or tribal title to the lands therein contained has, since the admission of the State, been extinguished by the allotment of the lands in severalty to the individual Indians and by the purchase of the balance thereof by the United States, and that such allotments and purchase have been ratified by the public laws and acts of Congress; and further, that the former reservation known and designated as the Nez Perce Indian Reservation had, prior to the time of the commission of the acts mentioned in the indictment, been opened for occupation, settlement and disposal under the general land laws of the United States by an act of Congress, and that the same had been, as a matter of general and public knowledge, prior to the time mentioned in the indictment, settled and appropriated by citizens of the State; that various townsites within the boundaries of the former reservation had been settled by citizens and that title thereto transferred from the United States to the inhabitants, and that municipal governments, namely, villages, had been organized and were in existence within the boundaries of the former reservation, and that the same, nor any part thereof, is not, and was not, at the times mentioned in the indictment, Indian country, or lands reserved for the use and occupation of Indians or occupied by any Indian maintaining tribal relations or by any Indians or persons whomsoever over which the United States is exercising, or attempting to exercise, any of the au-

thority or control in nature of the guardianship of the person. Other grounds of demurrer were assigned, but they need not be here set out.

The demurrer was overruled, and the case went to trial, the accused pleading not guilty. At the close of the evidence he asked the court to direct a verdict of not guilty, but that request was denied and the result of the trial was a verdict of guilty. Motions for arrest of judgment and for a new trial having been denied, the defendant was, on May 16, 1905, sentenced to pay a fine of $100 and costs and to be imprisoned in the penitentiary for the term of one year and ten days.

In order that the grounds of the demurrer may be clearly apprehended it is necessary to bring into view certain legislation by Congress and an agreement or treaty made between the United States and the Nez Perce Indians.

By the act of Congress of February 8, 1887, c. 119, providing for the allotment of lands in severalty to Indians on the various Indian reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, it was provided: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same, by patent, to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, that the President of the United States may in any case, in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above

mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, that the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; . . ." 24 Stat. 389, § 5.

Section 6 of that act is as follows: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of the act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Idaho was admitted into the Union in 1890, act of July 3, c. 656, 26 Stat. 656, the act of admission containing no provision about Indian lands or reservations. But the constitution of Idaho, which Congress accepted, ratified and confirmed, contained this provision: "And the people of the State of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or

held by any Indians or Indian tribes; and, until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."

In the act of August 25, 1894, c. 290, 28 Stat. 286, 326, 327, 330, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes, will be found the provisions of an agreement between the Nez Perce tribe of Indians upon the Lapwai Reservation in Idaho, from which it appears that in making that agreement the parties proceeded under the authority of the above act of 1887. By that agreement the Indians ceded, sold, relinquished and conveyed to the United States all their claim, title and interest in and to all the unallotted lands within the limits of that reservation, except certain specified tracts, which they retained. The parties stipulated that the land so ceded should not be open for public settlement until trust patents for the allotted lands had been duly issued and recorded and the first payment made to the Indians. Article IX of that agreement has a particular bearing upon this case. It reads: "It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians." The agreement by its terms was not to take effect and be in force until ratified by Congress. It was accepted, ratified and confirmed by the above act of August 25, 1894, c. 290.

Mr. Frank E. Fogg for plaintiff in error:

The United States has no jurisdiction for the purposes of

local police control over territory within a State owned in fee by white citizens of such State, and not reserved for use and occupancy by Indians, nor for any government purpose whatsoever. In the present case the sale of liquor was made in a municipal territory clearly within the jurisdiction of the State and outside the jurisdiction of the United States. In these police matters there is no such thing as a divided sovereignty and jurisdiction is vested entirely either in the State or the Nation, and not divided between the two. See *In re Heff*, 197 U. S. 505, which controls this case, in which there exist even stronger reasons for denying to the United States jurisdiction in the premises, because even if the statute in question could be held constitutional, the acts charged do not constitute an offense under the statute.

The acts of Congress under which plaintiff in error was indicted exclude entirely lands that the Government had patented to white citizens without any restrictions whatsoever. By the very terms of the act under which the plaintiff in error was charged, even if the same could be held constitutional, the lands included within the village of Culdesac, the title to which had passed from the United States without restriction, are excluded from the term "Indian country," as contained in said act.

Congress by the act of ratifying the agreement with the Nez Perces, could not place any restrictions upon future legislation, amending or even abrogating the existing law in reference to the prohibition of the introduction of liquor.

The plenary power of Congress over tribal relations and lands cannot be limited by provisions of treaty so as to preclude future enactments, giving effect to the government policy in relation thereto. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

The effect and purpose of the agreement of May 1, 1893, with the Nez Perces was to break up the tribal relations; in fact, the United States, by the act of ratifying the said agreement with the Nez Perces, not only renounced its guardianship of the person and general property of every Indian of the former

Nez Perce tribe, but practically destroyed the very machinery by which the Indians could govern themselves. Unless the sixteen hundred Indians immediately become full citizens of the State of Idaho, and, in fact, subject to all its laws, both civil and criminal, upon the acceptance of land in severalty, as provided by the act of February 8, 1887, then they are without government or means of government; their political and civil status is an anomaly suspended in the air between the sovereignty of the State and the sovereignty of the Nation.

There is no such thing as qualified citizenship, for Congress cannot confer upon the Indians such citizenship as would entitle them to all the rights of citizens of the State where they were located, and at the same time deny to the State the right to subject them to the same complete and exclusive police control that it has over its other citizens. *In re Celestene*, 114 Fed. Rep. 551–553; *In re Now-goe-Zhuck*, 76 Pac. Rep. 877–880.

The contention of the Government that the United States has jurisdiction because of a clause in the treaty or agreement with the Nez Perce Indians ratified May 1, 1893, providing that the laws of the United States prohibiting the introduction of liquor into the Indian country shall remain in force over the land ceded for a period of twenty-five years, is entirely untenable. Congress was without constitutional authority to authorize such an agreement with the Indians or to ratify the clause in question. The effect of such an agreement would be to establish a divided sovereignty of certain definite territory and deprive the State of full police control of its own citizens within its own territory. It would seem, further, that in so far as it attempted to provide for the future police control of the territory ceded, that the clause is void for the additional reason, that it amounts to the Government bartering with its own citizens to place a limitation upon its future policy in regard to matters of mere police regulation. *Boyd* v. *Alabama*, 94 U. S. 650; *New York & N. E. E.* v. *Bristol*, 151 U. S. 567; *Holden* v. *Hardy*, 169 U. S. 392.

The Attorney General and *Mr. William R. Harr,* Special Assistant to the Attorney General, for defendant in error:

The *Heff Case,* 197 U. S. 488, is not controlling. The question there was as to the authority of Congress, *after* an Indian allottee had been made a citizen and put under the jurisdiction of the State, to exercise certain police jurisdiction over him. Here the question is as to the authority of Congress *before* that took place—if it has ever taken place—to reserve a limited jurisdiction over the ceded territory. In this case the matter of citizenship and subjection to state authority, and not the jurisdiction retained by Congress, is really in issue.

It was competent for Congress to stipulate that the lands ceded by the Nez Perces should be subject for a definite period to the laws of the United States regulating the introduction of liquor into the Indian country.

At the time the agreement of May 1, 1893 was made and ratified the Nez Perce Indian Reservation, being lands to which the Indian title had not been extinguished, was clearly Indian country within the meaning of the laws of the United States. By article IX of the agreement it is, in effect, declared that it shall continue to be Indian country for a period of twenty-five years. The authority of Congress so to provide is settled by the decisions of this court. *Bates* v. *Clark,* 95 U. S. 204; *United States* v. *Forty-three Gallons of Whiskey,* 93 U. S. 197, 198.

Even though the Nez Perces, having since received their allotments, should be held to be, by virtue of the act of February 8, 1887, citizens of the United States and subject to the laws of the State of Idaho, that fact does not necessarily impair the jurisdiction expressly retained by Congress to regulate the introduction of intoxicants upon the ceded lands for a specified period.

The stipulation in the agreement to that effect being within the competency of Congress, under the decision in the case last cited, notwithstanding the lands were embraced within the limits and general jurisdiction of the State, a subsequent

change in the political status of one or all of the Indians should not impair the validity of the stipulation or relieve the United States from its obligation or power to enforce it.

The power of Congress to make treaties with the Indian tribes is coextensive with its power to make treaties with foreign nations. *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 197, 198.

It is true that in the present case we have not a treaty made by the President by and with the consent of the Senate, but simply an agreement negotiated in pursuance of and ratified by act of Congress approved by the President. That fact seems, however, immaterial. The power of the United States to deal with the Indians is the same whether exercised by law or treaty. A treaty has no superior force or sanctity to an act passed in pursuance of the Constitution. Both are equally declared to be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. An act of Congress may repeal a treaty, and *vice versa*. *Foster* v. *Neilson*, 2 Pet. 253; *Chae Chan Ping* v. *United States*, 130 U. S. 581.

Congress may provide for the dissolution of Indian tribal governments and the incorporation of the Indians as citizens of the United States. In so doing it may attach conditions to its grant of citizenship. Its power in this respect is as broad and untrammeled as the power to admit new States into the Union. Qualified citizenship is not inconsistent with the provisions of the Constitution. *United States* v. *Rickert*, 188 U. S. 432; *In re Heff*, 197 U. S. 509.

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

From the above statement it appears:

That the lands allotted in severalty to Indians in conformity with the act of February 8, 1887, were to be held for the period of twenty-five years by the United States in trust for the sole

use and benefit of the Indian allottee or his heirs, when a formal patent was to be issued by the United States to the Indian or his heirs in fee, free from all charge or incumbrance whatever—such period subject to be extended by the President in his discretion;

That upon the completion of the allotments and patenting of the lands to the allottees, as in that act provided, every member of the respective bands or tribes of Indians to whom allotments have been made was to have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which he resided; also, that every Indian born within the United States, to whom an allotment was made under the act of 1887 or under any treaty, and every Indian born within the United States who had voluntarily taken up within such limits his residence separate and apart from any Indian tribe and adopted the habits of civilized life, was declared to be a citizen of the United States and entitled to all the rights, privileges or immunities of such citizens; and,

That by the agreement of 1893 with the Indians the lands thereby ceded, those retained, *and* those allotted to the Nez Perce Indians, were to be subject for the period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, should for a like period be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to the Indians. It also appears that at the date of such agreement it was made an offense against the United States, punishable by fine and imprisonment, for any one either to sell, exchange, give, barter or dispose of ardent spirits, ale, beer, wine or intoxicating liquor of any kind to any Indian under charge of an Indian superintendent or agent, or to introduce or attempt to introduce ardent spirits, ale, beer, wine or intoxicating liquor of any kind into the Indian country.

There are certain facts which the accused insists are decisive in his favor. They are as follows:

1. That the village of Culdesac, although within the boundaries of the Nez Perce Reservation as established before Idaho was admitted into the Union, was, at the time specified in the indictment, an organized village or town of that State.

2. The accused, Dick, is a Umatilla Indian who, at the date of the offense, held and for three years had held an allotment in severalty and also what is called a trust patent. On or about the thirteenth of March, 1905, he purchased at Culdesac five bottles of whiskey, the contents of two bottles of which he and some other Indians drank up. Part of the money paid for the whiskey was furnished by Te-We-Talkt, a Nez Perce Indian, living on the Nez Perce Reservation and holding an allotment and also a preliminary trust patent. Dick gave one bottle of the whiskey to Te-We-Talkt, but afterwards it was taken from the latter by the superintendent and acting agent of the Nez Perce Indians. The purchasing of the whiskey, the giving of the one bottle to Te-We-Talkt and the taking of that bottle from the latter all occurred within the limits of the village of Culdesac. Nothing happened in relation to the transaction outside of the village. The superintendent of the Nez Perce Indians testified: "I do not know of any reservation or any part of the reservation used for Government purposes or for Indian purposes within the boundary of the village of Culdesac. I have no idea there is any such reservation within such village. Culdesac is seven or eight miles from the exterior boundaries of the Indian school reservation."

3. The lands upon which the village of Culdesac is located were part of those ceded to the United States by the agreement of 1893 with the Indians, and before the above transaction in that village about whiskey occurred the title to such lands had passed by patent from the United States under the townsite laws to the probate judge of Nez Perce County, in trust for the inhabitants of the village. 141 Fed. Rep. 5, 7.

We need not stop to consider the scope, meaning or validity of that part of amended § 2139 of the Revised Statutes, which makes it an offense against the United States to sell, exchange,

give, barter or dispose of ardent spirits, ale, beer, wine or intoxicating liquors "to any Indian under charge of any Indian superintendent or agent." No case is here for trial under that clause of the statute; for, the only charge in the indictment is that the accused unlawfully and feloniously introduced intoxicating liquors into the "Indian country."

Section 2139, as amended and reënacted in 1892, makes it an offense against the United States for any one to introduce intoxicating liquors into the "Indian country," and the offense charged against Dick was the introduction by him of whiskey into that country on the fifteenth day of March, 1905. The transaction out of which the present prosecution arose occurred, as we have seen, within the village of Culdesac, a municipal organization existing under and by virtue of the laws of Idaho, and the parties involved in it were Dick and Te-We-Talkt, who were at that time Indian allottees in severalty and holders of trust patents, and therefore, according to the decision in *Matter of Heff*, 197 U. S. 488, citizens of the United States. If this case depended *alone* upon the Federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words "Indian country" to embrace any body of territory in which, at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction of the State, for all purposes of government, was full and complete. *Bates* v. *Clark*, 95 U. S. 204; *Ex parte Crow Dog*, 109 U. S. 556, 561.

But this case does not depend upon the construction of the Federal liquor statute, considered alone. That statute must be interpreted in connection with the agreement of 1893 between the United States and the Nez Perce Indians. By that agreement, as we have seen, the United States stipulated that the lands ceded by the Nez Perce Indians, and those retained as well as those allotted to the Indians (which embraced all

the lands in the original Reservation), should be subject, for the limited period of twenty-five years, to all Federal laws prohibiting the introduction of intoxicants into the Indian country.

Now, the principal contention of the accused is that the United States has no jurisdiction for purposes of local police control over lands within a State which are owned in fee by white citizens of such State, although they may have been once the property of an Indian tribe and were acquired by the United States subject to the condition that the acts of Congress, relating to a named subject, should remain in force, for a prescribed period, over such territory. We could not allow this view to control our decision without overruling former decisions, the correctness of which, so far as we are aware, has never been questioned. In determining the extent of the power of Congress to regulate commerce with the Indian tribes, we are confronted by certain principles that are deemed fundamental in our governmental system. One is that a State, upon its admission into the Union, is thereafter upon an equal footing with every other State and has full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the Federal Constitution or by its own constitution. Another general principle, based on the express words of the Constitution, is that Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of any State within whose limits are Indian tribes. These fundamental principles are of equal dignity, and neither must be so enforced as to nullify or substantially impair the other. In regulating commerce with Indian tribes Congress must have regard to the general authority which the State has over all persons and things within its jurisdiction. So, the authority of the State cannot be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes.

At the date of the agreement of 1893 with the Nez Perce Indians the Reservation upon which they lived was their

property, and they and their lands were subject to Federal jurisdiction, although the lands of that Reservation were within the limits of the State of Idaho which had been previously admitted into the Union upon an equal footing with other States. The future of those lands was a matter to be determined primarily between the Indians owning them and the United States under whose exclusive jurisdiction, at that time, were both the Indians and their lands. The Indians—such is the fair interpretation of the agreement—desired to retain some of their lands, but were willing to cede a part of them to the United States to be allotted in severalty to men of their tribe, provided the lands then constituting the reservation, "those ceded, those retained, *and* those allotted" to the Nez Perce Indians, were protected by the Federal laws prohibiting the introduction of intoxicants into the Indian country. We may assume that they particularly had in mind the lands allotted in severalty, because the allottees, after receiving preliminary trust patents, would become citizens of the United States, and it was necessary that the Indians, remaining on the unallotted and retained lands, should be protected against the pernicious influences that would come from having the allotted lands used by citizens of the United States as a storehouse for intoxicants. Only the authority of the United States could have adequately controlled the conduct of such citizens. If intoxicants could be kept upon the lands of the allottees in severalty, it is easy to perceive what injury would be done to the Indians living on the other lands, who, in order to obtain intoxicating liquor, could go regularly or frequently to the places near by, on some allotted lands, where intoxicants were stored for sale or exchange. Therefore, the provision in the agreement, by which the lands allotted in severalty, as well as those retained and ceded, were made subject (not for all time, but only for a limited period, reasonable in duration) to any Federal statute forbidding the introduction of intoxicants into the Indian country, was one demanded by the highest considerations of public policy, whether we look to the

proper government of the Indian tribes by the United States or to the safety and happiness of the Indians themselves.

This question, as to the validity of Article IX of the agreement of 1893, is, we think, concluded by principles announced in former decisions in this court. A leading case is that of *United States* v. *Forty-three Gallons of Whiskey &c.*, 93 U. S. 188, 193, 195, 197. That was a libel of information by the United States against a lot of whiskey seized and sought to be forfeited by virtue of an act of Congress, approved June 30, 1834, and amended March 15, 1864. The liquors were introduced into an organized village of the State of Minnesota, which village was located upon territory that had been ceded to the United States by a treaty made in 1863 and proclaimed in 1864 with certain bands of Indians. The case proceeded upon the ground that the carrying of the whiskey into the Minnesota village was in violation of an existing act of Congress, making it a crime to introduce spirituous liquors or wines into the "Indian country." The treaty with the Indians, which was involved in that case, provided that the statutes of the United States prohibiting the introduction and sale of spirituous liquors into the Indian country should be the law throughout all the country ceded, until otherwise directed by Congress or the President. In that case the contention was that the place where the whiskey was found was not Indian country; that it ceased to be such when the territory was transferred to the United States; and that the extension, by force alone of the Indian treaty, of the Federal laws relating to lands in an organized county of the State was an infringement of the State's lawful jurisdiction and an invasion of its sovereignty, the State having been admitted into the Union upon an equal footing with the original States.

This court said: "The Red Lake and Pembina bands of Chippewa Indians ceded to the United States, by treaty, concluded October 2, 1863, a portion of the lands occupied by them, reserving enough for their own use. The seventh article is in these words 'The laws of the United States now in force,

or that may hereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded until otherwise directed by Congress or the President of the United States.' The ceded country is now part of an organized county of the State of Minnesota; and the question is, whether the incorporation of this article in the treaty was a rightful exercise of power. If it was, then the proceedings to seize and libel the property introduced for sale in contravention of the treaty were proper, and must be sustained. Few of the recorded decisions of this court are of greater interest and importance than those pronounced in *The Cherokee Nation* v. *The State of Georgia*, 6 Pet. 1, and *Worcester* v. *The State of Georgia*, 6 Pet. 515. Chief Justice Marshall, in these cases, with a force of reasoning and an extent of learning rarely equalled, stated and explained the condition of the Indians in their relation to the United States and to the States within whose boundaries they lived; and his exposition was based on the power to make treaties and regulate commerce with the Indian tribes. Under the Articles of Confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of a State within its own limits be not infringed or violated. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes—a power as broad and as free from restrictions as that to regulate commerce with foreign nations. The only efficient way of dealing with the Indian tribes was to place them under the protection of the general government. Their peculiar habits and character required this; and the history of the country shows the necessity of keeping them 'separate, subordinate, and dependent.' Accordingly, treaties have been made and laws passed separating Indian territory from that of the States, and providing that intercourse and trade with

the Indians should be carried on solely under the authority of the United States. Congress very early passed laws relating to the subject of Indian commerce, which were from time to time modified by the lessons of experience. . . . This power is in nowise affected by the magnitude of the traffic or the extent of the intercourse. As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the Government, Congress has the power to say with whom, and on what terms, they shall deal and what articles shall be contraband. If liquor is injurious to them inside of a reservation, it is equally so outside of it, and why cannot Congress forbid its introduction into a place *near by, which they would be likely to frequent?* It is easy to see that the love of liquor would tempt them to stray beyond their borders to obtain it, and that bad white men, knowing this, would carry on the traffic in adjoining localities, rather than venture upon forbidden ground. If Congress has the power, as the case we have last cited decides, to punish the sale of liquor anywhere to an individual member of an Indian tribe, why cannot it also subject to forfeiture liquor introduced for an unlawful purpose into territory in proximity to that where the Indians live? There is no reason for the distinction; and, as there can be no divided authority on the subject, our duty to them, our regard for their material and moral well-being, would require us to impose further legislative restrictions, should country adjacent to their reservations be used to carry on the liquor traffic with them."

After referring to *United States* v. *Holliday*, 3 Wall. 409, in which it was held that Congress could regulate commerce with the individual members of Indian tribes, the court proceeded: "The chiefs doubtless saw, from the curtailment of their reservation and the consequent restriction of the limits of the 'Indian country' that the ceded lands would be used to store liquors for sale to the young men of the tribe; and they well knew that, if there was no cession, they were already sufficiently protected by the extent of their reservation. Under such cir-

cumstances it was natural that they should be unwilling to sell until assured that the commercial regulation respecting the introduction of spirituous liquors should remain in force in the ceded country, until otherwise directed by Congress or the President. This stipulation was not only reasonable in itself, but was justly due from a strong Government to a weak people it had engaged to protect. It is not easy to see how it infringes upon the position of equality which Minnesota holds with the other States. The principle that Federal jurisdiction must be everywhere the same, under the same circumstances, has not been departed from. The prohibition rests on grounds which, so far from making a distinction between the States, apply to them all alike. The fact that the ceded territory is within the limits of Minnesota is a mere incident; for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without state lines. Based, as it is, exclusively on the Federal authority over the *subject-matter*, there is no disturbance of the principle of state equality."

The result in that case was that the whiskey was forfeited because illegally introduced in violation of the treaty with the Indians, and this notwithstanding the place at which it was found and seized was within a State.

In *Bates* v. *Clark*, 95 U. S. 204, 208, 209, the court said that Indian lands ceased, without any further act of Congress, to be Indian country after the Indian title had been extinguished, but it took care to add the qualifying words, "unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case." Referring to the treaty involved in the case of the *Forty-three Gallons of Whiskey*, the court further said: "When this treaty was made, in 1864, the land ceded was within the territorial limits of the State of Minnesota. The opinion holds that it was Indian country before the treaty, and did not cease to be so when the treaty was made, *by reason of the special clause to the contrary in the treaty, though within the boundaries*

of a State. It follows from this that all the country described by the act of 1834 as Indian country remains Indian country as long as the Indians retained their original title to the soil, and ceases to be Indian country whenever they lose that title, *in the absence of any different provision by treaty or by act of Congress.*" See also *Ex parte Crow Dog*, 109 U. S. 556, 561.

Following our former decisions, we adjudge that the agreement between the United States and the Nez Perce Indians, whereby the Indian lands ceded, retained and allotted to the Nez Perce Indians, should be subject (not without limit as to time, but only for twenty-five years) to any Federal statutes prohibiting the introduction of intoxicants into the Indian country, was not liable to objection on constitutional grounds; in which case the demurrer to the indictment was properly overruled, and the plaintiff in error rightfully convicted.

In view of some contentions of counsel and of certain general observations in the case of *Forty-three Gallons of Whiskey*, above cited, not necessary to the decision of that case, but upon which some stress has been laid, it is well to add that we do not mean, by anything now said, to indicate what, in our judgment, is the full scope of the treaty-making power of Congress, nor how far, if at all, a treaty may permanently displace valid state laws or regulations. We go no further in this case than to say that the requirement, in the agreement of 1893, that the Federal liquor statutes protecting the Indian country against the introduction of intoxicants into it should, for the limited period of twenty-five years, be the law for the lands ceded and retained by, as well as the lands allotted to, the Nez Perce Indians, was a valid regulation based upon the treaty-making power of the United States and upon the power of Congress to regulate commerce with those Indians, and was not inconsistent, in any substantial sense, with the constitutional principle that a new State comes into the Union upon entire equality with the original States. The judgment must, for the reasons stated, be affirmed.

It is so ordered.

ATLANTIC TRUST COMPANY *v.* CHAPMAN, RECEIVER OF THE WOODBRIDGE CANAL AND IRRIGATION COMPANY.

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

No. 109. Argued January 15, 16, 1908.—Decided February 24, 1908.

A receiver, as soon as he is appointed and qualifies, comes under the sole direction of the court and his engagements are those of the court, and the liabilities he incurs are chargeable upon the property and not against the parties at whose instance he was appointed and who have no authority over him and cannot control his actions.

While cases may arise in which it may be equitable to charge the parties at whose instance a receiver is appointed with the expenses of the receivership, in the absence of special circumstances the general rule, which is applicable in this case, is that such expenses are a charge upon the property or fund without any personal liability therefor on the part of those parties; and the mere inadequacy of the fund to meet such expenses does not render a plaintiff who has not been guilty of any irregularity liable therefor.

145 Fed. Rep. 820, reversed.

THE facts are stated in the opinion.

Mr. Stanley W. Dexter, with whom *Mr. Edward B. Whitney* was on the brief, for petitioner:

The Circuit Court was without power to compel the complainant to pay the deficit of a receivership which was in all respects regular, after final judgment in complainant's favor.

There is no inherent power in any court to award costs, in the absence of statute, and where costs are authorized by statute, they follow the judgment and are taxed to the losing party, as was done in this case. *Wallace* v. *Sheldon,* 76 N. W. Rep. 418 (Nebraska); *In re Commissioners,* 20 App. Div. 271 (New York); *In re City of Brooklyn,* 148 N. Y. 107.

Priority is given to the compensation of receivers and their solicitors over receiver's certificates, and such allowances have

sometimes been called "costs of the proceeding to be paid out of the fund." *Petersburg Savings Co.* v. *Dellatorre,* 70 Fed. Rep. 643; *Radford* v. *Folsom,* 55 Iowa, 276.

There is no suggestion, however, that they can be taxed against a successful party, and in the present case, the receiver and his solicitors have been paid.

The receiver's counsel has in prior arguments urged certain provisions of the California Code. It seems unnecessary for us to discuss these, since the equity practice of the Federal courts is uniform throughout the United States and does not in any respect follow that which prevails in the various localities. 1 Foster's Fed. Prac. (3d ed.), pp. 10–12, 120–121; *Boyle* v. *Zacharie,* 6 Pet. 648, 658; *First National Bank* v. *Ewing,* 103 Fed. Rep. 168, 194; *Kirby* v. *Lake Shore R. R.,* 120 U. S. 130, 137; *Goodyear Co.* v. *Dancel,* 119 Fed. Rep. 692; *Phinizy* v. *Augusta Railway Co.,* 98 Fed. Rep. 776. Even in common law actions costs are not governed by provisions of state legislation. *United States* v. *Treadwell,* 15 Fed. Rep. 532.

Prior to the decision of this case the only authority directly in point was that approved and followed by Judge Morrow. See *Farmers' Loan & Trust Co.* v. *Oregon Pacific R. R. Co.,* 31 Oregon, 237, fully sustaining petitioner's contention.

The receiver is not the agent of the plaintiff in the litigation nor does the plaintiff have any control or authority over him. He is agent and executive officer of the court which takes possession of the property which is the subject of dispute, and controls and operates it for the use and benefit, not of either party to the controversy, but of whomsoever in the end may be concerned in its disposition. His acts and possession are the acts of the court and the parties to the litigation have no control over his actions nor any power to determine what liabilities he may incur.

The receiver's employés must look to the property in the court's hands and the income therefrom for the payment of their compensation. Their wages are not costs of the litigation in any sense, and, though incurred during the pendency of the

suit, they are not incurred in the suit. They are not expenses of either side of the controversy and are not costs or fees which can be charged against the successful party to the litigation. *Farmers' Loan & Trust Co.* v. *Oregon Pacific R. R. Co.*, 31 Oregon, 237. And see *Booth* v. *Clark*, 17 How. 322, 331; *Davis* v. *Gray*, 16 Wall. 203, 218; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112.

This court has always maintained the position that a receiver is an agent of the court and derives no authority from the act of the parties at whose suggestion or by whose consent he is appointed. *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 223, 236; *Quincy, Missouri & Pacific R. R. Co.* v. *Humphreys*, 145 U. S. 82, 97. The lower Federal courts have maintained the same doctrine. *Texas & St. Louis Ry. Co.* v. *Rust*, 17 Fed. Rep. 275, 282; *Central Trust Co.* v. *Wabash, St. Louis & Pacific Railway Co.*, 23 Fed. Rep. 863; *New York, P. & O Ry. Co.* v. *New York, L. E. & W. Ry. Co.*, 58 Fed. Rep. 268, 278.

The only pledge that the court made, or could lawfully make, was that the fund in court would be impressed with a paramount lien in favor of the receiver's creditors, and that it would enforce such lien against the property and parties as a condition of releasing the property. Taft, J., 58 Fed. Rep. 15. See also Beach on Receivers, § 416; *Meyer* v. *Johnson*, 53 Alabama, 237, 348, 349; *Turner* v. *Peoria &c.*, 95 Illinois, 134, 145; *Kneeland* v. *American Loan Co.*, 136 U. S. 89, 98.

Mr. Edgar C. Chapman, respondent, in person:

The Circuit Court has power to compel petitioner to pay the deficit of the receivership.

In railroad receiverships (and the case at bar is similar) it has been uniformly held that the courts have the power to decree reimbursement to the receiver out of the income of the property and if that is not sufficient then out of the *corpus*, before payment of the mortgage debt is allowed.

The theory upon which courts have thus proceeded is that

the court has pledged its faith to the payment of the expenses of the receivership. As the court has no property of its own with which to operate the railroads, it must, in order to keep faith with those whom it employs, redeem its pledge by either resorting to the fund brought into court or else to the party at whose instance and upon whose showing it was induced to undertake the management of the property. This power is inherent. It does not depend upon consent or arise from contract. Alderson on Receivers, § 332.

If a court has the power to redeem some of its pledges by resorting to the fund in its possession for that purpose, it has also the power to redeem all of its pledges by resorting to the party that induced it to appoint the receiver, assuming that such party is able to respond.

Property cannot be administered by the court and kept a "going concern," without expense.

The court must not knowingly order expenses to be incurred that it has no intention of seeing paid.

When the court places a receiver in charge of property on representations made to it by a complainant, with orders to contract such indebtedness as appears needful, it is to be presumed that reliance shall be placed upon the court for the payment of this indebtedness.

Ordinarily the fund is sufficient to protect the court and its officers and employés, and the court is not compelled to proceed further. And this is why there is a dearth of decisions on the precise question presented by the case at bar, namely, the power of the court to look beyond the property administered upon where it fails, or proves insufficient to the complainant to make up the deficiency.

That the court has this power in a proper case, and the case at bar is such an one, there is no doubt. See *Knickerbocker* v. *McKindley C. & M. Co.*, 67 Ill. App. 295; *Pacific Bank* v. *Madera Fruit Co.*, 124 California, 525; *Ephraim* v. *Pacific Bank*, 129 California, 589; also cases cited by Judge Ross in *Chapman* v. *Atlantic Trust Co.*, 119 Fed. Rep. 270. *Farmers' Loan*

& Trust Co. v. *Oregon Pacific R. R. Co.*, 31 Oregon, 237, discussed and distinguished.

MR. JUSTICE HARLAN delivered the opinion of the court.

The principal question in this case—now before us upon writ of certiorari for the review of a final order of the Circuit Court of Appeals for the Ninth Circuit—is stated by counsel to be this: Is a complainant, who has in good faith prosecuted a suit upon a good cause of action, and upon whose application the court has properly appointed a receiver, and who obtains a decree fully establishing his rights, nevertheless personally responsible for a deficiency caused by the failure of the property which is the subject of the suit to bring enough to cover the allowances made by the court to the receiver and his counsel, and the expenses which the receiver, without special request of the complainant in any instance, had incurred?

The Woodbridge Canal and Irrigation Company, a corporation of California, executed July 17, 1891, a mortgage conveying all its property and franchises to the Atlantic Trust Company, a New York corporation, in trust to secure certain bonds, with interest coupons attached, issued by the mortgagor company for the purpose of raising money to fully complete and equip its canal and headworks, and of paying its indebtedness then existing or to be subsequently incurred. The bonds were made payable with interest semi-annually at the office of the Trust Company in the city of New York.

In the event of default in the payment of semi-annual interest on the bonds for six months, or of any tax or assessment for the same period, the trustee and its successors were authorized, on the written request of the majority of the holders of the outstanding bonds, or, if the principal of the bonds shall be due, upon the request of the holders of outstanding bonds, to take actual possession of the mortgaged property, and by themselves or agents hold, use and enjoy

the same, and from time to time make repairs, replacements, alterations, additions and improvements as fully as the company might have done before such entry, and receive all tolls, income, rent, issues and profits arising from the property. The trustee and its successor or successors were authorized, on such default, to sell the mortgaged property at public auction, after at least two months' notice, and execute to the purchaser or purchasers a deed in fee simple, or otherwise, for all the right, title, interest and estate reversionary or in possession which they might be entitled to receive, have or hold of the company, such sale to be a complete bar against the company, its successors or assigns, and all persons claiming from or under it.

The mortgage made provision as to the disposal of moneys received from tolls, income, profits, etc., and provided that "nothing herein shall be construed as limiting the right of the trustee to apply to any competent court for a decree of foreclosure and sale under this indenture, or for the usual relief in such proceedings, and the said trustee, or its successor, may, in its discretion, so proceed."

The Canal and Irrigation Company, having made default in the payment of the principal and interest due on its bonds, its board of directors, by formal action, recognized their inability to meet its obligations, and requested the trustee to bring the present suit for the foreclosure of the mortgage, and enforce the payment of the principal and interest of the bonds. The bringing of the suit was also in conformity with the written request of the owners and holders of fifty-five of the outstanding bonds, who expressed their election and option that the principal of the bonds should forthwith become due and payable.

The bill filed by the Trust Company prayed: 1. That a receiver be appointed to take charge of the mortgaged property and to maintain and operate the canals pending the suit and until sale under a judgment of foreclosure. 2. That the court ascertain the number and amount of outstanding bonds, fix

the compensation of the receiver and his attorney, and that the plaintiff have judgment against the Canal and Irrigation Company, for the amount due for principal and interest on the bonds, and for attorney's fee, trustee's commissions, costs and expenses of the suit. 3. That the mortgaged property be sold at public auction, and that out of the proceeds the expenses of sale, costs of suit, trustee's commissions and counsel fees be paid, the balance to be applied in payment of outstanding bonds.

The court, on motion of the Trust Company, the Canal and Irrigation Company appearing and consenting thereunto, appointed E. C. Chapman receiver of the mortgaged property, with authority to take possession of it. The receiver was empowered by the order of court to continue the operation of the main and branch canals of the mortgagor company in the usual and ordinary way as the same were then operated, discharging, so far as practicable, contracts for water supplies entered into by the company, collecting rents, tolls, and moneys payable under water contracts, keeping the property in good condition and repair, employing needful agents and servants at such compensation as he deemed reasonable, paying for needful labor, supplies and materials as might seem to him to be necessary and proper in the exercise of a sound discretion, "with leave to apply to the court from time to time as he may be advised for instructions in the premises." "He shall," the order proceeded, "do whatever may be needful to preserve and maintain the corporate franchises of said defendant corporation and its rights to the use of the water and all its property, until final judgment in this action, and to defray the necessary and proper expenses incident thereto." The above order was made October 3, 1894.

In the progress of the cause the receiver, upon his own motion and not, so far as the record shows, by direction of the plaintiff, applied to the court and obtained its authority to borrow money and issue certificates, which were used by him in the operation of the property, paying debts, etc.

Certain parties were permitted to intervene and the litigation lingered until September 18, 1897, when a decree of foreclosure and sale was entered, nearly three years after the receiver was appointed. There was great difficulty in effecting a sale, partly because of the washing away of a dam. Finally, a bid of $21,000 by one Thompson, acting on behalf of the receiver and his attorneys, was accepted. That amount was just enough to cover the fees of the receiver and his counsel and the expenses of the sale and to make a small *pro rata* payment on the accrued interest on receiver's certificates. This left unpaid all other expenses and certificates of the receiver. The sale was confirmed August 15, 1898, and the commissioner was directed to deliver a deed for the property.

The order confirming the sale directed the clerk of the court to report the balance remaining unpaid on account of the fees of officers or appointees of the court, or of advances made by them, and on account of receiver's certificates, time checks or other expenses of the receiver's administration. The order also directed the receiver to render an account of his receipts, disbursements and expenses in the management and care of the property between the date of the decree of foreclosure and the date of the sale and transfer of possession.

The clerk made the required report, from which it appeared that the proceeds of sale, $21,000, were absorbed by these claims: Compensation of receiver, $9,000; receiver's attorneys, $9,000, and fees of commissioner, master, advertising, etc., $3,000. He further reported that of the amounts found due by the decree of foreclosure of September 18, 1897, there remained unpaid, on the following accounts, these sums: Receiver's certificates, $12,292.47; receiver, for advance made by him, care and management of property, $3,105.72; time checks issued by receiver, $5,728.89; work done for receiver, $2,269.85; expenses of operating canal system, $5,728.54; other sums, $13,723.49; total, $42,848.96.

On the third of August, 1899, nearly five years after the appointment of the receiver, he filed his final report and peti-

tion, in which he prayed that the balance due him on account of his receipts and disbursements after the making of the decree, also the balance due to his employés after the making of the report upon which the decree was based, and the compensation to be allowed to him and his counsel since the date of the decree, be fixed and established by the court, and judgment entered "*against the plaintiff* in this cause for the full amount of the deficiency hereinbefore stated, with the sums so allowed for services and expenses since the date of said decree, and that the proper process of court be issued for the collection thereof from plaintiff, and that when collected the same be paid into court to be by the court disbursed to the several persons entitled thereto."

The petition alleged that the Canal and Irrigation Company was insolvent and unable to respond to any judgment for deficiency that had been or might be entered in the cause. Upon this report and petition being filed the Circuit Court ordered the Trust Company to show cause why the amount due the receiver and his employés should not be settled and allowed, and why judgment for such deficiency should not, when ascertained, be entered against that company and it be required to pay the same into court.

The Trust Company appeared and demurred to the receiver's report and motion for judgment against it. The Circuit Court, after hearing, sustained the demurrer and discharged the rule to show cause. Upon appeal to the Circuit Court of Appeals the order of the Circuit Court was reversed, the former court being of opinion that the Trust Company was liable to a personal judgment for the alleged deficiency. *Chapman* v. *Atlantic Trust Co.*, 119 Fed. Rep. 257.

The grounds upon which the Circuit Court and the Circuit Court of Appeals, respectively, proceeded appear in the margin.[1]

[1] CIRCUIT COURT—JUDGE MORROW: "I am of the opinion that provisions should have been made when this suit was commenced, or at the time when the Receiver was appointed, for the payment of or security for the amount of his expenses, and for the redemption of whatever certificates might be

Upon the return of the case to the Circuit Court the Trust Company filed its answer to the receiver's petition, and the cause was submitted, by consent, as upon bill and answer, on

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issued by him, in the event that the proceeds of the sale of the property should prove insufficient. But such provision was not made at the time by the court, and I am of the opinion that the court is without authority to do so now. In *Farmers' Loan Co.* v. *Oregon Pacific R. R. Co.*, 31 Oregon, 237, this question was fully considered, and the views there expressed are in accord with my opinion in the present case."

CIRCUIT COURT OF APPEALS—JUDGE ROSS, 119 Fed. Rep. 268: "Those who render services in and about the receivership are justly entitled to be paid the fair value of such services, and when the issuance of receiver's certificates becomes necessary for the proper preservation of the property, and such certificates are authorized by the court to be issued by the Receiver for money to be used for such purposes, those who buy the obligations are entitled to have them paid. How? In cases like the present, out of the property or its proceeds, certainly. No one, we apprehend, will question that. But the property having been sold for but a trifle more than the amount theretofore allowed the Receiver and his attorney for their services in and about the receivership, and they credited with such allowance on their bid, who is to suffer? The complainant, at whose instance the Receiver was appointed, or those who, relying upon his acts, based upon the authority and sanction of the court, invested their money and rendered their services in and about the operation and preservation of the property? It is not difficult to determine on which side of this question are the equities. With due deference we are unable to see any force in the suggestion of the Supreme Court of Oregon in the case cited that, as the complainant in such a suit has no control over the Receiver, if he be held liable for the expenses of the receivership, in the event the property prove insufficient to pay them, he may be bankrupted. At the same time it is conceded by that learned court that where it appears probable that the property will prove insufficient, the court may require, as a condition to the appointment of a receiver, a guaranty of the payment of the expenses of such officer, and a like guaranty subsequently, on pain of the discharge of the Receiver, when it becomes evident that the property will prove insufficient to pay the expenses. The theory of this manifestly is, that in these two instances the complainant can inform himself of the probable outcome of the property, and if he be not willing to give the guaranty he will not secure the appointment of a Receiver in the one instance, or his continuance in office in the other. But why should he not be required to inform himself, also, when no such condition is imposed by the court? Precisely the same opportunity on complainant's part, and precisely the same duty to inform himself in that respect, exists in the absence of the requirement of the guaranty mentioned. The complainant, whose lien upon the property it is sought to foreclose, in the nature of things, must and should be held to have much better information regarding the value

the issues joined by the receiver's final report and petition, and the answer of the Trust Company. In conformity with the opinion of the Circuit Court of Appeals the Circuit Court gave personal judgment against that company for $36,207.57, as the amount due the receiver. That judgment was affirmed by the Circuit Court of Appeals. *Atlantic Trust Co.* v. *Chapman,* 145 Fed. Rep. 820.

We are of opinion that the Court of Appeals erred in holding that the Trust Company was liable for the deficiency found to exist. No such liability could arise from the simple fact that it was on plaintiff's motion that a receiver was appointed to take charge of the property pending the litigation. The motion for a receiver was to the end that the property might be cared for and preserved for all who had or might have an interest in the proceeds of its sale. The circumstances seemed to have justified the motion, but whether a receiver should have been appointed or not was in the sound discretion of the court. Immediately upon such appointment and after the qualification of the receiver, the property passed into the custody of the law, and thenceforward its administration was wholly under the control of the court by its officer or creature, the receiver. In *Booth* v. *Clark,* 17 How. 322, 331, it was said: "A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues or profits of land, or other thing in question in this court, pending the suit, where

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of the property and its probable outcome than the court. Indeed, it is not easy to see how the court can be properly expected to know anything about it. The appointment of a Receiver, if made at all, is usually made at the request of the complainant—occasionally, as in the case at bar, with the consent of the defendant. If the complainant was not willing to pay the expenses of the receivership it asked for, in the event of the insufficiency of the property to do so, it should not have asked the court to make the appointment, incur the liabilities, and pledge its faith to their payment. It was the duty of the complainant to keep informed in respect to the progress of the receivership, the property, and its probable outcome, and whenever it became unwilling to further stand good for any deficiency, to ask the court to bring to an end the business it undertook and was conducting on complainant's petition."

it does not seem reasonable to the court that either party should do it. Wyatt's Prac. Reg. 355. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in *custodia legis* for whoever can make out a title to it. *Delany* v. *Mansfield*, 1 Hogan, 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. *Verplanck* v. *Mercantile Insurance Company*, 2 Paige, C. R. 452." In *Porter* v. *Sabin*, 149 U. S. 473, 479, the court said: "When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it," citing *Wiswall* v. *Sampson*, 14 How. 52, 65; *Peal* v. *Phipps*, 14 How. 368, 374; *Booth* v. *Clark*, 17 How. 322, 331; *Union Bank* v. *Kansas City Bank*, 136 U. S. 223; *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 287, 297. Ought the receiver, in this case, to have been authorized to burden the property with indebtedness on account of money borrowed or on account of certificates which should become a first lien? Ought some limit have been put on expenses of that kind? These were matters to be determined by the court in the light of all the circumstances. It was for the court to say whether the Canal and Irrigation Company should be kept on its feet by moneys borrowed or obtained, under its orders, by the receiver. The wishes of the parties could not control as to such matters. Indeed they need not in strictness have been consulted as to what should be done from time to time in the management of the property. If the situation was such as to render it uncertain or doubtful whether the property

would ultimately bring, at a sale, enough to meet the expense incurred in connection with its management, the court might well have declined to permit its receiver to issue certificates or to borrow any money on the property as security for its payment. So, if the condition and apparent prospects of the property made such a course proper, the court, in the exercise of a sound judicial discretion and looking to the interests of all who might be affected by its action, could, at the outset, have made it a condition of the appointment of a receiver that the plaintiff and those whom it represented should be liable for any deficiency in the funds required for the expenses of the receivership; or it might have made it a condition of any order authorizing receiver's certificates or the borrowing of money, that the plaintiff, or those whom it represented, should make good any deficiency that might be disclosed after applying the proceeds of the sale according to the rights of parties. Still further, the court—if it had been proper, under all the circumstances, to pursue such a course—could have refused to operate the canals in question at all and required the parties to proceed to a final decree of foreclosure and sale at the earliest practicable moment. But none of these things were done. Under the responsibility imposed upon it by law, the court determined to carry on the business of the Canal and Irrigation Company for a time; and, under the same responsibility, it authorized the receiver to borrow money, issue receiver's certificates, and incur expenses, without any security for indebtedness incurred in this way, except the property or the fund in the control of the court, and the good faith, discretion and care of the court in its administration. No other security seems to have been contemplated by the court or the receiver or any party to the cause. No hint or warning was given, in the progress of the cause, that the absent trustee was to be liable in the event that the property or fund under the control of the court proved insufficient to meet the expenses of the receivership. The Trust Company, it is true, invoked the jurisdiction of the court by bringing this suit for foreclosure and sale and

making a motion for the appointment of a receiver to hold and manage the property *pendente lite*. That, surely, the Trust Company had the right to do, but it did not thereby make itself ultimately liable for money borrowed and receiver's certificates issued by order of the court. The one person who was in a position to inform the court from time to time of the condition and probable value of the property, and of what was or what seemed to be necessary in order to preserve it for the parties interested in it, was its officer and representative, the receiver. It was at his instance and because of his report of the condition and needs of the property, that money was borrowed and certificates issued in order that expenses incurred in the administration of the property might be met. To hold the Trust Company liable for indebtedness thus created would be most inequitable, and would not, we think, be in accord with sound principle.

It is true that cases are cited in which the party bringing a suit, in which a receiver is appointed, has been held liable for expenses incurred by the receiver in excess of the proceeds arising from the sale of the property. But in most, if not in all, of those cases the circumstances were peculiar and were such as to make it right and equitable, in the opinion of the court, that that should be done. As, for instance, in *Ephraim* v. *Pacific Bank*, 129 California, 589, 592, in which arose a question as to the party to whom a receiver should look for reimbursement or payment of his expenses, the court recognized the fact that the general rule that the compensation of a receiver was a charge upon the fund in his hands did not apply without qualification to every case, and said: "If he [the receiver] has taken property into his custody under an irregular, unauthorized appointment, he must look for his compensation to the parties at whose instance he was appointed, and the same rule applies if the property of which he takes possession is determined to belong to persons who are not parties to the action, and is taken from his possession by paramount authority. As to such property his appointment as receiver was

unauthorized and conferred upon him no right to charge it with any expenses." In *Farmers' Nat. Bank* v. *Backus*, 74 Minnesota, 264, 267, the Supreme Court of Minnesota said: "The second proposition is that, a receiver being an officer of the court, subject to its control, and not to that of the party asking for his appointment, his fees and expenses are chargeable solely against the fund which comes into his hands as receiver. The parties to the action are not personally liable therefor, unless they have given a bond or other contract to pay them as a condition of the appointment or continuance of the receiver. This may be conceded to be correct as a general rule, but there are cases where the court will, if the fund in court be insufficient to give the receiver reasonable compensation and indemnity, require the parties at whose instance he is placed in possession of the property to pay him. *Johnson* v. *Garrett*, 23 Minnesota, 565; *Knickerbocker* v. *McKindley Co.*, 67 Ill. App. 293; High, Rec. § 796. The special facts of this case fully justify the order of the trial court. It is not a case where the party asking for the appointment of a receiver is required to pay the receiver's charges without having received any benefit from the receivership. It is a case where the benefits so received were more than five times as great as the amount required to be paid. . . . The order of the court requiring the appellant to pay the receiver is, in effect, the enforcement of the receiver's equitable right to be paid from a fund growing out of the receivership." In *Cutter* v. *Pollock*, 7 N. Dak. 631, 634, the Supreme Court of North Dakota, speaking by its chief justice said: "We do not believe that any case can be found to uphold the palpably unjust rule that one who is shown to have had no right to maintain the action, and no interest whatever in the property which he claims, can require that the defendant, who has paid out of his own pocket the expenses of a receivership, shall not call upon him (the plaintiff in the action) for reimbursement." See High on Receivers (3d ed.), § 796; Beach on Receivers, § 774.

The above cases relied upon in the Circuit Court of Appeals—

and others of like kind could be cited—proceeded upon their special facts. They do not, in our judgment, authorize the order made by that court, although they tend to support the rule that cases *may* arise in which, because of their special circumstances, it is equitable to require the parties, at whose instance a receiver of property was appointed, to meet the expenses of the receivership, when the fund in court is ascertained to be insufficient for that purpose. Here, it is not asserted that the plaintiff trustee was not in the exercise of his strict rights when bringing a suit for foreclosure and sale and asking that the property be put in possession of a receiver. It gave no assurances as to the probable value of the property or of the profits to arise from its management. It misled no one who loaned money to the receiver, or who purchased the certificates. It acted as an ordinary litigant, submitting to the action of the court in all particulars. We do not think that the mere insufficiency of the property or fund to meet the expenses of a receivership entitled the receiver to hold the plaintiff in the suit personally liable, if all that could be said was that he instituted the suit and moved for the appointment of the receiver to take charge of the property and maintain and operate it pending the suit. A receiver, as soon as he is appointed and qualifies, comes, as we have said, under the sole direction of the court. The contracts he makes or the engagements into which he enters, from time to time, under the order of the court, are, in a substantial sense, the contracts and engagements of the court. The liabilities which he incurs are liabilities chargeable upon the property under the control and in the possession of the court and not liabilities of the parties. They have no authority over him and cannot control his acts.

When neither the order appointing a receiver nor the order authorizing him to borrow money and issue certificates was conditioned upon the plaintiff (in a suit for foreclosure and sale) being liable for the expenses of the receivership, and when no special circumstances appear which, upon equitable principles, would authorize the court to fix liability upon the plain-

tiff for such expenses, the general rule should be applied which makes such expenses a charge upon the property or fund under the control of the court, without any personal liability therefor upon the part of the plaintiff who invoked the jurisdiction of the court. The mere inadequacy of the property or fund to meet such expenses constitutes in itself no reason why liability should be fastened upon the plaintiff, who has been guilty of no irregularity, and who, so far from seeking any improper advantage, has succeeded in his suit by obtaining the relief asked, namely, a decree of foreclosure and sale.

The considerations which, in our judgment, should control in cases like this are well stated by the Supreme Court of Oregon in the above case of *Farmers' Loan Co.* v. *Oregon Pacific R. R. Co.*, 31 Oregon, 237. That, it is true, was the case of a railroad receivership, but what is said is equally applicable to other *quasi*-public corporations having public duties to perform, as in the case of water and irrigation companies. The particular question in that case was whether the plaintiff in a suit brought to foreclose a railroad mortgage could be held liable for the wages of employés of the receiver, who had no funds with which to pay them, having exhausted his power to float receiver's certificates. After observing that the plaintiff, at whose instance a receiver is appointed thereby consents to the absolute control and management of the mortgaged property by the court and its agents and to the priority of claims for the expenses incurred in its operation and management, and after declaring that it was not perceived upon what ground it could be claimed that, because the expenses of the receivership were allowed without any fault of his to exceed the value of the mortgaged property, thus entirely destroying his security, he must, in addition to the loss of his debt, be compelled to make good the deficit, unless the order of appointment was made upon that condition, the court in that case proceeded to say (p. 247): that the plaintiff "has no control over the acts of the receiver, and if, without his consent, he is to be held responsible therefor, he is liable to absolute bankruptcy and ruin. Such a

rule would render the plaintiff's position so uncertain and precarious as practically to preclude him from any protection whatever through the appointment of a receiver pending the foreclosure suit. But the inquiry is made, 'shall not a railroad mortgagee who applies for and obtains the appointment of a receiver, with authority to operate the road, be held responsible for the liabilities incurred by such officer when they cannot be made out of the property itself?' We think not, unless such responsibility was imposed as a condition to the appointment or the continuance of the receiver in office. The appointment of a receiver in a suit to foreclose a railroad mortgage is not a matter of strict right, but rests in the sound judicial discretion of the court; and it may, as a condition to issuing the necessary order, impose such terms as may, under the circumstances of the particular case, appear to be reasonable, and, if not acceded to, may refuse to make the order. 30 Am. L. Rev. 161; *Fosdick* v. *Schall*, 99 U. S. 235. If, therefore, upon an application for the appointment of a railroad receiver, it appears probable that the income and corpus will prove insufficient to pay the expenses and liabilities thereof, we have no doubt that the court may require of the plaintiff, as a condition to such appointment, a guaranty of the payment of the expenses of such officer. And if, at any time after the appointment has been made, it become apparent to the court that it will be unable to pay and discharge the present or future liabilities incurred by its executive officer and manager, it should refuse to continue the operation of the road under the receiver, unless its expenses are guaranteed. No court is bound or ought to engage or continue in the operation of a railroad or any other enterprise without the ability to promptly discharge its obligations, and, unless it can do so, it should keep out or immediately go out of the business. But, unless such terms are imposed as a condition of the appointment or continuation in office of the receiver, his employés must look to the property in the custody of the court and its income for their compensation. They have no claim whatever on any of the parties to the litigation. They

are the employés and servants of the court, and not of the parties. Their wages are in no sense costs of the litigation; and, although incurred during the progress of the suit, they are not incurred in the suit. They are neither expenses of the plaintiff, nor of the defendant, and are not fees or costs which can be charged against the successful party to the litigation, as is sought to be done in this case."

Without further elaboration, or further citation of authorities, we adjudge that the final orders of the Circuit Court and of the Circuit Court of Appeals, whereby the Trust Company was held liable to make good the deficiency found to exist in the funds required for the expenses of the receivership, were erroneous. Those orders must be set aside, and the petition of the receiver, so far as it seeks to impose such liability on the plaintiff, must be dismissed. To that end the decree is reversed and the cause remanded for such proceedings as will be consistent with this opinion and be in conformity with law.

Reversed.

MR. JUSTICE MCKENNA did not sit in this case.

COSMOPOLITAN CLUB *v.* COMMONWEALTH OF VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 130. Argued January 23, 1908.—Decided February 24, 1908.

The charter of a private corporation may be forfeited or annulled for the misuse of its corporate privileges and franchises, and its forfeiture or annulment, by appropriate judicial proceedings, for such a reason would not impair the obligation of the contract, if any, arising between the State and the corporation out of the mere granting of the charter. The charter granted to a club, *held*, in this case, not to amount to such a contract

that the club could disregard the valid laws subsequently enacted by the State, regulating the sale of liquor.

The judgment of a court of competent jurisdiction of Virginia, made after a hearing, that a corporation of that State had violated the liquor laws of the State, and that in pursuance of statutory provisions the charter rights and franchises of the club ceased without further proceedings, *held*, in this case not to have violated any right belonging to the club under the contract or due process clauses of the Constitution of the United States.

THE facts are stated in the opinion.

Mr. R. Randolph Hicks for appellant:

Charters of incorporation are within the protection of the contract clause of the Constitution. *Dartmouth College Case*, 4 Wheat. 518.

The judgment complained of annulled the charter of appellant, and unless the State of Virginia retained the right, by some constitutional provision or legislative act, of repealing, forfeiting or modifying the charter of appellant the judgment is erroneous. The constitution in effect in Virginia on the date of the granting of appellant's charter contained no such reservation, though such a provision does appear in the constitution of Virginia adopted in the year 1903, and which is now in force. Section 1173, Code, is the only section in which the legislature retained the right of repealing, altering or modifying the charter of any bank and likewise retained the right of repealing, altering or modifying the *provisions* of chapter 47 of the Code of Virginia. Said section nowhere reserved to the legislature the right of repealing, altering or modifying charters granted under the provisions of § 1145 of said Code. In order to vest in the legislature this right the court must write into § 1173 the words "charters granted under" in front of the words "the provisions of chapter 47." The reservation of the right to repeal, alter or modify the provisions of chapter 47 does not give the right to alter or modify or amend a charter granted under those provisions. Courts cannot supply words in a statute where there is no ambiguity and the meaning of the language is plain. *Maillard* v. *Lawrence*, 16 How. 261;

United States v. *Fisher*, 2 Cranch, 399; *Levy* v. *McCartee*, 6 Pet. 102; *United States* v. *Weltberger*, 5 Wheat. 94; *Denn* v. *Reives*, 10 Pet. 527.

When the meaning of a statute is plain, consequences and motives are not to be considered and though the literal interpretation may defeat the object of the act, still it must be adopted. *King* v. *Barnham*, 15 E. C. L. 157. See also *St. Paul* v. *Phelps*, 137 U. S. 528; *Bate* v. *Sulzberger*, 157 U. S. 1; *Hadden* v. *Collector*, 5 Wallace, 107; *Sturges* v. *Crowninshield*, 4 Wheat. 202.

In the case at bar the privilege of selling intoxicating liquors was granted by a subsequent act of the legislature. The rights thus conferred might, at any time, be withdrawn and the legislature might have prescribed a fine or imprisonment for a misuse of this privilege, but the legislature could not take away the contractual rights as set out in the charter of incorporation as a punishment for the misuse of this privilege when those contractual rights were perfectly innocent, not inhibited by the statute, nor even subject to inhibition by the legislature. *Washington Bridge Co.* v. *State*, 18 Connecticut, 53; *Bailey* v. *Phila. R. R. Co.*, 4 Harr. 389; *State* v. *Noyes*, 47 Maine, 189; *Pingry* v. *Washburn*, 1 Aiken, 264; *Miller* v. *New York & R. R. Co.*, 21 Barb. 513; *People* v. *Jackson & Michigan Plank Road Co.*, 9 Michigan, 285–307; *Sloan* v. *Pacific R. R. Co.*, 61 Missouri, 24; *Attorney General* v. *Chicago & C. R. R. Co.*, 35 Wisconsin, 425.

If this conclusion is not correct, then the legislature may at any time destroy any charter by prohibiting some one power in the charter which is properly a subject of police regulation and imposing as a punishment the destruction of all the other innocent rights and thus do indirectly what it cannot do directly. Undoubtedly the contract evidenced in the charter may be forfeited like any other contract by nonuser or misuser, in regard to matters which are of the essence of the contract between the corporation and the State. *Dartmouth College* v. *Woodward*, 4 Wheat. 658; *State* v. *Council Bluffs*, 11 Nebraska,

356; *S. C.*, 9 N. W. Rep. 564; *Commonwealth* v. *Commercial Bank*, 28 Pa. St. 389; *Hodsdon* v. *Courtland*, 16 Maine, 314.

But this misuser must be a misuser or nonuser of the rights granted in the charter, which was not the case with appellant. As far as the record shows there has been neither misuse nor nonuse of any contractual right granted in the charter of incorporation.

Mr. William A. Anderson, Attorney General of the State of Virginia, for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

Complaint having been made in due form that the Cosmopolitan Club, a corporation of Virginia, formed to promote social intercourse, athletic and physical culture, and to encourage manly sports, had violated and evaded the laws of that commonwealth regulating the licensing and sale of liquors, the corporation court of the city of Norfolk, where the club had its domicil, gave notice that it would, on a named day, inquire into the truth of the charge.

The proceeding was based on a statute of Virginia passed March 12, 1904,[1] amendatory of a previous statute, and providing that "upon complaint of any person that any such corporation so chartered as a social club is being conducted, or has been conducted, for the purpose of violating or evading the laws of this State regulating the licensing and sale of liquors, and after service of such complaint on such corporation at least ten days before the hearing of said complaint, the circuit court of the county or the corporation court of the city wherein is located its place of business or meeting, or the judge thereof in vacation, shall inquire into the truth of said com-

[1] Chapter 116. An act to amend and reënact § 142 of an act of the General Assembly of Virginia, entitled "An Act to amend and reënact §§ 75–147, inclusive, of an act approved April 16, 1903," and to provide how social clubs chartered since April 16, 1903, shall obtain licenses to sell ardent spirits, etc. Acts of Assembly, 1904, p. 214.

plaint; and if the court, or judge in vacation, shall adjudge that the said corporation is being conducted, or has been conducted, for the purpose of violating or evading the laws of the State regulating the licensing and sale of liquors, the chartered rights and franchises of said corporation shall cease and be void without any further proceedings, and the said corporation and all persons concerned in the violation or evasion of said law shall be subject to the penalties prescribed herein."

At the hearing of the case the club, by its counsel, moved to dismiss the complaint on the ground that under the constitutions of Virginia and of the United States the court had no power to entertain it and that the act under which it was filed was contrary to those constitutions. The motion to dismiss was overruled and the parties introduced their evidence. The result was a judgment by the corporation court that the club had been conducted for the purpose of violating and evading the laws of Virginia regulating the licensing and sale of liquors. The defendant then applied to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas. The latter court, upon inspection of the record, refused the application upon the ground that the judgment was plainly right. The president of that court allowed a writ of error for the review of its judgment by this court.

It is contended by the plaintiff in error that the judgment against it was inconsistent with the contract clause of the Constitution of the United States. The charter of the club, it is insisted, was a contract between it and Virginia, which could not be amended or annulled unless at the time it was granted, the State, by constitutional provision or by legislative act, had retained or reserved the right of repealing, forfeiting or modifying it. Neither the state constitution nor any statute, it was alleged—and we assume such to be the fact—contained any such reservation at the time the club's charter was granted.

Assuming that the charter of the club constituted a contract between it and the State, it would not follow that the statute

of Virginia, enacted in 1904, after the granting of such charter, was inconsistent with the clause of the Constitution forbidding a State from passing any law impairing the obligation of a contract. The principle is well established that the charter of a private corporation may be forfeited or annulled for the misuse of its corporate privileges and franchises, and that its forfeiture or annulment, by appropriate judicial proceedings, for such a reason, would not impair the obligation of the contract arising between the State and the corporation out of the mere granting of the charter. In *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, 580, an insurance company contested the validity, under the contract cause of the Constitution, of a statute of Illinois prescribing certain regulations (not in force when the company's charter was granted) in reference to the conduct of life insurance business in that State. This court overruled the contention, observing: "The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the State, in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. *Terrett* v. *Taylor*, 9 Cranch, 43, 51; Angell & Ames on Corporations (9th ed.), § 774, note. Equally implied, in our judgment, is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created. *Sinking Fund Cases*, 99 U. S. 700; *Commonwealth* v. *Farmers' & Mechanics' Bank*, 21 Pick. 542; *Commercial Bank* v.

Mississippi, 4 Sm. & Marsh, 439, 497, 503. If this condition be not necessarily implied, then the creation of corporations, with rights and franchises which do not belong to individual citizens, may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are intrusted. It would be extraordinary if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all."

These principles were expressly reaffirmed, upon a review of the adjudged cases, in *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 347.

It must, therefore, be held that the contract between the club and the State did not authorize the club to disregard the valid law of the State regulating the licensing and sale of liquors. Such a course upon the part of the club was alleged to be a misuse of its corporate privileges and franchises. The distinct charge against the club in the corporation court was that it was being conducted for the purpose of violating and evading the statute regulating the licensing and sale of liquors—a statute which the commonwealth could rightfully enact under its power to care for the health and morals of its people. And the court adjudged that the charge against the club was sustained—the result being that, by the statute, the chartered rights and franchises of the club ceased without any further proceedings. Even if this court could reëxamine the judgment of the corporation court on the facts, the present record would not justify us in holding that error was committed.

Was this result consistent with the due process enjoined by the Constitution? This question must be answered in the affirmative. The proceedings against the club were had in a

court competent under the constitution and laws of Virginia to determine the questions raised by the complaint against the club. This must be assumed to be the case after the highest court of Virginia refused a writ of error upon the ground that the judgment of the corporation court was plainly right. The mode of proceeding against the club was not unusual in such cases. As early as *Terrett* v. *Taylor*, 9 Cranch, 43, 51, this court said: "A private corporation created by the legislature may lose its franchises by a misuser or nonuser of them; and they may be resumed by the government under a judicial judgment upon *quo warranto* to ascertain and enforce the forfeiture." So in *New Orleans Waterworks* v. *Louisiana*, above cited, the first of several questions raised there was that since the charter of a certain waterworks company prescribed mandamus as the remedy to maintain a lawful tariff of water rates, was not the substitution by the writs of forfeiture of charter, as a remedy for the maintenance of unlawful rates, a breach of the contract, and a deprivation of the property without due process of law, and a denial of the equal protection of the laws? The court answered the question by saying (p. 351): "The answer to the first question, as to mandamus being the exclusive remedy for illegal rates, is that the state court has otherwise construed the charter, and has held that mandamus is not the only remedy, but that the company was liable to be proceeded against by *quo warranto* at the suit of the State through its attorney general. The claim that by so proceeding there is any impairment of the obligation of a contract by any subsequent legislation, or that there has thus been a deprivation of property without due process of law, or a denial of the equal protection of the laws, has no colorable foundation. An examination of this question, among others, was made by the state court after full hearing by all parties, and all that can possibly be claimed on the part of the plaintiff in error is that such court erroneously decided the law. That constitutes no Federal question."

It thus appears that the club ceased to exist as a corpo-

ration by virtue of a judgment of a court of competent jurisdiction, all the parties being before it and given full opportunity to be heard. Such a judgment cannot be held to have violated any right belonging to the club under the contract or other clause of the Federal Constitution. *Foster* v. *Kansas*, 112 U. S. 201, 206; *Kennard* v. *Louisiana*, 92 U. S. 480; *Louisiana Waterworks Co.* v. *Louisiana*, above cited.

Judgment affirmed.

BASSING *v.* CADY.

ERROR TO THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND.

No. 426. Argued January 8, 1908.—Decided February 24, 1908.

On appeal or writ of error to this court, papers or documents used in the court below cannot in strictness be examined here unless by bill of exceptions or other proper mode they are made part of the record.

The mere arraignment and pleading to an indictment does not put the accused in judicial jeopardy, nor does the second surrender of the same person by one State to another amount to putting that person in second jeopardy because the requisition of the demanding State is based on an indictment for the same offense for which the accused had been formerly indicted and surrendered but for which he had never been tried.

One charged with crime and who was in the place where, and at the time when, the crime was committed, and who thereafter leaves the State, no matter for what reason, is a fugitive from justice within the meaning of the interstate rendition provisions of the Constitution, and of § 5278, Rev. Stat., and this none the less if he leaves the State with the knowledge and without the objection of its authorities.

THE facts are stated in the opinion.

Mr. Edward D. Bassett for plaintiff in error:

The plaintiff in error is not a fugitive from justice within the meaning of Art. IV, § 2, Const. of the U. S. and § 5278, Rev. Stat. *Dennison* v. *Kentucky*, 24 How. 66; *Robb* v. *Connolly*,

111 U. S. 624; *Ex parte Reggel*, 114 U. S. 642; *Roberts* v. *Reilly*, 116 U. S. 80; *Streep* v. *United States*, 160 U. S. 128; *Hyatt* v. *New York*, 188 U. S. 691; *Munsey* v. *Clough*, 196 U. S. 364; *Pettibone* v. *Nichols*, 203 U. S. 192; *Appleyard* v. *Massachusetts*, 203 U. S. 222; *Illinois* v. *Pease*, 207 U. S. 100.

The plaintiff in error is not a fugitive from justice as this court has defined the term in the foregoing decisions.

He has afforded an opportunity to the State of New York to prosecute him for his alleged offense, being returned on former extradition proceedings, and has been within the jurisdiction of that State several times since the commission of his alleged offense was known. *In re Kingsbury*, 106 Massachusetts, 223, 227.

He has complied with the purpose and spirit of the Constitution and statute, and his continued residence in Rhode Island should be protected from action on the part of the State of New York branding him as a fugitive from justice. *Appleyard* v. *Massachusetts, supra; Illinois* v. *Pease, supra.*

If a person can be extradited twice for the same offense, he can also be extradited a hundred times for the same alleged offense. Each time he is put to great expense, humiliation, and deprived of his liberty, and certainly the provisions of the constitution and statute referred to in this case do not contemplate that a citizen of another State shall be harrassed and persecuted by successive extradition proceedings after he has been returned to the demanding State on the first request to answer the charges made against him.

His delivery to the State of New York on the first extradition warrant gave the demanding State rightful possession of his person, and it could lawfully subject him to criminal process for the offense charged. *Streep* v. *United States*, 160 U. S. 128; *Bruce* v. *Rayner*, 62 C. C. A. 501, 504.

And the State of New York could then have prosecuted him for that or any other offense it had against him, or acted toward him as it saw fit. *Lascelles* v. *Georgia*, 148 U. S. 537.

The State of New York, however, saw fit to discharge the

plaintiff in error, and thereby he ceased to be a fugitive from its justice for that particular offense.

Leaving the State of New York with express assent and knowledge of its authorities negatives the fact that he is a fugitive from justice. *In re Todd* (S. Dak., 1900), 81 N. W. Rep. 637; *Senator Patterson's case,* cited in Moore on Extradition, § 569.

Mr. J. Jerome Hahn for defendant in error:

The law is clearly to the effect that the number of extraditions which may be issued is in the discretion of the executive, the sole requirement for interstate extradition being simply that having committed a crime within a State the person whose surrender is sought has left the jurisdiction of the demanding State and is found within the territory of another State when it is sought to subject him to criminal process. *Roberts* v. *Reilly,* 116 U. S. 80; *Appleyard* v. *Massachusetts,* 203 U. S. 222; *Illinois* v. *Pease,* 207 U. S. 100; 2 Moore on Extradition, 933; *In re White,* 45 Fed. Rep. 239.

As to the third assignment of error, it raises no Federal question; the question was not raised in the petition for the writ of *habeas corpus,* or at the hearing thereon before the Governor of Rhode Island, or the Superior Court and is without merit in fact. The requisition for extradition states that because Bassing was a fugitive from justice, the Governor of New York requested his extradition, which fact was necessarily proven to the Governor of Rhode Island and found by him to be a fact before he issued the warrant, which under no procedure known to counsel, need contain further findings of fact than are therein set forth. The issuing of the warrant is in effect a finding that the authorities of the demanding State have proven the facts set forth in the requisition, and it is in the usual form.

Mr. Justice Harlan delivered the opinion of the court.

There was some difference of opinion between counsel upon

the question whether certain papers, printed by the defendant, constituted any part of the record which this court could examine upon the present writ of error. While this is not an important matter in view of our conclusion as to the controlling questions in the case it is appropriate to say that, on appeal or writ of error to this court, papers or documents used at the hearing in the court below cannot in strictness be examined here unless they are made part of the record by bill of exceptions or in some other proper mode. For the purposes of our decision we take the case to be substantially as the plaintiff in error insists that it is on the record. He cannot ask more.

The Governor of Rhode Island, on the tenth day of July, 1907, issued a warrant of arrest addressed to the Sheriff of the County of Bristol, in that State, reciting that information had been communicated to him by the Governor of New York that Jacob Bassing (the present plaintiff in error) was charged with the crime of grand larceny, first degree, committed in New York, was a fugitive from the justice of the latter State, and was supposed to be then in Rhode Island; and that the Governor of New York had transmitted to him a copy of an indictment, warrant and other papers, certified by him to be authentic, charging Bassing with the above crime, and demanded his delivery to the agent of New York according to the Constitution and laws of the United States. The warrant of the Governor of Rhode Island commanded the arrest of Bassing and his delivery to the person designated by the Governor of New York to receive and convey him to the latter State to be there dealt with according to law.

Having been arrested under that warrant, and being in the custody of the Sheriff of Bristol County, Bassing sued out the present writ of *habeas corpus* from the Superior Court of Rhode Island. The material part of that petition is in these words: "Your petitioner further shows that he has been extradited at a prior time, to wit, March 12, 1907, on requisition of the Governor of the State of New York for the same offense as is alleged in the present indictment. Your petitioner

further shows that on April 15, A. D. 1907, he was discharged from custody by the State of New York, to which he had been extradited, where he was held in custody for the same alleged offense for which he is now held for extradition, and your petitioner offers to produce in court the warrant under which he is now held, together with a copy of the indictment for the offense on which he is now held, it being impossible to procure a copy of said warrant on the presentation of this petition on account of the shortness of the time since said warrant has been issued, and because said Sheriff of Bristol County threatens to immediately remove said Bassing out of the jurisdiction of this court. Your petitioner further shows that his detention and imprisonment, as aforesaid, is unlawful, in this, to wit: First. That the warrant of the Governor of Rhode Island and the order for his delivery to the agent of the State of New York were issued without authority of law and contrary to the constitution and laws of the State of Rhode Island, as well as contrary to the Constitution and laws of the United States [relating to fugitives from justice], especially § 2, Art. IV, of the Constitution of the United States, and § 5278 of the Revised Statutes of the United States, in that your petitioner is not a fugitive from justice. Wherefore he prays that he may be relieved of said unlawful restraint and imprisonment, and that a writ of *habeas corpus* may issue in this behalf, so that your petitioner may be forthwith brought before this court to do, submit to and receive what the law may direct."

The sheriff justified under the warrant issued by the Governor of Rhode Island.

At the hearing of the case in the Rhode Island court it appeared that the accused was charged by indictment in one of the courts of New York with the crime of grand larceny, first degree, committed on the sixth of February, 1907; and that on the fourteenth of March of that year the Governor of New York made his requisition on the Governor of Rhode Island, in due form, for the arrest of Bassing as a fugitive from justice. That requisition was honored by the Governor of Rhode Island

and Bassing was taken to New York. He was there arraigned and pleaded to the indictment. After one or two continuances the district attorney moved to dismiss the indictment, stating orally as a reason for his action (so Bassing testified in this case), that he had not sufficient evidence to hold the accused. The motion was sustained and Bassing returned to Rhode Island without, so far as the record shows, any objection on the part of the New York authorities. Shortly thereafter a second indictment was found in the New York court against Bassing for the same offense as that charged in the first indictment, and this was made the basis of a second requisition upon the Governor of Rhode Island on the fourteenth of June, 1907. Upon that requisition the Governor of Rhode Island issued the warrant of arrest of which Bassing complained in his present petition for a writ of *habeas corpus*.

The question arises on these facts whether the Governor of Rhode Island was authorized by the Constitution and laws of the United States to issue a second warrant for the arrest of Bassing and his delivery to the agent of New York, such warrant being based upon a second indictment for the same offense as that charged in the former indictment. We have not been referred to nor are we aware of any judicial decision covering this precise question. If the proceedings in the New York court, after the appearance there of the accused under the first requisition by the Governor of that State, had so far progressed, before the dismissal of the first indictment, as to put him in legal jeopardy of his liberty, it might be—but upon that point we forbear any expression of opinion—that the Governor of Rhode Island could rightfully have declined to honor a requisition to meet a second indictment for the same offense. But no such case is presented. The accused had not been put in jeopardy when the first indictment was dismissed. It may have been that the dismissal was because the State was without sufficient evidence at the time to hold the defendant; or there may have been other and adequate reasons for the course taken by the State's attorney. His mere arraignment and pleading

to the indictment did not put him in judicial jeopardy. 1 Wharton's American Cr. Law (6th ed.), 1868, §§ 544, 590, and authorities cited under each section. Suffice it to say, that when the second warrant of arrest was issued by the Governor of Rhode Island the accused had not been tried, nor put on final trial, in New York, nor placed in jeopardy there for the offense with which he was charged in that State. We do not, therefore, perceive any reason, based on the Constitution and laws of the United States, why the Governor of Rhode Island could not honor, as he did, the second requisition of the Governor of New York and issue thereon a second warrant of arrest. It is certain that no right secured to the alleged fugitive by the Constitution or laws of the United States was thereby violated.

The plaintiff in error insists, as one of the grounds of his discharge, that he was not a fugitive from justice. Undoubtedly it was competent for him to show that he was not a fugitive, but he did not establish that fact by evidence. The warrant of arrest issued by the Governor of Rhode Island established *prima facie* the lawfulness of his arrest, and, nothing to the contrary appearing in proof, it was to be taken by the court which heard this case that the accused was a fugitive from the justice of the State in which he stood charged by indictment with crime. So far as the record shows it did not appear by proof that the accused was not in New York at the time the crime with which he was charged was committed. If he was in New York at that time (and it must be assumed upon the record that he was) and thereafter left New York, no matter for what reason or under what belief, he was a fugitive from the justice of that State within the meaning of the Constitution and laws of the United States. These views are in accord with the adjudged cases. *Appleyard* v. *Massachusetts*, 203 U. S. 222, and authorities cited; *Illinois ex rel. McNichols* v. *Pease*, 207 U. S. 100, and authorities cited. He was none the less such a fugitive, within the meaning of the Constitution and laws of the United States, because after the

dismissal of the first indictment he left New York and returned to Rhode Island with the knowledge of or without objection by the New York authorities.

The judgment of the state court refusing the discharge of the accused from custody must be affirmed.

It is so ordered.

UNITED STATES v. BITTY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 503. Submitted January 27, 1908.—Decided February 24, 1908.

It is within the power of Congress to determine the regulations and exceptions under which this court shall exercise appellate jurisdiction in cases other than those in which this court has original jurisdiction and to which the judicial power of the United States extends; and the act of March 2, 1907, c. 2564, 34 Stat. 1246, permitting the United States to prosecute a writ of error directly from this court to the District or Circuit Courts in criminal cases in which an indictment may be quashed or demurrer thereto sustained where the decision is based on the invalidity or construction of the statute on which the indictment is based, is not unconstitutional because it authorizes the United States to bring the case directly to this court and does not allow the accused so to do when a demurrer to the indictment is overruled.

In construing an act of Congress prohibiting the importation of alien women for prostitution or other immoral purposes regard must be had to the views commonly entertained among the people of the United States as to what is moral and immoral in the relations between man and woman and concubinage is generally regarded in this country as immoral.

While penal laws are to be strictly construed they are not to be construed so strictly as to defeat the obvious intent of the legislature.

While under the rule of *ejusdem generis* the words "or other immoral purpose" would only include a purpose of the same nature as the principal subject to which they were added they do include purposes of the same nature, such as concubinage, when the principal subject is prostitution and the importation of women therefor.

The prohibition in the alien immigration act of February 20, 1907, c. 1134, 34 Stat. 898, against the importation of alien women and girls for the purpose of prostitution or any other immoral purpose includes the importation of an alien woman or girl to live as a concubine with the person importing her.

THE facts, which involve the construction of the acts of Congress regulating the immigration of aliens into the United States, are stated in the opinion.

The Attorney General and *Mr. Assistant Attorney General Cooley* for plaintiff in error:

The rule of *ejusdem generis* does not apply to this case. The rule is merely a technical rule of construction which the courts have frequently declined to apply, when by so doing the manifest intention of the legislature would have been defeated. *Wilkinson* v. *Leland*, 2 Peters, 662; *State* v. *Williams*, 2 Strob. L. R. 474; *Regina* v. *Payne*, L. R. 1; C. C. 27. See also *Willis* v. *Mabon*, 48 Minnesota, 140, 155; *Webber* v. *City of Chicago*, 148 Illinois, 314; *Gillock* v. *The People*, 171 Illinois, 307; *Woodworth* v. *State*, 26 Ohio St. 196; *Winters* v. *Duluth*, 82 Minnesota, 127; *City of St. Joseph* v. *Elliott*, 47 Mo. App. 418; *Foster* v. *Blount*, 18 Alabama, 687; *Haigh* v. *The Town Council of Sheffield*, L. R. 10; Q. B. 102; *Bows* v. *Fenwick*, L. R. 9; C. P. 339.

The immigration act of 1907 should be considered as a whole and in connection with other statutes *in pari materia* in determining its meaning. When §§ 2 and 3 of the act are read together they show the clearly expressed purpose of the Congress to prevent the immigration of numerous classes of persons regarded as undesirable additions to the population of the country. Among those excluded are idiots, epileptics, paupers, professional beggars, persons afflicted with tuberculosis or any loathsome or dangerous contagious disease, persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude, polygamists, anarchists, and contract laborers, as well as prostitutes and women or girls brought in for purposes of prostitution or for any other immoral purpose.

The Congress has deliberately made the exclusion of persons more comprehensive in the act of 1907 than in the acts of 1891 (26 Stat. 1084), 1893 (27 Stat. 569), and 1903 (32 Stat. 1213). The narrow construction placed upon the act by Judge Hough

defeats the intention of the legislature, which clearly was to exclude various undesirable classes of persons, among others women of loose moral character.

Even should the rule *ejusdem generis* be applied herein, the finding of the court below is not warranted by the language of the statute. The words "for any other immoral purpose" must be given some meaning, and that given to them by the trial court limits them to an extent evidently not contemplated by Congress. The courts have repeatedly refused, even when applying the rule of *ejusdem generis*, to apply it in a narrow sense. *Misch* v. *Russell*, 136 Illinois, 22; *Queen* v. *Edmundson*, 2 Ellis & Ellis, 77; *County of Union* v. *Ussery*, 147 Illinois, 204.

It can hardly be denied that the act of the defendant in error in importing the woman mentioned in the indictment is one which is generally condemned by the moral sense of all enlightened communities and is assuredly contrary to purity. But it is more than that. Both the common and statute law have uniformly recognized illicit sexual relations as immoral, and courts have repeatedly refused to enforce contracts the consideration for which was future illicit cohabitation. Such purpose is one which the law seeks to defeat and holds as against sound public policy and deserving of condemnation by right-thinking men.

The conduct of the defendant in error was "immoral" as matter of strict law and this position is amply sustained by state and Federal authorities. *Ralston* v. *Boady*, 20 Georgia, 449, and cases cited; *Potter* v. *Gracie*, 58 Alabama, 303; *Walker* v. *Perkins*, 3 Burrows, 1568; *S. C.*, 1 W. Black, 517; *Nye* v. *Moseley*, 6 Barnewall & Cresswell, 133. See also *Walker* v. *Gregory*, 36 Alabama, 180; *Winebrinner* v. *Weisiger*, 19 Kentucky, 33; *Reed* v. *Brewer*, 36 S. W. Rep. 99; *Mackbee* v. *Griffith*, 2 Cranch C. C. 336.

Mr. Edward A. Alexander for defendant in error:

Counsel for defendant conceded in the court below, and concedes here, that concubinage is highly immoral, and that

it has been recognized as such by various States, which have passed laws against it. However, whether it be immoral or not is not the question. The only question involved on this point is whether or not Congress intended to legislate against those isolated cases where certain individuals come into this country with their mistresses.

The statute in question is a criminal statute and must be strictly construed.

The term "prostitute" necessarily implies the idea of a female who hires the use of her body for money, whereas the term "mistress" implies the case of one who cohabits with a male without being married to him.

There is a marked degree of difference between a prostitute and a mistress. If Congress had intended to cover the case of mistresses, who are not prostitutes, and who are in no way connected with the importation of prostitutes, or with the "white slave trade," Congress could and would readily have said so by the use of apt language, as it cannot be presumed that Congress, which is one of the most intelligent bodies of government in the world, does not know how to use the English language to adequately designate its intentions.

The act of Congress under which this appeal was prosecuted by the United States is of doubtful validity.

The act gives the Government of the United States the right to appeal from a judgment or decree sustaining a demurrer to an indictment where the constitutionality or construction of a statute is involved. The act does not give to the defendant the right to appeal from a judgment or decree overruling his demurrer.

Furthermore, the act gives the Government the right to appeal in a criminal case where the construction of the statute is involved, and not in a criminal case where the defendant is indicted for violating a statute, but in which the construction of the statute does not come into question.

Furthermore, had the defendant in this case pleaded not guilty and gone to trial, had a jury been sworn, and a motion

made for the direction of a verdict of acquittal, and granted, it is believed, under the jeopardy clause of the Constitution, the defendant could not again be tried, and no appeal would lie, but because he demurred an appeal does lie.

The difference between the state legislatures and Congress is that the state legislatures possess all of the powers of the people of the State, except those which are expressly prohibited, whereas Congress only possesses those powers expressly granted or necessarily implied to carry out the objects for which Congress was created or for which the powers conferred were given.

It is conceded that Congress has the power to increase or diminish the appellate power of the Supreme Court, but it is doubted whether the people of the United States have given to Congress the power to pass partial legislation, which affects differently persons in the same class covered by the legislation.

Section 2, Article IV, of the Constitution provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

An act providing for appeals in certain specific cases, and also giving the Government the right to appeal and not giving the same right to the defendant, seems not only to be partial legislation, but seems to be also in conflict with Art. IV, § 2, of the Constitution, providing that "the citizens of each State shall be entitled to all privileges and immunities of the citizens in the several States."

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a criminal prosecution under an act of Congress regulating the immigration of aliens into the United States.

By the act of March 3, 1875, c. 141, relating to immigration, it was made a felony, punishable by imprisonment not exceeding five years and by fine not exceeding five thousand dollars, for any one knowingly and willfully to import or to cause the importation of women into the United States for the purposes of "prostitution." 18 Stat. 477.

By the act of March 3, 1903, § 3, c. 1012, it was provided: "That the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden; and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold or attempt to hold, any woman or girl for such purposes in pursuance of such illegal importation shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned not less than one nor more than five years and pay a fine not exceeding five thousand dollars." 32 Stat. 1213, 1214, Pt. 1.

A more comprehensive statute regulating the immigration of aliens into the United States was passed on February 20, 1907, c. 1134. By that act the prior act of 1903 (except one section) was repealed. The third section of this last statute was in these words: "That the importation into the United States of any alien woman or girl for the purpose of prostitution, *or for any other immoral purpose,* is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than five years and pay a fine of not more than five thousand dollars; and any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections twenty and twenty-one of this Act." 34 Stat. 898, Pt. 1.

The defendant in error Bitty was charged by indictment in

the Circuit Court of the United States for the Southern District of New York with the offense of having unlawfully, willfully, and feloniously imported into the United States from England a certain named alien woman for "an immoral purpose," namely, "that she should live with him as his concubine."

The Circuit Court having sustained a demurrer to the indictment and dismissed the case the United States prosecuted this writ of error under the authority of the act of March 2, 1907, 34 Stat. 1246, c. 2564. That statute authorizes a writ of error, on behalf of the United States, from the District or Circuit Courts directly to this court in all criminal cases in which an indictment is quashed or set aside or in which a demurrer to the indictment or any count thereof is sustained, "where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

The demurrer to the indictment was sustained and the indictment dismissed upon the ground that the statute, properly construed, did not make it an offense for one to bring and import an alien woman into the United States for the purpose of having her live with him as his concubine. The case is, therefore, one in which the United States was entitled, under the above act of 1907, to prosecute a writ of error from this court unless, as the accused suggests, the act is unconstitutional in that it authorizes the United States in the cases specified to bring the case directly to this court, but does not allow the accused to bring it here when a demurrer to the indictment or to some count thereof is overruled. There is no merit in this suggestion. Except in cases affecting ambassadors and other public ministers and consuls and those in which a State shall be a party—in which cases this court may exercise original jurisdiction—we can exercise appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make in the other cases to which by the Constitution the judicial power of the United States extends. Const. Art. III, § 2. What such exceptions and regula-

tions should be it is for Congress, in its wisdom, to establish, having of course due regard to all the provisions of the Constitution. If a court of original jurisdiction errs in quashing, setting aside or dismissing an indictment for an alleged offense against the United States, upon the ground that the statute on which it is based is unconstitutional, or upon the ground that the statute does not embrace the case made by the indictment, there is no mode in which the error can be corrected and the provisions of the statute enforced, except the case be brought here by the United States for review. Hence—that there might be no unnecessary delay in the administration of the criminal law, and that the courts of original jurisdiction may be instructed as to the validity and meaning of the particular criminal statute sought to be enforced—the above act of 1907 was passed. Surely such an exception or regulation is in the discretion of Congress to prescribe, and does not violate any constitutional right of the accused. *Taylor* v. *United States*, 207 U. S. 120. Congress was not required by the Constitution to grant to an accused the privilege of bringing here upon the overruling of a demurrer to the indictment and before the final determination of the case against him, the question of the sufficiency of the indictment simply because, in the interest of the prompt administration of the criminal law, it allowed the United States to prosecute a writ of error directly to this court for the review of a final judgment which stopped the prosecution by quashing or dismissing the indictment upon the ground of the unconstitutionality or construction of the statute.

We come now to the merits of the case, and they are within a very narrow compass. The earlier statutes, we have seen, were directed against the importation into this country of alien women for the purposes of prostitution. But the last statute, on which the indictment rests, is, we have seen, directed against the importation of an alien woman "for the purpose of prostitution *or* for any other immoral purpose;" and the indictment distinctly charges that the defendant imported the alien woman in question "that she should live with him as his concubine,"

that is, in illicit intercourse, not under the sanction of a valid or legal marriage. Was that an immoral purpose within the meaning of the statute? The Circuit Court held, in effect, that it was not, the bringing of an alien woman into the United States that she may live with the person importing her as his concubine not being in its opinion an act *ejusdem generis* with the bringing of such a woman to this country for the purposes of "prostitution." Was that a sound construction of the statute?

All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of "prostitution." It refers to women who for hire or without hire offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." *Murphy* v. *Ramsey,* 114 U. S. 15, 45. Congress no doubt proceeded on the ground that contact with society on the part of alien women leading such lives would be hurtful to the cause of sound private and public morality and to the general well-being of the people. Therefore the importation of alien women for purposes of prostitution was forbidden and made a crime against the United States. Now the addition in the last statute of the words, "or for any other immoral purpose," after the word "prostitution," must have been made for some practical object. Those added words show beyond question that Congress had in view the protection of society against another class of alien women other than those who might be brought here merely for purposes of "prostitution." In forbidding the importation of alien women "for any other immoral purpose," Congress evidently thought

that there were purposes in connection with the importations of alien women which, as in the case of importations for prostitution, were to be deemed immoral. It may be admitted that in accordance with the familiar rule of *ejusdem generis*, the immoral purpose referred to by the words "any other immoral purpose," must be one of the same general class or kind as the particular purpose of "prostitution" specified in the same clause of the statute. 2 Lewis' Sunderland Stat. Const., § 423, and authorities cited. But that rule cannot avail the accused in this case; for, the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution. The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse. We must assume that in using the words "or for any other immoral purposes," Congress had reference to the views commonly entertained among the people of the United States as to what is moral or immoral in the relations between man and woman in the matter of such intercourse. Those views may not be overlooked in determining questions involving the morality or immorality of sexual intercourse between particular persons. Chief Justice Marshall, speaking for the court, said that "though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. . . . The case must be a strong one indeed, which would justify a court in departing from the plain

meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest." *United States* v. *Wiltberger*, 5 Wheat. 76, 95, 96. In *United States* v. *Winn*, 3 Sumner, 209, 211, Mr. Justice Story said that the proper course is "to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." To the same effect are *United States* v. *Morris*, 14 Pet. 464; *American Fur Co.* v. *United States*, 2 Pet. 358, 367; *United States* v. *Lacher*, 134 U. S. 624, 628; Sedgwick on Stat. Constr. (2d ed.) 282; Maxwell on Interpretation of Statutes, (2d ed. 318). Guided by these considerations and rules, we must hold that Congress intended by the words "or for any other immoral purpose," to include the case of anyone who imported into the United States an alien woman that she might live with him as his concubine. The statute in question, it must be remembered, was intended to keep out of this country immigrants whose permanent residence here would not be desirable or for the common good, and we cannot suppose either that Congress intended to exempt from the operation of the statute the importation of an alien woman brought here only that she might live in a state of concubinage with the man importing her, or that it did not regard such an importation as being for an immoral purpose.

The judgment must be reversed, and the case remanded with directions to set aside the order dismissing the indictment and overrule the demurrer, and for such further proceedings as will be consistent with this opinion.

It is so ordered.

HENNINGSEN *v.* UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND.

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

No. 78. Argued December 16, 17, 1907.—Decided February 24, 1908.

Although diversity of citizenship is alleged in the bill, if the grounds of the suit and relief are also based on statutes of the United States, which, as in this case, are necessarily elements of the decision of the Circuit Court of Appeals, an appeal lies from the judgment of that court to this court.

The equity of the surety on a bond given by a contractor under the act of August 13, 1894, 28 Stat. 278, who by reason of the contractor's default has been obliged to pay material-men and laborers, is superior to that of a bank loaning money to the contractor, secured by assignments of amounts to become due. In such a case the surety is subrogated to the rights of the contractor, but the bank is not.

143 Fed. Rep. 810, affirmed.

R. M. HENNINGSEN and Edward W. Clive, as copartners, in May, 1903, contracted with the United States for the construction of certain buildings at Fort Lawton, in the State of Washington, and entered into a bond with the United States Fidelity and Guaranty Company of Baltimore (hereinafter called the Guaranty Company) as surety in the penal sum of $11,625 for the faithful performance of the contract, and to "promptly make full payments to all persons supplying labor or materials in the prosecution of the work provided for in said contract." The buildings were constructed in accordance with the terms of the contract, but the contractors failed to pay certain just and lawful claims for labor and materials, amounting in the aggregate to $15,409.04. After such default the Guaranty Company instituted a suit in the United States Circuit Court for the District of Washington, in which it made the contractors and all persons to whom they were indebted for labor and materials defendants, confessing its own liability to the full amount of the bond. A decree was entered, adjudging the

company liable to such creditors of the contractors in the full sum of the bond, $11,625, and awarding payment to such creditors *pro rata*. It also adjudged that upon such payment the liability of the company upon the bond should be discharged. On March 16, 1904, pending the performance of the contract, the contractor, or rather Henningsen alone, for Clive had ceased to have any connection with the performance of the contract, made a written assignment of all payments which were then due, or might thereafter become due on account of the contract, to R. R. Spencer, in trust for the National Bank of Commerce of Seattle, to secure payment of a loan made by the bank to the contractors, October 10, 1903, of $3,500, and also subsequent loans, and at the same time gave as further security an order addressed to the United States quartermaster, requesting him to deliver to said Spencer all checks of the Government on account of said contract. The moneys so loaned were paid directly by the bank to Henningsen and handled and disbursed by him, without any supervision or control upon the part of the bank or Spencer. This suit was commenced by the Guaranty Company by a bill in the Circuit Court of the United States for the District of Washington to restrain the appellants from collecting or accepting the balance due on the contract from the United States. It appeared at the time of the commencement of the suit that there was in the hands of the quartermaster, due upon the contract, the sum of $13,066, which he was about to pay to Spencer under the assignment and order. On June 17, 1904, an arrangement was made between the parties, by which the sum of $8,024.21 was paid to certain creditors, and the balance, $5,041.79, was applied in conditional payment of the indebtedness of the contractors to the bank, with a stipulation that if it should be finally determined that the Guaranty Company was entitled to receive it then the bank should pay it to the Guaranty Company. This suit proceeded to a decree in favor of the Guaranty Company for $5,041.79, which decree was affirmed by the Circuit Court of Appeals. (February 12, 1906; 143 Fed. Rep. 810;

74 C. C. A. 484.) The bond of the Guaranty Company was given under the requirements of the act of Congress of August 13, 1894, c. 280 (28 Stat. 278), which reads:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: *Provided*, That such action and prosecution shall involve the United States in no expense."

Mr. George E. de Steigner, with whom *Mr. W. W. Wilshire* was on the brief, for appellants:

The contract, so far as the United States is concerned, had been fully performed, so that there was no right of the Government to which the surety company could be subrogated; the creditors furnishing labor and material had no lien upon the fund, and therefore there was no right in their favor to which the surety company could be subrogated; therefore the War Department was entitled to pay it to the contractors or to their assignee, the bank, and either the contractors or the bank

was entitled to receive it. Therefore the Circuit Court of Appeals was in error in stating that "the real question in the case is one of priority of equities as between the bank and the surety company." The real question is whether the surety company had any equity whatsoever.

It must recover, if at all, on the strength of its own right. This right must be something more than the general right of a creditor to be paid. It must be something in the nature of a lien, legal or equitable, upon the particular fund. *Prairie State Bank* v. *United States*, 164 U. S. 227; *First National Bank* v. *City Trust Company*, 114 Fed. Rep. 529; *Greenville Savings Bank* v. *Lawrence*, 76 Fed. Rep. 545; *Lawrence* v. *United States*, 71 Fed. Rep. 228; *Reid* v. *Pauly*, 121 Fed. Rep. 652; *Richard Brick Company* v. *Rothwell*, 18 App. D. C. 516.

The decision in each case was founded upon the fact, either that the contractors had failed to perform their contract and the sureties had completed the performance thereof for the Government, or that the contract provided for the retention of a portion of the contract price until laborers and material-men were paid. In the present case, neither of these facts is found. The original contractors finished the work for the Government; and the contract contained no stipulation for retaining any part of the amount due for the payment of laborers and material-men. There is, therefore, no default of which the Government can take advantage. So far as it is concerned, the contract has been fully performed. *United States* v. *Rundle*, 100 Fed. Rep. 400; *United States* v. *National Surety Co.*, 92 Fed. Rep. 549.

There was no right or equity left in the United States to which the complainant could be subrogated. *Liles* v. *Rogers*, 113 N. Car. 197.

The laborers and material-men never had any right to the fund. Aside from some statutory or contract provision, laborers or material-men have no claim, legal or equitable, either against the property improved, or the contract price. *Lawrence* v. *United States*, 71 Fed. Rep. 228; *Canal Co.* v. *Gor-*

don, 6 Wall. 561, 571; *Withrow Lumber Co.* v. *Glasgow Investment Co.*, 101 Fed. Rep. 863–868; *Mechanics' Bank* v. *Winant*, 1 N. Y. S. 659–660; *Randolph* v. *New York*, 53 How. Pr. 68; Phillips on Mechanics' Liens, § 1; 20 Am. & Eng. Enc. Law (2d ed.), 269, 293.

Of course, in no case is there such a claim in the case of public property. 20 Am. & Eng. Enc. Law (2d ed.), 295.

The complainant cannot be subrogated to any rights of the Government, because the contract had been fully performed and the Government had lost all interest in the retention of the fund; and the complainant cannot be subrogated to the rights of the laborers or material-men, because the fund was not retained for their benefit and they have no interest therein to which the right of subrogation can attach.

Mr. James B. Murphy, with whom *Mr. Harold Preston*, *Mr. Carroll B. Graves* and *Mr. Edward B. Palmer* were on the brief, for appellees:

The assignment made by Henningsen to Spencer is void under Rev. Stat., §§ 3477, 3737, as against the rights of third persons. *Greenville Savings Bank et al.* v. *Lawrence*, 76 Fed. Rep. 545; *United States* v. *Gillis*, 95 U. S. 407; *Spawford* v. *Kirk*, 97 U. S. 484.

The appellant bank occupies no better position than a general creditor. It was under no obligation to lend this money, and there is no proof that any part of it was used on the contract in question. The money was passed to the credit of Henningsen, and checked out to whom and for what no one seems to know, and as far as this fund is concerned the bank is a stranger and a mere volunteer. *Emmert* v. *Thompson*, 52 N. W. Rep. 31; Sheldon on Subrogation, § 240; *Ætna Life Ins. Co.* v. *Middleport*, 124 U. S. 534.

On the other hand, this appellee, by admitting its liability and paying the full penalty of its bond into court, comes into court with clean hands. It did equity and to all intents and purposes occupies the same position in a court of equity as a

surety who had finished a contract or had already paid the contractors' bills. That is, it is entitled to assert the doctrine of subrogation and has a prior equity in this fund. The doctrine of subrogation does not depend on a lien. *Ætna Life Ins. Co.* v. *Middleport*, 124 U. S. 534; *Matthews* v. *Fidelity Trust Co.*, 52 Fed. Rep. 687; *Memphis & Little Rock R. R. Co.* v. *Dow*, 120 U. S. 287; *Emmert* v. *Thompson*, 52 N. W. Rep. 31; *Prairie State Bank* v. *United States*, 164 U. S. 227; *First National Bank* v. *City Trust Co.*, 114 Fed. Rep. 529.

The appellants' contention that appellee is not entitled to assert the right of subrogation is not well founded. They insist that there "must be something in the nature of a lien." Such is not the law. This doctrine is a creation of equity to see that substantial justice is done by one who in good conscience ought to do it. *Ætna Life Ins. Co.* v. *Middleport*, 124 U. S. 534; *Memphis & Little Rock R. R. Co.* v. *Dow*, 120 U. S. 287; *Emmert* v. *Thompson*, 52 N. W. Rep. 31; *Prairie State Bank* v. *United States*, 164 U. S. 227, and cases cited.

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

A motion is made to dismiss on the ground that the jurisdiction of the Circuit Court was invoked solely on the ground of the diversity of citizenship of the parties, and hence the decree of the Circuit Court of Appeals was final. The motion must be overruled. Diversity of citizenship was, it is true, alleged in the bills, but grounds of suit and relief were also based on the statutes of the United States, as from the discussion of the merits will be seen. Those statutes entered as elements into the decision of the Circuit Court of Appeals, and were necessary elements. *Howard* v. *United States*, 184 U. S. 676; *Warner* v. *Searle & Hereth Co.*, 191 U. S. 195, 205.

Passing to the merits of the case, the question turns upon the respective equities of the parties. Appellants concede that the bank was not by the making of the loans to Henningsen entitled to subrogation to the rights, if any, of the United

States or the laborers or material-men, and also that if the Guaranty Company is entitled to subrogation to any right of the United States Government arising through the building contract, the bank can make no claim by reason of the assignment.

Henningsen, for we may leave Clive out of consideration, entered into a contract with the United States to construct buildings. The Guaranty Company was surety on that contract. Its stipulation was not merely that the contractor should construct the buildings, but that he should pay promptly and in full all persons supplying labor and material in the prosecution of the work contracted for. He did not make this payment, and the Guaranty Company, as surety, was compelled to and did make the payment. Is its equity superior to that of one who simply loaned money to the contractor to be by him used as he saw fit, either in the performance of his building contract or in any other way? We think it is. It paid the laborers and material-men and thus released the contractor from his obligations to them, and to the same extent released the Government from all equitable obligations to see that the laborers and supply men were paid. It did this not as a volunteer but by reason of contract obligations entered into before the commencement of the work. *Prairie State Bank* v. *United States*, 164 U. S. 227, is in point. In that case Sundberg & Co., in 1888, contracted with the Government to build a custom-house at Galveston. Hitchcock was surety on that contract. On February 3, 1890, in consideration of advances made and to be made by the Prairie Bank, Sundberg & Co. gave a power of attorney to a representative of the bank to receive from the United States the final payment under the contract. In May, 1890, Sundberg & Co. defaulted in the performance of this contract and Hitchcock, as surety, without any knowledge of the alleged rights of the bank, assumed the completion of the contract and disbursed therein about $15,000 in excess of the current payments from the Government. In a contest between Hitchcock and the Prairie Bank it was held that Hitchcock had the superior equity, and the judgment of the Court of Claims in his favor

for the amount still due from the Government was affirmed. The bank loaned to Sundberg & Co. about $6,000 prior to the time that they defaulted in the performance of their contract and prior to any action by Hitchcock in completing the contract or in paying out money, so that the bank actually parted with $6,000 of its money before Hitchcock parted with any of his. It was held that Hitchcock's equity commenced with his obligation in 1888 to see that Sundberg & Co. duly performed their contract with the Government. Mr. Justice WHITE, delivering the opinion of the court, reviewed the authorities at length and discussed the question fully. He said (p. 232):

"Under the principles thus governing subrogation, it is clear whilst Hitchcock was entitled to subrogation, the bank was not. The former in making his payments discharged an obligation due by Sundberg, for the performance of which he, Hitchcock, was bound under the obligation of his suretyship. The bank, on the contrary, was a mere volunteer, who lent money to Sundberg on the faith of a presumed agreement and of supposed rights acquired thereunder. The sole question, therefore, is whether the equitable lien, which the bank claims it has, without reference to the question of its subrogation, is paramount to the right of subrogation which unquestionably exists in favor of Hitchcock. In other words, the rights of the parties depend upon whether Hitchcock's subrogation must be considered as arising from and relating back to the date of the original contract or as taking its origin solely from the date of the advance by him."

It seems unnecessary to again review the authorities. It is sufficient to say that we agree with the views of the Circuit Court of Appeals, expressed in its opinion, in the present case:

"Whatever equity, if any, the bank had to the fund in question, arose solely by reason of the loans it made to Henningsen. Henningsen's surety was, upon elementary principles, entitled to assert the equitable doctrine of subrogation; but it is equally clear that the bank was not, for it was a mere volunteer, and under no legal obligation to loan its money. *Prairie State Bank*

v. *United States*, 164 U. S. 227; *Insurance Company* v. *Middleport*, 124 U. S. 534; Sheldon on Subrogation, § 240." See also *United States Fidelity Co.* v. *Kenyon*, 204 U. S. 349, 356, 357.

The decree of the Circuit Court of Appeals is

Affirmed.

MULLER, PLAINTIFF IN ERROR, *v.* THE STATE OF OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 107. Argued January 15, 1908.—Decided February 24, 1908.

The peculiar value of a written constitution is that it places, in unchanging form, limitations upon legislative action, questions relating to which are not settled by even a consensus of public opinion; but when the extent of one of those limitations is affected by a question of fact which is debatable and debated, a widespread and long continued belief concerning that fact is worthy of consideration.

This court takes judicial cognizance of all matters of general knowledge—such as the fact that woman's physical structure and the performance of maternal functions place her at a disadvantage which justifies a difference in legislation in regard to some of the burdens which rest upon her.

As healthy mothers are essential to vigorous offspring, the physical well-being of woman is an object of public interest. The regulation of her hours of labor falls within the police power of the State, and a statute directed exclusively to such regulation does not conflict with the due process or equal protection clauses of the Fourteenth Amendment.

The right of a State to regulate the working hours of women rests on the police power and the right to preserve the health of the women of the State, and is not affected by other laws of the State granting or denying to women the same rights as to contract and the elective franchise as are enjoyed by men.

While the general liberty to contract in regard to one's business and the sale of one's labor is protected by the Fourteenth Amendment that liberty is subject to proper restrictions under the police power of the State.

The statute of Oregon of 1903 providing that no female shall work in certain establishments more than ten hours a day is not unconstitutional so far as respects laundries.

48 Oregon, 252, affirmed.

THE facts, which involve the constitutionality of the statute

of Oregon limiting the hours of employment of women, are stated in the opinion.

Mr. William D. Fenton, with whom *Mr. Henry H. Gilfry* was on the brief, for plaintiff in error:

Women, within the meaning of both the state and Federal constitutions, are persons and citizens, and as such are entitled to all the privileges and immunities therein provided, and are as competent to contract with reference to their labor as are men. *In re Leach*, 134 Indiana, 665; *Minor* v. *Happerset*, 21 Wall. 163; *Lochner* v. *New York*, 198 U. S. 45; *First National Bank* v. *Leonard*, 36 Oregon, 390; II. B. & C. Ann. Codes & Statutes of Oregon, §§ 5244, 5250.

The right to labor or employ labor and to make contracts in respect thereto upon such terms as may be agreed upon, is both a liberty and a property right, included in the constitutional guarantee that no person shall be deprived of life, liberty or property without due process of law. Cooley's Const. Lim. (7th ed.), 889; *Ex parte Kuback*, 85 California, 274; *Seattle* v. *Smyth*, 22 Washington, 327; *Low* v. *Printing Co.*, 41 Nebraska, 127, 146; *Richie* v. *People*, 155 Illinois, 98, 104; *Cleveland* v. *Construction Co.*, 67 Ohio St. 197, 213, 219; *Frorer* v. *People*, 141 Illinois, 171, 181; *Coal Co.* v. *People*, 147 Illinois, 67, 71; *State* v. *Goodwill*, 33 W. Va. 179, 183; *State* v. *Loomis*, 115 Missouri, 307, 316; *In re Morgan*, 26 Colorado, 415; *Lochner* v. *New York*, 198 U. S. 45, 53; *State* v. *Buchanan*, 29 Washington, 603; *State* v. *Muller*, 48 Oregon, 252.

The law operates unequally and unjustly, and does not affect equally and impartially all persons similarly situated, and is therefore class legislation. Cases cited *supra* and *Bailey* v. *The People*, 190 Illinois, 28; *Gulf, Colo. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Ex parte Northrup*, 41 Oregon, 489, 493; *In re Morgan*, 26 Colorado, 415; *In re House Bill 203*, 21 Colorado, 27; *In re Eight Hour Bill*, 21 Colorado, 29.

Section 3 of this act is unconstitutional in this, that it de-

prives the plaintiff in error and his employés of the right to contract and be contracted with, and deprives them of the right of private judgment in matters of individual concern, and in a matter in no wise affecting the general welfare, health and morals of the persons immediately concerned, or of the general public. Cases cited *supra* and *In re Jacobs*, 98 N. Y. 98; *People* v. *Gillson*, 109 N. Y. 389; *Godcharles* v. *Wigeman*, 113 Pa. St. 431, 437; *Ramsey* v. *People*, 142 Illinois, 380.

Conceding that the right to contract is subject to certain limitations growing out of the duty which the individual owes to society, the public, or to government, the power of the legislature to limit such right must rest upon some reasonable basis, and cannot be arbitrarily exercised. *Ritchie* v. *People*, 155 Illinois, 98, 106; *State* v. *Loomis*, 115 Missouri, 307; *Ex parte Kuback*, 85 California, 274; *City of Cleveland* v. *Construction Co.*, 67 Ohio St. 197, 218; *State* v. *Goodwill*, 33 W. Va. 179, 182; *Lochner* v. *New York*, 198 U. S. 48, 57.

The police power, no matter how broad and extensive, is limited and controlled by the provisions of organic law. *In re Jacobs*, 98 N. Y. 98, 108; *People* v. *Gillson*, 109 N. Y. 389; *Civil Rights Cases*, 109 U. S. 11; *Mugler* v. *Kansas*, 123 U. S. 661; Tiedeman on Lim. of Police Powers, §§ 3–86.

Women, equally with men, are endowed with the fundamental and inalienable rights of liberty and property, and these rights cannot be impaired or destroyed by legislative action under the pretense of exercising the police power of the State. Difference in sex alone does not justify the destruction or impairment of these rights. Where, under the exercise of the police power, such rights are sought to be restricted, impaired or denied, it must clearly appear that the public health, safety or welfare is involved. This statute is not declared to be a health measure. The employments forbidden and restricted are not in fact or declared to be, dangerous to health or morals. Cases cited *supra* and *Wenham* v. *State*, 65 Nebraska, 395, 405; Tiedeman on Lim. of Police Power, § 86; 1 Tiedeman, State & Fed. Control of Persons and Property, p. 335–337; *Colon* v. *Lisk*,

153 N. Y. 188, 197; *People* v. *Williams,* 100 N. Y. Supp. 337; *People* v. *Williams,* 101 N. Y. Supp. 562

Mr. H. B. Adams and *Mr. Louis D. Brandeis* for defendant in error. *Mr. John Manning, Mr. A. M. Crawford,* Attorney General of the State of Oregon, and *Mr. B. E. Haney* were on the brief:

The legal rules applicable to this case are few and are well established, namely:

The right to purchase or to sell labor is a part of the "liberty" protected by the Fourteenth Amendment of the Federal Constitution and this right to "liberty" is, however, subject to such reasonable restraint of action as the State may impose in the exercise of the police power for the protection of health, safety, morals and the general welfare. *Lochner* v. *New York,* 198 U. S. 45, 53, 67.

The mere assertion that a statute restricting "liberty" relates, though in a remote degree, to the public health, safety or welfare does not render it valid. The act must have a "real or substantial relation to the protection of the public health and the public safety." *Jacobson* v. *Massachusetts,* 197 U. S. 11, 31. It must have "a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate." *Lochner* v. *New York,* 198 U. S. 45, 56, 57, 61.

While such a law will not be sustained if it has no real or substantial relation to public health, safety or welfare, or that it is an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family, if the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words when the validity of a statute is questioned, the burden of proof, so to speak, is

upon those who assail it. *Lochner* v. *New York*, 198 U. S. 45–68.

The validity of the Oregon statute must therefore be sustained unless the court can find that there is no "fair ground, reasonable in and of itself, to say that there is material danger to the public health (or safety), or to the health (or safety) of the employés (or to the general welfare), if the hours of labor are not curtailed. *Lochner* v. *New York*, 198 U. S. 45, 61.

The Oregon statute was obviously enacted for the purpose of protecting the public health, safety, and welfare. Indeed it declares: that as the female employés in the various establishments are not protected from overwork, an emergency is hereby declared to exist.

The facts of common knowledge of which the court may take judicial notice establish, conclusively, that there is reasonable ground for holding that to permit women in Oregon to work in a "mechanical establishment, or factory, or laundry" more than ten hours in one day is dangerous to the public health, safety, morals or welfare. *Holden* v. *Hardy*, 169 U. S. 366; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Lochner* v. *New York*, 198 U. S. 481.

Mr. Louis D. Brandeis also submitted a separate brief in support of the constitutionality of the law.[1]

Mr. Justice Brewer delivered the opinion of the court.

On February 19, 1903, the legislature of the State of Oregon passed an act (Session Laws, 1903, p. 148), the first section of which is in these words:

"Sec. 1. That no female (shall) be employed in any mechanical establishment, or factory, or laundry in this State more than ten hours during any one day. The hours of work may be so arranged as to permit the employment of females

[1] For an abstract of this brief, see p. 419, *post*.

at any time so that they shall not work more than ten hours during the twenty-four hours of any one day."

Section 3 made a violation of the provisions of the prior sections a misdemeanor, subject to a fine of not less than $10 nor more than $25. On September 18, 1905, an information was filed in the Circuit Court of the State for the county of Multnomah, charging that the defendant "on the 4th day of September, A. D. 1905, in the county of Multnomah and State of Oregon, then and there being the owner of a laundry, known as the Grand Laundry, in the city of Portland, and the employer of females therein, did then and there unlawfully permit and suffer one Joe Haselbock, he, the said Joe Haselbock, then and there being an overseer, superintendent and agent of said Curt Muller, in the said Grand Laundry, to require a female, to wit, one Mrs. E. Gotcher, to work more than ten hours in said laundry on said 4th day of September, A. D. 1905, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

A trial resulted in a verdict against the defendant, who was sentenced to pay a fine of $10. The Supreme Court of the State affirmed the conviction, *State* v. *Muller*, 48 Oregon, 252, whereupon the case was brought here on writ of error.

The single question is the constitutionality of the statute under which the defendant was convicted so far as it affects the work of a female in a laundry. That it does not conflict with any provisions of the state constitution is settled by the decision of the Supreme Court of the State. The contentions of the defendant, now plaintiff in error, are thus stated in his brief:

"(1) Because the statute attempts to prevent persons, *sui juris*, from making their own contracts, and thus violates the provisions of the Fourteenth Amendment, as follows:

" 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"(2) Because the statute does not apply equally to all persons similarly situated, and is class legislation.

"(3) The statute is not a valid exercise of the police power. The kinds of work proscribed are not unlawful, nor are they declared to be immoral or dangerous to the public health; nor can such a law be sustained on the ground that it is designed to protect women on account of their sex. There is no necessary or reasonable connection between the limitation prescribed by the act and the public health, safety or welfare."

It is the law of Oregon that women, whether married or single, have equal contractual and personal rights with men. As said by Chief Justice Wolverton, in *First National Bank* v. *Leonard*, 36 Oregon, 390, 396, after a review of the various statutes of the State upon the subject:

"We may therefore say with perfect confidence that, with these three sections upon the statute book, the wife can deal, not only with her separate property, acquired from whatever source, in the same manner as her husband can with property belonging to him, but that she may make contracts and incur liabilities, and the same may be enforced against her, the same as if she were a *femme sole*. There is now no residuum of civil disability resting upon her which is not recognized as existing against the husband. The current runs steadily and strongly in the direction of the emancipation of the wife, and the policy, as disclosed by all recent legislation upon the subject in this State, is to place her upon the same footing as if she were a *femme sole*, not only with respect to her separate property, but as it affects her right to make binding contracts; and the most natural corollary to the situation is that the remedies for the enforcement of liabilities incurred are made co-extensive and co-equal with such enlarged conditions."

It thus appears that, putting to one side the elective franchise, in the matter of personal and contractual rights they stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers. We held in *Lochner* v. *New York*, 198 U. S. 45, that

a law providing that no laborer shall be required or permitted to work in a bakery more than sixty hours in a week or ten hours in a day was not as to men a legitimate exercise of the police power of the State, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such was in conflict with, and void under, the Federal Constitution. That decision is invoked by plaintiff in error as decisive of the question before us. But this assumes that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor.

In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters, an epitome of which is found in the margin.[1]

[1] The following legislation of the States impose restrictions in some form or another upon the hours of labor that may be required of women: Massachusetts: chap. 221, 1874, Rev. Laws 1902, chap. 106, § 24; Rhode Island: 1885, Acts and Resolves 1902, chap. 994, p. 73; Louisiana: § 4, Act 43, p. 55, Laws of 1886, Rev. Laws 1904, vol. 1, p. 989; Connecticut: 1887, Gen. Stat. revision 1902, § 4691; Maine: chap. 139, 1887, Rev. Stat. 1903, chap. 40, § 48, p. 401; New Hampshire: 1887, Laws 1907, chap. 94, p. 95; Maryland: chap. 455, 1888, Pub. Gen. Laws 1903, art. 100, § 1; Virginia: p. 150, 1889–1890, Code 1904, tit. 51A, chap. 178A, § 3657*b*; Pennsylvania: No. 26, p. 30, 1897, Laws 1905, No. 226, p. 352; New York: Laws 1899, § 1, chap. 560, p. 752, Laws 1907, chap. 507, § 77, subdiv. 3, p. 1078; Nebraska: 1899, Comp. Stat. 1905, § 7955, p. 1986; Washington: Stat. 1901, chap. 68, § 1, p. 118: Colorado: Acts 1903, chap. 138, § 3, p. 310; New Jersey: 1892, Gen. Stat. 1895, p. 2350, §§ 66, 67; Oklahoma: 1890, Rev. Stat. 1903, chap. 25, art. 58, § 729; North Dakota: 1877, Rev. Code 1905, § 9440; South Dakota: 1877, Rev. Code (Penal Code, § 764), p. 1185; Wisconsin: § 1, chap. 83, Laws of 1867, Code 1898, § 1728; South Carolina: Acts 1907, No. 233, p. 487.

In foreign legislation Mr. Brandeis calls attention to these statutes: Great Britain: Factories Act of 1844, chap. 15, pp. 161, 171; Factory and Workshop Act of 1901, chap. 22, pp. 60, 71; and see 1 Edw. VII, chap. 22. France, 1848; Act Nov. 2, 1892, and March 30, 1900. Switzerland, Canton

While there have been but few decisions bearing directly upon the question, the following sustain the constitutionality of such legislation: *Commonwealth* v. *Hamilton Mfg. Co.*, 120 Massachusetts, 383; *Wenham* v. *State*, 65 Nebraska, 394, 400, 406; *State* v. *Buchanan*, 29 Washington, 602; *Commonwealth* v. *Beatty*, 15 Pa. Sup. Ct. 5, 17; against them is the case of *Ritchie* v. *People*, 155 Illinois, 98.

The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to

of Glarus, 1848; Federal Law 1877, art. 2, § 1. Austria, 1855; Acts 1897, art. 96*a*, §§ 1–3. Holland, 1889; art. 5, § 1. Italy, June 19, 1902, art. 7. Germany, Laws 1891.

Then follow extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization. The matter is discussed in these reports in different aspects, but all agree as to the danger. It would of course take too much space to give these reports in detail. Following them are extracts from similar reports discussing the general benefits of short hours from an economic aspect of the question. In many of these reports individual instances are given tending to support the general conclusion. Perhaps the general scope and character of all these reports may be summed up in what an inspector for Hanover says: "The reasons for the reduction of the working day to ten hours—(*a*) the physical organization of women, (*b*) her maternal functions, (*c*) the rearing and education of the children, (*d*) the maintenance of the home—are all so important and so far reaching that the need for such reduction need hardly be discussed."

which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.

It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the Fourteenth Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a State may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many respects the individual's power of contract. Without stopping to discuss at length the extent to which a State may act in this respect, we refer to the following cases in which the question has been considered: *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Holden* v. *Hardy*, 169 U. S. 366; *Lochner* v. *New York*, 198 U. S. 45.

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the

consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference

justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.

We have not referred in this discussion to the denial of the elective franchise in the State of Oregon, for while it may disclose a lack of political equality in all things with her brother, that is not of itself decisive. The reason runs deeper, and rests in the inherent difference between the two sexes, and in the different functions in life which they perform.

For these reasons, and without questioning in any respect the decision in *Lochner* v. *New York*, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution, so far as it respects the work of a female in a laundry, and the judgment of the Supreme Court of Oregon is

Affirmed.

BIEN *v.* ROBINSON, RECEIVER OF HAIGHT & FREESE COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 135. Submitted January 27, 1908.—Decided February 24, 1908.

Where the jurisdiction of the Circuit Court is questioned merely in respect to its general authority as a judicial tribunal to entertain a summary proceeding to compel repayment of assets wrongfully withheld from a receiver appointed by it, its power as a court of the United States as such is not questioned and the case cannot be certified directly to this court under the jurisdiction clause of § 5 of the Judiciary Act of 1891.

Where no sufficient reason is stated warranting this court in deciding that the Circuit Court acted without jurisdiction, this court will assume that the Circuit Court acted rightfully in appointing receivers and issuing an injunction against disposition of assets.

The delivery of a check is not the equivalent of payment of the money ordered by the check to be paid, and in this case, the check not having been

cashed until after receivers had been appointed, the payee, who had knowledge of their appointment and the issuing of an injunction order, was required to repay the amount.

A court of equity has power by summary process, after due notice and opportunity to be heard, to compel one who, in violation of an injunction order of which he had knowledge, has taken assets of a corporation in payment of indebtedness, to repay the same to the receiver.

THE facts are stated in the opinion.

Mr. Albert I. Sire for plaintiff in error.

Mr. Roger Foster, Mr. Frederick J. Moses and *Mr. G. Thomas Dunlop* for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

By a decree of the Circuit Court of the United States for the District of Massachusetts, James D. Colt was appointed receiver of the property and assets of the Haight & Freese Company, a New York corporation, then ostensibly engaged in business as stockbrokers in New York, Boston, Philadelphia and other cities. Subsequently, and on May 9, 1905, in the Circuit Court of the United States for the Southern District of New York, upon a bill filed on behalf of one Ridgway Bowker against the said Haight & Freese Company and others, Colt and one Edmonds were appointed temporary receivers of the same corporation, "both original and as ancillary to said decree of the Circuit Court of the United States for the District of Massachusetts." The order appointing receivers also contained a clause enjoining the defendants, various other named persons and corporations, and all persons and corporations generally, from paying over or transferring any of the money, property, effects or assets of the corporation to any person other than the receivers. On the same day that the receivers were appointed, but before the filing of the bill of complaint, an officer of the Haight & Freese Company gave to Franklin Bien, an attorney at law, a check drawn on the Colonial Bank of the city

of New York, in which were on deposit funds of the company, and later in the day Mr. Bien learned of the appointment of the receivers and the terms of the order. The check was certified on the following day, was then endorsed by Bien and collected through a third party. In June following, upon the petition of the receivers, a rule was issued requiring Mr. Bien to show cause why an order should not be made requiring him to pay to the receivers the money thus collected on the check, with interest. The application was heard upon affidavits, and an order was issued by the circuit judge requiring Mr. Bien to pay the money to the receivers, with interest, within ten days after the service of the order. Bien thereupon sued out this writ of error. In addition to allowing the writ of error the circuit judge certified that the application was made "upon the ground that this [Circuit] court had no jurisdiction to make the order as in said petition for appeal and assignment of errors appears," and it was further certified "that the question of jurisdiction was involved in making the order of May 29, 1906."

The alleged errors assigned are in substance that the court below had not jurisdiction over the plaintiff in error or the subject matter of the proceedings, 1, because the plaintiff in error was not an officer of the Haight & Freese Company; 2, because the check was received prior to the filing of the bill of complaint and the appointment of receivers; and 3, because the right of the receivers to the fund could not be determined in a summary proceeding, but could only be adjudged in an action at law to recover the proceeds of the check.

It was also assigned as error that the plaintiff in error was deprived of a jury trial, contrary to his rights under the Constitution of the United States, and that the Circuit Court had refused and denied his application "to compel the defendant in error to bring any action he may be advised for the recovery of the said sum of two thousand dollars," which denial operated to "deprive the plaintiff in error of his property without due process of law as provided for by the Constitution and laws of the United States."

In the brief of counsel it is further urged that the Circuit Court was without jurisdiction to appoint the receivers, the contention being that the case presented by the bill was not one cognizable in a court of equity, but that the remedy of the complainant was in an action at law.

The case will be disposed of by our ruling upon a motion which has been made to dismiss the writ of error for want of jurisdiction in this court over the same.

The writ of error was applied for and allowed upon the question of the jurisdiction of the Circuit Court. By the first clause of § 5 of the act of March 3, 1891, c. 517, 26 Stat. 826, 827, it is provided that appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to this court "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." The scope and meaning of this clause has not infrequently been the subject of consideration, and the prior authorities are reviewed in *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424, where the court said (p. 432):

"It has been definitely settled that it [the section] must be limited to causes where the jurisdiction of the Federal court, as a Federal court, is put in issue, and that questions of jurisdiction applicable to the state courts, as well as to the Federal courts, are not within its scope."

In *Schweer* v. *Brown*, 195 U. S. 171, we declared that an issue as to the authority of the court, arising in a summary proceeding in bankruptcy to compel repayment of money part of the assets of the bankrupt's estate, was not embraced in the first of the classes of cases enumerated in § 5 of the Judiciary Act of 1891, as that class only includes cases where the question is as to the jurisdiction of courts of the United States as such. And in *Smith* v. *McKay*, 161 U. S. 355, it was held that the question whether the remedy was at law or in equity did not involve the jurisdiction of a Federal court as such, and the case was dismissed. Obviously, therefore, in the case at bar

the jurisdiction of the Circuit Court in respect to its power *as a court of the United States* was not assailed either in the assignment of errors or in the argument at bar. The jurisdiction of the court was questioned merely in respect to its general authority as a judicial tribunal, to entertain the summary proceeding against Bien, initiated by the rule to show cause, or its power as a court of equity to entertain the suit of Bowker and afford him equitable relief, and we cannot, therefore, under the clause of the Judiciary Act above referred to, pass upon the questions asserting a want of jurisdiction in the Circuit Court.

As the writ of error was allowed upon assignments claimed to present questions as to the jurisdiction of the Circuit Court, and the circuit judge certified the question of jurisdiction, the writ might well be treated as bringing up only jurisdictional questions. Inasmuch, however, as the right to bring a case direct to this court exists when constitutional questions are raised and decided in the Circuit Court, we will briefly notice the assignments not stated as jurisdictional, viz., that the denial of a jury trial was an invasion of rights under the Constitution of the United States, and that the refusal to compel the receiver to bring an action at law for the recovery of the two thousand dollars paid by the bank was a deprivation of property without due process of law. The record does not contain the bill of complaint upon which the court made its order appointing receivers of and enjoining interference by third parties with the assets of the Haight & Freese Company. It is shown, however, that that company, represented by Mr. Bien as its solicitor, moved to set aside the order as having been "inadvertently granted, and among other grounds that the court was without jurisdiction." This motion was denied, "with leave to renew should the order in the Massachusetts District be vacated," and such action by the court appears to have been acquiesced in by the Haight & Freese Company. Even if it be assumed that the objection was available to Bien, no sufficient reason has been stated warranting us in deciding that the Circuit Court acted without juris-

diction, and we must assume that the appointment of the receivers and the making of the injunction order was rightful. As to the money collected on the check, the argument at bar on behalf of the plaintiff in error proceeded upon the manifestly incorrect hypothesis that the delivery to Bien of the check was the equivalent of the payment of the money ordered by the check to be paid.

Reduced to its last analysis, the contention of this branch of the case is that a court of equity, which in the due exercise of jurisdiction had appointed receivers of the assets and property of a corporation and enjoined interference by others with such property, was without power, by summary process, after due notice and opportunity to be heard, to compel a repayment by one who, with knowledge of the order of injunction and in violation of its terms, took in satisfaction of an indebtedness from a debtor to the corporation, property forming part of the assets of such corporation. We think the contention and the assignments of error based thereon are so manifestly frivolous as to be utterly insufficient to serve as the foundation for a writ of error.

It is unnecessary to pass upon various other objections to our jurisdiction over the writ made on behalf of the defendant in error, as it plainly results that the motion to dismiss must be granted, and our order therefore is

Writ of error dismissed.

NOTLEY *v.* BROWN.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 68. Argued January 24, 1908.—Decided February 24, 1908.

Harrison v. *Magoon*, 205 U. S. 501, followed to effect that the act of March 3, 1905, c. 1465, 33 Stat. 1035, did not operate retroactively and that this court has no authority to review judgments of the Supreme Court of Hawaii, rendered prior to that date, which could not be reviewed under the previous act.

In this case it was held that the writ of error could not be sustained as to the judgment referred to therein because entered prior to March 3, 1905, and also that it could not be sustained as to a judgment in the same suit entered after the writ of error had been sued out.

THE facts are stated in the opinion.

Mr. Robert M. Morse, with whom *Mr. William M. Richardson*, *Mr. Sidney M. Ballou* and *Mr. J. J. Dunne* were on the brief, for plaintiffs in error:

It is conceded that the plaintiffs in error proceeded at the outset on the assumption that the decision of the Supreme Court of Hawaii of March 8, 1904, overruling the plaintiffs' exceptions, was the final judgment in the case, and that the United States statute of 1905 had a retroactive effect and entitled the plaintiffs in error to come into this court on a writ of error to reverse that judgment. In fact, however, the decision of the Hawaiian court on the bill of exceptions was not a final judgment, and that court could not enter a final judgment before the Hawaiian act of 1905. Even if it had been or could be considered to be a final judgment, the decision of this court in *Harrison* v. *Magoon*, 205 U. S. 501, to the effect that the United States statute of 1905 was not retroactive would deprive this court of jurisdiction.

It appears, however, that on June 8, 1905, a judgment, and

the first judgment in this case entered by any court, was entered in the Circuit Court of Hawaii and that the plaintiffs in error thereupon applied to the Supreme Court of Hawaii for a writ of error to the Circuit Court, which writ of error was granted under date of November 24, 1905, and, on motion by defendants in error to quash the same, was dismissed April 13, 1906, and that judgment thereon was entered September 27, 1907, as of April 13, 1906.

This judgment of the Hawaiian court was, in effect, an affirmance of the judgment of the Circuit Court, and was, for the purpose of a writ of error to this court, a final judgment in the case by the Supreme Court of Hawaii.

The entire record of the case is now before this court, and if it appears from inspection of the record that substantial error has been committed, to which seasonable objection was taken by the plaintiffs in error, this court has the power to correct and will correct such error. *Gregory* v. *McVeigh*, 23 Wall. 294; *Fisher* v. *Perkins*, 122 U. S. 522.

The court may treat the phrase, March 8, 1904, not as the particular date of the judgment, but as descriptive only and surplusage, and will give effect to the apparent intention of the plaintiffs in error to enforce their right to a review of the final judgment in the case by the highest court of the Territory.

The power of the court to review does not depend upon the presence or absence of any specific assignment of error. *World's Columbian Exposition Co.* v. *Republic of France*, 91 Fed. Rep. 64.

Rule 35 of the Supreme Court is to the effect that the court will notice plain errors, even though not assigned, and this court has frequently considered such errors. *United States* v. *Pena*, 175 U. S. 500, and even when no assignment of errors has been filed. *Farrar* v. *Churchill*, 135 U. S. 609; *Behn* v. *Campbell*, 205 U. S. 403.

It may be claimed, however, that because the judgment of the Hawaiian court was the quashing of a writ of error on a motion to dismiss, it was not such a judgment as can be re-

viewed by this court. No limitation as to the kind or character of the judgment to be entered is imposed by act of Congress of 1905, or by the Hawaiian act of 1905, and it is therefore to be assumed that the same rules and practice are to prevail as in cases between Federal and state courts. See *Williams* v. *Bruffy*, 102 U. S. 248.

The test as to what constitutes a final judgment to which a writ of error can be taken is whether in entering such judgment the court was affirming or rejecting a claim which the plaintiff in error sought to enforce as a matter of right, or whether it was one which the court in the exercise of its discretion might allow or not. *Walden* v. *Craig*, 9 Wheat. 510; *Pickett's Heirs* v. *Legerwood*, 7 Peters, 142; *Shreve* v. *Cheesman*, 69 Fed. Rep. 785; *Whitworth* v. *United States*, 114 Fed. Rep. 302.

In the case at bar the plaintiffs in error claimed the right to a review of the judgment of June 8, 1905, as a matter of right, and set out nine assignments of error, each raising questions of law. Nothing but questions of law were therefore before the Supreme Court of the Territory. Therefore, its judgment in dismissing the writ of error, which, as we have said, is equivalent to a decree of affirmance, is reviewable by this court.

Judgment dismissing the writ of error was in fact entered September 27, 1907, but of the date of April 13, 1906. This case falls within the United States act of 1905.

Where a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall within the law. *Railroad Co.* v. *Grant*, 98 U. S. 398; *Gurnee* v. *Patrick County*, 137 U. S. 141. The converse must also be true, that, where a law granting jurisdiction is enacted without any reservation, all pending cases fall within the law.

Even if the writ of error can bring up only the proceedings in the Hawaiian courts subsequent to the entry of judgment of June 8, 1905, the writ should be sustained as the Supreme Court of the Territory in dismissing the writ of error did so upon the ground that all the errors assigned in the petition had

been passed on by it on March 8, 1904. But the sixth and seventh assignments relate to the proceedings in the lower court had since March 8, 1904, and therefore could not have been passed upon by the appellate court.

Mr. Aldis B. Browne and *Mr. W. L. Stanley,* with whom *Mr. Alexander Britton* and *Mr. Henry Holmes* were on the brief, for defendants in error:

The act of March 3, 1905, needs no interpretation with respect to the point here involved. By its express language it takes effect and operates only "from and after its passage."

The final judgment whereof review is here sought was rendered long before its passage. Admittedly no provision for review thereof in this court then existed. No time limit for appeal or review in any higher court was provided. The cause was at an end.

Nor can the act be given retroactive effect in authorizing review of a judgment theretofore made final in the Supreme Court of Hawaii. *White* v. *United States,* 191 U. S. 545, 552. See also *United States* v. *American Sugar Refining Co.,* 202 U. S. 563; *Hooker* v. *Hooker,* 10 S. & M. (Miss.) 599, 601; *Stewart* v. *Davidson,* 10 S. & M. (Miss.) 351, 358.

While the legislative power to enlarge or restrict remedies exists, it is clearly limited to causes which are then pending, and not to those wherein there has been final judgment and the parties hence dismissed, and with the cause thus put at judicial end. *Jensen et al.* v. *Frieke et al.,* 113 Illinois, 171, 175; *Willoughby* v. *George,* 5 Colorado, 80, 82; *Davis* v. *Menasha,* 21 Wisconsin, 491; *Merrill* v. *Sherburne,* 1 N. H. 199; *Bates* v. *Kimball, Admr.,* 2 Chipman (Vt.), 77; *Lewis* v. *Webb,* 3 Maine, 326.

So in the case at bar, under the operation of the final judgment of the Supreme Court of Hawaii, now here sought to be reviewed, the rights of the parties became fixed and the property had become subject to the absolute and final disposition prescribed in the testator's will. With that property and the

rights created thereunder the community had every right to deal. In short, the cause had come to a final end. See *Gilman* v. *Tucker*, 128 N. Y. 190, 204; *Greenwood* v. *Butler*, 52 Kansas, 424; *Lewis et al.* v. *Webb*, 2 Greenleaf, 326; *Weaver* v. *Lapsley*, 43 Alabama, 224; *McCabe* v. *Emerson*, 18 Pa. St. 111; *People* v. *Carnal*, 6 N. Y. 463; *Taylor* v. *Place et al.*, 4 R. I. 324.

Mr. Justice White delivered the opinion of the court.

In a contest in a Hawaiian court of probate certain documents were held not to have been executed under undue influence, and were admitted to probate as the last will and testament and codicils thereto of Charles Notley. On appeal to the Circuit Court, in term, upon motion of the contestants, a jury was impanelled to try issues of fact embodied in two questions, which substantially required the jury to say whether undue influence had been exerted upon the testator. On the trial various exceptions were taken to rulings on the admission and rejection of evidence, and at the close of the evidence the trial judge granted a motion to instruct the jury to find a verdict sustaining the will.

The verdict was rendered January 28, 1903. On the same day the trial judge signed the following order, which was duly filed on the following day:

"Order for Entering up Judgment.

"Upon the entering up of the verdict on the appeal in this matter,

"It is hereby ordered that the clerk of this court do sign and enter up judgment in favor of proponents of the last will and testament of Charles Notley, deceased, in accordance with said verdict, and the decree admitting said will and codicils to probate is hereby affirmed.

"Done in open court at Hilo this 28th day of January, 1903."

On January 27, 1903, the clerk endorsed and filed a formal judgment. It would seem, however, that he did not then sign

the face of the judgment, and perhaps did not enter it, as following the date of the judgment is this recital:

"A. S. Le Baron Gurney, Clerk Fourth Circuit Court.

"Judgment entered this 28th day of January, 1903.

"(Seal) This 8th day of June, A. D. 1905, as of the 28th day of January, 1903."

The following endorsement is also on the back of the judgment, under the endorsement of the filing on January 29, 1903: "Filed June 8, 1905. A. S. Le Baron Gurney, Clerk." The record is silent as to how these additions to the judgment came to be made.

A motion to set aside the verdict and for a new trial having been overruled, the cause was taken on exceptions to the Supreme Court of Hawaii. In that court the action of the trial court in instructing a verdict was sustained and two motions for a rehearing were overruled, the last on August 2, 1904. 15 Hawaii, 435, 700; *S. C.*, 16 Hawaii, 66. It will be observed that the last action of the court on the application for a rehearing was had nearly a year prior to the clerk's signature affixed to the face of the judgment on June 8, 1905, as of January 28, 1903, and the additional file mark on the back of the judgment made on June 8, 1905.

More than a year after the final action of the Supreme Court of the Territory on the exceptions, that is, on November 24, 1905, a petition for a writ of error to the Circuit Court, with assignments of error, was filed in the Supreme Court of the Territory on behalf of the contestants, praying that court to reverse a judgment entered in the Circuit Court. The petition for the writ recited the order admitting the will and codicils to probate, the appeal to the Circuit Court, the trial upon specified issues of fact, the motion to direct a verdict, the instruction to sign a certain form of verdict, the verdict, the taking of various exceptions, and the overruling of motions for a new trial. No reference was made in the petition for a writ of error to the fact that the exceptions reserved at the trial had been previously taken to the Supreme Court of the

Territory and had been there decided adversely to the contestants. The petition then proceeded to recite that on June 8, 1905—which, it will be observed, was after the final action of the Supreme Court on the exceptions—the contestants had in the Circuit Court filed a motion to set aside the "Order for entering judgment," filed January 29, 1903, upon the ground that the order was obtained *ex parte* and without notice to or knowledge of contestants, and said motion was heard upon affidavit and oral evidence and was overruled, to which exception was duly taken, etc. It was further recited that on the same day, while this motion was pending, counsel for proponents moved that the clerk of the court be instructed to sign the judgment which had been previously made out on January 28, 1903, and filed on the next day, in conformity to the order of the court rendered on January 28, 1903, and that on this motion being granted by the court the judgment was entered and signed by the clerk, and the following exception was taken:

"Contestants except to the allowance of proponents' motion that the clerk of court be ordered to sign the form of judgment filed January 29th, 1903, and to the judgment so signed on the ground that such allowance is illegal, null and void and not justified by the law or evidence or record herein and to the judgment on the ground that said judgment is contrary to the law and evidence and weight of evidence and without authority of law and is illegal, null and void.

"Dated Hilo, June 8th, 1905."

The first five of the grounds set forth in the assignment of errors made for the purpose of the writ of error prayed from the Supreme Court of the Territory, as above stated, were but a reiteration of alleged errors asserted to have been previously committed by the trial court in instructing a verdict in favor of the will, and which had already been taken to the Supreme Court of the Territory on the exceptions and had been adversely passed upon by that court. The remaining assigned errors were as follows:

"Sixth. That the court erred in making the *ex parte* order of January 29, 1903, confirming the decree of Judge Little admitting the alleged will of Charles Notley to probate.

"Seventh. That the court erred in denying contestants' motion to set aside order of Judge Robinson filed January 29, 1903, confirming decree of Judge Little admitting will to probate.

"Eighth. That the court erred in ordering the clerk to sign the form of judgment submitted by proponents.

"Ninth. That the court erred in entering judgment for the proponents in said matter of the estate of Charles Notley, deceased, being petition for probate of will."

It may be observed that Judge Little was the judge by whom the will was originally admitted to probate, while Judge Robinson was the judge who presided at the trial in the Circuit Court and whose action in instructing a verdict had been approved by the Supreme Court of the Territory. The writ of error from the Supreme Court prayed under the circumstances just stated was allowed on November 24, 1905, and on December 14, 1905, a motion to quash the writ was filed upon the following grounds:

"(1) That it is apparent upon the record that this honorable court has heretofore, to wit, on the 8th day of March, 1904, on the 3rd day of June, 1904, and on the 2nd day of August, 1904, decided the questions now sought to be reviewed and embraced in the assignment of errors filed herein; and

"(2) That the petition for writ of error was not filed nor the writ issued within six months from the rendition of judgment in said cause, the same having been rendered and filed on, to wit, the 29th day of January, 1903."

After argument, for reasons stated in an opinion filed April 13, 1906 (17 Hawaii, 455), the Supreme Court of Hawaii granted the motion and dismissed the writ.

Although the court, in its opinion, declared that there was considerable force in the contention of the defendants in error that the writ should be dismissed, because the only judgment rendered below was that of January 28, 1903, and therefore

that the writ of error had not been sued out within the statutory limit, viz., six months from the rendering of the judgment, it did not rest its conclusion to dismiss upon that ground. The court, reviewing the controversy, held that every substantial question in the case had been already disposed of when the case was previously before it on exceptions. Without specifically analyzing the assignment of errors based on the action of the trial court on June 8, 1905, in directing the clerk to sign the judgment which had been made out in pursuance of the order of the court on January 28, 1903, those assignments were, in fact, treated as irrelevant or without merit, since it was held that as a necessary result of the previous action of the court in finally disposing of the exceptions, judgment was required to be entered upon the verdict by operation of law on notice to the trial court of the overruling of the exceptions.

Although as we have seen the opinion of the Supreme Court of the Territory just referred to was announced on April 13, 1906, no formal order or judgment in conformity to the opinion delivered by the court quashing the writ was entered until September 27, 1907. A few days after the delivery by the Supreme Court of the Territory of the opinion referred to, that is, on April 18, 1906, three of the contestants served a formal notice on the fourth one, calling upon him to elect whether he would join them in a writ of error to be prosecuted from this court to the Supreme Court of the Territory of Hawaii, to obtain a reversal of the judgment of the territorial court "rendered against you and us . . . on the eighth day of March, 1904, a motion for rehearing having been heard and considered, and having been denied on the 3d day of June, 1904." The contestant thus notified formally replied that he would not join the other contestants in prosecuting a writ of error to reverse the judgment rendered on March 8, 1904. Thereupon an application for the allowance of a writ of error from this court was made to the Chief Justice of the Supreme Court of the Territory. In a petition for the writ the only

judgment referred to was that claimed to have been rendered by the Supreme Court of the Territory on March 8, 1904, when the case was before that court on the exceptions. In the assignment of errors accompanying the petition it was recited that the final judgment for the reversal of which the writ of error was prayed was that rendered on March 8, 1904, and the three first grounds therein assigned exclusively related to the action of the Supreme Court of the Territory when the case was before that court on exceptions in sustaining the ruling of the trial court, in instructing a verdict. The fourth and last error assigned was as follows:

"Fourth. That the said Supreme Court of the Territory of Hawaii erred in that the said cause having been remanded to the Circuit Court of the Fourth Circuit of the Territory of Hawaii after the aforesaid judgment of the Supreme Court, and further proceedings having been taken in said cause in said Circuit Court and a writ of error dated November 25, 1905, in said cause, having been thereafter sued out by the present plaintiffs in error from the Supreme Court of the Territory of Hawaii to the said Circuit Court, the said Supreme Court quashed said writ of error."

The Chief Justice of the Supreme Court of the Territory having refused to allow the writ on the petition therefor and assignment of errors heretofore referred to, the writ was allowed by a justice of this court. The transcript of the record was filed in this court on July 20, 1906.

On November 28, 1906, a motion was made to dismiss the writ of error for want of jurisdiction. In the brief filed on behalf of the defendants in error it was insisted that prior to the act of March 3, 1905 (33 Stat. 135), the power of this court to review the judgments and decrees of courts of the Territory of Hawaii was governed by the rules relating to the right to review judgments and decrees of state courts, and that as the cause presented no question which would justify a review if the judgment had been rendered in a state court, there was therefore no jurisdiction. It was conceded that a broader and

different right as to the courts of the Territory of Hawaii had been conferred by the act of March 3, 1905, but it was urged that that act did not confer jurisdiction because the judgment of the Supreme Court of the Territory to which the writ of error was addressed had been rendered prior to the passage of the act of 1905, and as that act had no retroactive effect, there was no jurisdiction. Whilst admitting that the controversy involved no question giving the right to review if the judgment had been rendered in a state court, and therefore there could be no review under the prior act, plaintiffs in error insisted that there was power to review under the act of March 3, 1905, because that act operated retroactively. The motion was not passed upon, but was postponed to the hearing on the merits.

At the same term (October term, 1906), however, and some months after the motion to dismiss had been postponed to the hearing upon the merits, the question involved in that motion arose in another case, and it was decided that the act of March 3, 1905, did not operate retroactively, and therefore that this court had no authority to review a judgment or decree of a court of the Territory of Hawaii rendered before the passage of the act which could not be reviewed under the previous act. *Harrison* v. *Magoon*, 205 U. S. 501.

Five months after the decision just referred to in the *Magoon case*, what is styled a judgment was entered by the Supreme Court of Hawaii, concerning the action of that court in quashing the writ of error from that court to the lower Circuit Court previously referred to. Omitting the title of the cause and the signature of the clerk, the so-called judgment is copied in the margin.[1]

[1] Defendants in error above named having made a motion to quash the writ of error issued herein on the 25th day of November, A. D. 1905, upon grounds therein set forth, to wit:

(1) That said writ was not issued within six months from the rendition of judgment; and

(2) That all errors assigned have been heretofore decided by this court in 15 Hawaiian Reports, pages 435, 700, 16 Hawaiian, 66; and said motion com-

At the present term, on October 14, 1907, a stipulation of counsel was filed, adding to the record as omitted matter the petition for a writ of error from the Supreme Court of the Territory, the assignment of errors, the writ of error, the motion to quash the said writ of error, and the so-called judgment of September 27, 1907, quashing the same, to which we have previously referred.

With these facts in mind, we come to consider the controversy. At the outset we must dispose of the motion to dismiss, which we have previously said was made at the October term, 1906, and was postponed to the hearing on the merits.

As on its face the writ of error in terms is directed to the supposed judgment of the Supreme Court of Hawaii, rendered March 8, 1904, disposing of the case on exceptions, and there is no pretense of the existence of a Federal question among the issues arising on the exceptions, it is obvious that as a result of the decision in *Harrison* v. *Magoon*, *supra*, we are without jurisdiction to review by writ of error the judgment to which the writ runs. But although the writ of error is specifically addressed to the judgment of March 8, 1904, and all the grounds previously urged to maintain jurisdiction have been determined to be untenable, it is now pressed that there is jurisdiction upon other and different grounds which are, in fact, wholly incompatible with those previously taken. Let us consider these grounds.

It is urged that the Supreme Court of Hawaii did not render a judgment in 1904, and indeed it is asserted that that court had no power to render a judgment in passing on a case

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ing on to be heard, now after reading and filing said motion to quash said writ of error and after hearing W. L. Stanley, Esq., of counsel for defendants in error in support of said motion, and S. M. Ballou, Esq., of counsel for plaintiffs in error in opposition thereto, and due deliberation having been had, it is

Ordered, adjudged and decreed that said motion to quash the writ of error issued herein on the 25th day of November, 1905, be and the same is hereby granted, and that said writ be and it hereby is dismissed.

Dated Honolulu, September 27th, A. D. 1907, as of April 13, 1906.

taken up on exceptions. The claim, therefore, really is that although the judgment to which the writ of error is in terms addressed was no judgment, yet the writ should be sustained. Aside from the contradiction, this contention must rest upon one or two assumptions: 1st. That there was no final judgment susceptible of being reviewed by a writ of error until June 8, 1905, when, it is asserted, a judgment arose for the first time by the making of an order by the trial court directing the clerk to sign *nunc pro tunc* the judgment which had been previously prepared by the clerk in pursuance of the express order of the court in consequence of the verdict of the jury. Although this judgment was not only written up in 1903, but was endorsed filed on January 29, 1903, the argument is that as it was not signed on its face by the clerk when it was so filed it could not take effect as a judgment until the date of the actual signing on its face by that officer as a consequence of the *nunc pro tunc* order. 2d. That this writ of error must be treated, despite its terms, as if it were addressed to the action of the Supreme Court of Hawaii in quashing the writ of error on August 13, 1906.

In considering the first proposition it is to be observed that there is nothing in the record disclosing any ruling by the trial court concerning the order for the signature *nunc pro tunc* of the judgment or any exception taken to such a ruling. We say this because, leaving out of view some allusions made to the subject in the opinion of the Supreme Court of the Territory quashing the writ, the only reference to these matters is found in recitals contained in the application to the Supreme Court of Hawaii for a writ of error, which was stipulated into the record long after the writ in this case was allowed and the record filed here. But waiving any infirmity, and assuming that we may look at mere recitals in the petition for the writ of error from the Supreme Court of the Territory, the situation, if the contentions be well founded, is then this, that the only judgment susceptible of being reviewed was one which it was claimed was entered in the trial court in connection with the *nunc pro*

tunc entry, after the action of the Supreme Court of the Territory overruling the exceptions, and therefore after the judgment of that court which the writ seeks to review. And a consideration of the second proposition leads to a like result. Conceding that the writ of error, although it is in terms addressed to the action of the court on the exceptions, may now be treated as being addressed to its action in 1906 in quashing the writ of error, and further conceding, for the sake of argument only, that the judgment of the territorial court in refusing to consider the case on its merits and quashing the writ of error could, under any circumstances, be treated as a final judgment susceptible of being reviewed here by writ of error, nevertheless there is no judgment before us which we can review. This follows because, as shown by the statement which we have previously made, at the time when this writ of error was taken no judgment whatever had been entered in the Supreme Court of Hawaii giving formal expression to its decision quashing the writ. Indeed, the judgment so doing was only entered in that court, as we have seen, September 27, 1907, long after the record in this case had been filed here and the motion to dismiss the writ had been made and submitted on briefs of counsel and had been postponed to the hearing on the merits. In fact, no such judgment was entered until after the decision of this court in the *Magoon case*. The argument which seeks to have the writ of error from this court which is directed to one judgment applied to another rendered long after the writ of error was sued out, can only rest upon the assumption that the entry of the judgment below in 1907, after the writ of error was sued out, must be treated as relating back to the time in 1906, when the opinion of the court quashing the writ was announced. But if we apply this rule to the judgment in question we would have to apply it also to the judgment of the Hawaiian Circuit Court rendered January 28, 1903, and therefore we should be obliged to say, irrespective of the reason assigned by the Supreme Court of the Territory, that that court had rightly quashed the writ of error for want of juris-

diction, since it is conceded that under the statutes of Hawaii a writ of error must be sued out within six months from the rendition of judgment.

The considerations just stated make it inevitable that this writ of error should be dismissed. Of course, it may be that the reasons which we have given do not necessarily foreclose the right within the statutory time to prosecute a new writ of error to the judgment of the Supreme Court of the Territory of Hawaii, quashing the writ, entered September 27, 1907. On that subject, however, we observe, to the end that this litigation may not be unnecessarily prolonged, that because we do not decide the question not before us, as to whether such right to a new writ of error exists, we must not be considered as in the slightest degree intimating an affirmative view as to the existence of such a right.

Writ of error dismissed for want of jurisdiction.

CALVO *v.* DE GUTIERREZ.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 80. Argued December 17, 1907.—Decided February 24, 1908.

An agreement made between the owners of a half interest in property in Manilla, who were ultimate heirs of the deceased owner of the other half interest, and the widow of such decedent, who was his usufructuary heiress, provided for the sale of the property at a specified price, and that after certain payments the "remainder" should be paid to the widow, on her giving the usual usufructuary security. *Held*, that the agreement concerned a settlement of the rights of the parties to the property left by decedent and did not contemplate transferring any interest in the property from the other owners to the widow, and that the word "remainder" referred only to the remainder of the half interest of her testator and not to the balance remaining of the proceeds of the share of the other owners. 6 Philippine Reports, 88, affirmed.

THE facts are stated in the opinion.

Mr. Howard Thayer Kingsbury, with whom *Mr. Frederic R. Coudert* was on the brief, for appellant:

The language of the agreement is plain and unambiguous and requires no judicial construction. It is on its face, an adjustment of various controversies between the parties, growing out of their relations to the de la Fuente estate.

To say that "the remainder" means "one-half of the remainder" is to make a new contract for the parties, in direct contravention of Article 1281 of the Spanish and Philippine Civil Code, and see Digest, Book XXXII, Tit. 1, L. 25; 17 Am. & Eng. Ency. of Law (2d ed.), 4.

According to both civil law and common law, as well as common sense, when the language of the parties to a contract clearly expresses a certain intention, it is not open to them to say that they meant something different, or to a court to make for them a new contract which it considers more equitable. Alcubilla; 3 Diccionario de la Administracion Española (5th ed.), 494.

The argument of the court below, that the word "remainder" must be limited to the inheritance which it was the intention and object of the parties to divide, is wholly fallacious, since the agreement is by no means limited in scope to a division of the estate of Gonzalez de la Fuente, but provides for an adjustment and recognition of the rights of all the parties entitled or claiming to be entitled to any interest in various properties in which said testator had an interest, and for the payment of claims, some of which, such as the mortgage to the Obras Pias, were apparently not sole and individual liabilities of the testator. Art. 1283 Civil Code, cited by the court below is thus wholly inapplicable.

The court below had no jurisdiction to review the evidence, and interpret the contract according to the facts thus found by it as to the parties' intentions. Philippine Code Civ. Proc., § 497.

The motion for a new trial in the case at bar was merely on the ground that the evidence was not sufficient to justify the

judgment and was thus evidently made under § 145 of the Philippine Code of Civil Procedure, and addressed to the discretion of the trial judge.

This clearly did not empower the appellate court to review the evidence and in effect make new findings of fact as to the intention of the parties, based on parol evidence. *De la Rama* v. *De la Rama*, 201 U. S. 303, 313–314.

Upon the record before it, the court below construed the agreement erroneously.

There was no appearance or brief for appellee.

MR. JUSTICE WHITE delivered the opinion of the court.

At the time of the death of Francisco Gonzalez de la Fuente he was the owner of an undivided half interest in a piece of real estate known as No. 69 on the Escolta, Manila, of an undivided half interest in a house known as No. 97 Calle Palacio, Province of Mamarines, Philippine Islands, and likewise of an undivided half interest in a certain hacienda. Besides this, there stood in the name of the deceased two houses in Ermita, Manila, which were, however, encumbered with a debt of twelve thousand dollars, payable in Mexican money, which debt was due to one Julian de La O, and the deceased moreover owned certain furniture and jewelry.

The remaining undivided half interest not owned by Fuente in the three first described pieces of property were jointly owned by his nephew, Gabriel Olives y Gonzalez de la Fuente, and two nieces, who were both married—Angeles Olives y Gonzalez de la Fuente, wife of Eduardo Gutierrez y Repide, and Paz Olives y Gonzalez de la Fuente, wife of Manuel Martinez.

By the will of Fuente all his property was given to his nephew Gabriel and his two nieces Angeles and Paz, subject, however, to a right of usufruct during her life in his wife Concepcion Calvo. It would seem that some controversy arose

between the widow as usufructuary and the nephews and nieces as heirs of Fuente and as coöwners in their own right as to the partition of the property. The result was a written agreement between the parties—the nephews and nieces and the wife—the whole of which is in the margin,[1] and the parts which we think are pertinent to this controversy we quote:

"The undersigned, Angeles and Paz Olives, in the presence of their respective husbands, and Gabriel Olives, as heirs of

[1] *Translation of Exhibit "A."*

The undersigned, Angeles and Paz Olives, in the presence of their respective husbands, and Gabriel Olives, as heirs of certain property, of Francisco Gonzalez de la Fuente, and Concepcion Calvo as usufructuary heiress of the said Gonzalez, agree upon a division of the inheritance, the principal conditions of which are as follows:

First. The property No. — on the Escolta, half of which belonged to the testator, shall be sold at the price not less than ninety thousand dollars.

Second. From the proceeds of the sale there shall be paid the amount owing to pious works, the amount owing Mr. Roensch, that owing Julian de La O, and the unpaid legacies made by José Gonzalez de la Fuente.

Third. The remainder shall be turned over to Concepcion Calvo, to be used by her as usufructuary heiress, after she has given a mortgage bond (fianza hipotecaria).

Fourth. Concepcion Calvo relinquishes her right to reimbursement of the amounts expended by her on account of the last illness and burial of the testator. But in compensation for this she shall have all the movable property of the testator with the exception of a set of buttons, *etc.*, belonging to testator's father, which shall go to Gabriel Olives as the only male grandson.

Fifth. With regard to the pieces of property purchased by the testator from Pantaleona Rivera, which were paid for by money, half of which belonged to the testator and the other half to the heirs of Paz Gonzales, Concepcion Calvo recognizes the said heirs as absolute owners of the half of the interest of the testator in and to the said property.

Sixth. Angeles, Paz and Gabriel Olives respect the legacy of the testator to Concepcion Calvo, and acknowledge her right to enjoy the usufruct of half of the house No. 97 Calle Palacio, and half of the estate of Pasacao, and half the interest of the Ermita houses.

Seventh. Gabriel, Angeles and Paz Olives renounce all rights that they may have as wards of the testator to require a rendering of accounts of any kind.

Eighth. Concepcion Calvo shall be entitled to claim from Pantaleona Rivera whatever taxes she may have paid for the Ermita houses after the death of the testator.

In witness whereof, we sign the present document in Manila, this fourth day of May, 1903.

certain property of Francisco Gonzalez de la Fuente, and Concepcion Calvo, as usufructuary heiress of the said Gonzalez agree upon a division of the inheritance, the principal conditions of which are as follows:

"First. The property No. — on the Escolta, half of which belonged to the testator, shall be sold at the price not less than ninety thousand dollars.

"Second. From the proceeds of the sale there shall be paid the amount owing to pious works, the amount owing Mr. Roensch, that owing Julian de La O, and the unpaid legacies made by José Gonzalez de la Fuente.

"Third. The remainder shall be turned over to Concepcion Calvo, to be used by her as usufructuary heiress, after she has given a mortgage bond (fianza hipotecaria)."

This suit in the form of a bill in equity was commenced by the plaintiff in error, the widow, against the defendants, the nephew and nieces asserting rights under the agreement and asking the appointment of a receiver to take charge of the fund arising from the sale of the property on the Escolta and money derived from other sources, as well as a balance coming from the Ermita property after paying the debt with which that property was encumbered. Without going into detail or considering irrelevant questions, it suffices to say that the principal right which the widow asserted was that she was entitled under the agreement to hold as usufructuary the whole proceeds of the property on the Escolta after making the payments specified in the agreement. That is, her principal claim was that her usufructuary right under the will, in virtue of the agreement, attached not only to the proceeds of the share of the property on the Escolta owned by her husband at his death, but also to the share of the proceeds representing the undivided interest owned by the nephew and nieces. The case was put at issue and much testimony was taken in the trial court which that court deemed to be admissible upon the theory that it tended to throw light upon the meaning of the written agreement. There was judgment in favor of the widow,

practically maintaining all her claims, including her asserted right to a usufructuary interest in the whole sum of the Escolta property, and that portion of the decree was in effect the real subject of controversy in the Supreme Court of the Philippine Islands, to which the case was appealed. That court, whilst recognizing the rights of the widow in other particulars, reversed the judgment in so far as it decreed her to be entitled to a usufructuary interest in the whole of the proceeds of the Escolta property, and confined her usufructuary right to the proceeds of half of the Escolta property which had belonged to her husband.

Two substantial grounds of error are here assigned: First, that the Supreme Court of the Philippine Islands erred in its conclusion concerning the Escolta property, because in doing so it disregarded the unambiguous letter of the agreement; and, second, because it differed with the trial court as to the result of the evidence and therefore departed from the findings of fact made by the trial court, which it is asserted the court had not the power to do, because there had been no motion for a new trial in the lower court, on the ground that the findings of fact were plainly and manifestly against the weight of evidence. Philippine Code Civ. Proc. § 497. We put this latter consideration at once out of view as being totally devoid of merit. This is said because we do not think there were findings below concerning the evidence throwing light upon the contract in the sense which the proposition assumes, and even if there were, we find nothing in the record justifying the conclusion that such findings were disregarded by the Supreme Court or that its conclusion on the controverted question was based upon them. True it is that after interpreting the contract and stating the legal rules by which it deemed that interpretation was sustained the opinion of the Supreme Court made reference to what it believed to be the persuasive force of the testimony concerning the relations and dealings of the parties leading up to the contract. When the opinion, however, is considered as a whole, we think it is clear that the

references made to the testimony may be put out of view, since the action of the court was really based alone upon its construction of the contract and the law applicable to it, and we shall therefore confine ourselves exclusively to that subject.

It will be observed that the first paragraph of the contract provided for the sale of the house on the Escolta, "half of which belonged to the testator," and fixed the price at which the sale should be made. The second clause provided for the deduction from the proceeds of sale of certain admitted debts or liabilities. The third clause provided that the remainder should be turned over to Concepcion Calvo, to be used by her as usufructuary heiress, after the giving by her of a mortgage bond. The whole controversy hinges on the word "remainder." The plaintiff in error insists because of this word that the plain letter of the contract exacted that the wife should take as usufructuary not only the proceeds of the sale of the portion of the property which the husband owned, and upon which alone prior to the contract her usufructuary right attached, but also the proceeds of the half of the property which belonged to the other parties and which prior to the contract she had no right or interest in, as usufructuary.

The argument is thus stated: "To say that the remainder means one-half of the remainder is to make a new contract for the parties in direct contravention of article 1281 of the Spanish and Philippine Civil Code." The article referred to provides that where the terms of a contract are clear, and there can be no doubt about the intention of the contracting parties, the legal stipulations of the contract shall be enforced. We do not follow the reference in the argument to authorities under the Spanish and Roman law enforcing the legal proposition. It is elementary. The difficulty is in its application to the cause before us, since the real question under the contract is whether the word "remainder" as used does not, in view of the subject with which the contract is concerned, relate and relate only to the remainder of the proceeds as to which, under the

will of the deceased, the usufructuary interest of the widow attached. Considering this subject, and looking at the contract, we think there can be no doubt that the word "remainder" as used in the contract must in the very nature of things, in the absence of an express stipulation to the contrary, be held not to have transferred to the widow a usufructuary interest in property which her deceased husband did not own, and which the very terms of the contract show was owned by other parties. The reasoning of the court below, in our opinion, so adequately disposes of the contention that the word "remainder" should be considered as having transferred to the widow a usufructuary interest in property to which that interest did not attach, that we excerpt a portion thereof, as follows:

"The court below was of opinion that the language of the third section of the foregoing agreement leaves no room for interpretation or construction, and that the word 'remainder' as used therein refers necessarily to the balance remaining after deducting from the whole amount received from the Escolta property the amount of the debts and legacies mentioned in the second section. We are of opinion, however, that the court erred in its construction of this section of the agreement, and we think that the word 'remainder' must be limited to the inheritance which it was the intention and object of the parties to divide, for the preamble expressly states that the parties, as heirs of Francisco Gonzalez de la Fuente, agree upon a division of the inheritance, and it is admitted that one-half of the property on the Escolta was the property of the defendants, and formed no part whatever of said inheritance.

"Article 1283 of the Civil Code provides that 'however general may be the terms of a contract, there shall not be understood as included therein other subjects or things and cases different from those regarding which the interested parties proposed to contract;' and we are of opinion that although the word 'remainder,' as used in the third section of the said agreement, might, in the broadest acceptation of the term, refer to the total balance resulting from the sale of the Escolta

property, nevertheless, under the provisions of the foregoing article it should be limited to the subject-matter of the agreement, and thus limited, it must be taken to refer to the remainder of the share of the inheritance in which Doña Concepcion Calvo had a usufructuary life interest."

There is a conflicting contention in the argument for the appellant that if there be doubt as to the meaning of the word "remainder" that doubt should be resolved in favor of the right of the widow to a usufruct in the portion of the property not belonging to her husband and as to which, therefore, she was not his usufructuary heir. We do not stop to analyze the matters thus relied upon, as we think it suffices to say that after an examination of the whole contract we find nothing in it which would justify the construction of the word "remainder" which is asserted. In other words, we can discover nothing in any part of the agreement which would authorize, without express language to that effect, the transferring to one party to the contract of valuable property belonging to the other, especially when the contract itself was concerned only, as aptly pointed out by the lower court, with settling the rights of the parties to the property left by the deceased.

Affirmed.

GREAT NORTHERN RAILWAY COMPANY *v.* UNITED STATES.

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

No. 491. Argued January 7, 1908.—Decided February 24, 1908.

The provisions of § 13, Rev. Stat., that the repeal of any statute shall not have the effect to release or extinguish any penalty incurred under the statute repealed, are to be treated as if incorporated in, and as a part of, subsequent enactments of Congress, and, under the general principle of construction requiring effect to be given to all parts of a law, that section must be enforced as forming part of such subsequent enactments except in those instances where, either by express declaration or necessary implication such enforcement would nullify the legislative intent.

The act of Congress of June 29, 1906, c. 359, 34 Stat. 584, known as the Hepburn law, as construed in the light of § 13, Rev. Stat., as it must be construed, did not repeal the act of February 19, 1903, c. 708, 32 Stat. 847. known as the Elkins law, so as to deprive the Government of the right to prosecute for violations of the Elkins law committed prior to the enactment of the Hepburn law; nor when so construed does the Hepburn law under the doctrine of *inclusio unius exclusio alterius* exclude the right of the Government to prosecute for past offenses not then pending in the courts because pending causes are enumerated in, and saved by, § 10 of the Hepburn law.

In citing approvingly, as to the particular point involved in this case, cases recently decided in the lower Federal courts, this court expresses no opinion upon any other subjects involved in such cases, and does not even indirectly leave room for any implication that any opinion has been expressed as to such other issues which may hereafter come before it for decision.

Although a ground for demurrer to indictment may be sufficiently broad to embrace a contention raised before this court, if it appears that such contention was disclaimed, and was not urged, in the trial court and in the Circuit Court of Appeals, and was not referred to in any of the opinions below or in the petition for certiorari or the brief in support thereof, this court, will, without intimating any opinion in regard to its merits, decline to consider it.

155 Fed. Rep. 945, affirmed.

THE facts are stated in the opinion.

Mr. William R. Begg for petitioner:

(1) The indictment herein does not charge an offense under

§ 1 of the act of February 19, 1903 (the Elkins law), because it fails to allege that the concessions from tariff were either willfully or knowingly granted.

The indictment charges petitioner and the individual defendants jointly, with one and the same offense. The individual defendants could be guilty only of the offense defined in the third sentence of § 1.

The indictment charges only that petitioner and the other defendants unlawfully granted the concessions. Concessions from tariff granted under mistake are unlawful. *Railway Co.* v. *Mugg*, 202 U. S. 242; *Railway Co.* v. *Hefley*, 158 U. S. 98; *Railway Co.* v. *Harrison*, 119 Alabama, 539; *S. C.*, 24 So. Rep. 552.

The last half of the second sentence of § 1 makes any concession, however made, unlawful. Criminal intent must be necessary to convert this unlawful act into a crime. The concession, to be a crime, must be either knowingly or willfully granted. If a criminal intent is necessary to the crime, it must be charged in the indictment. *United States* v. *Carll*, 105 U. S. 611, 612; *Evans* v. *United States*, 153 U. S. 584, 587; *Armour Packing Co.* v. *United States*, 153 Fed. Rep. 1, 23, 24.

It is only by virtue of the Elkins law that the corporation may be guilty of the crime. *Commission* v. *Railway Co.*, 145 U. S. 263, 281; *United States* v. *Hanley*, 71 Fed. Rep. 672, 674, 676.

(2) That part of § 1 of the Elkins law, which defined the crimes charged in the indictment and prescribed punishment therefor, had been before the indictment was returned, repealed by § 2 of the act of June 29, 1906, commonly known as the Hepburn act.

The prosecution claims that under the Elkins law it was not necessary that to be a crime the concession from tariff be knowingly granted, and the indictment here involved does not charge a concession knowingly granted. Under the amendment made by the Hepburn act the departure, to be criminal, must be knowingly made, and the indictment must so allege. The element of scienter is injected.

The punishment is changed. Under the Elkins law the only

punishment prescribed was a fine. Under the amendment the punishment is a fine and also imprisonment for not to exceed two years, of other than corporate offenders.

Such radical changes in the ingredients of the crime and in the punishment therefor necessarily under the decisions of this and other courts, work the repeal of the part of the Elkins law above quoted. *Norris* v. *Crocker*, 13 How. 429, 439; *United States* v. *Tynen*, 11 Wall. 88, 92; *United States* v. *Claflin*, 97 U. S. 546, 550, 552; *United States* v. *Fisher*, 109 U. S. 143, 145; *Bank* v. *United States*, 107 U. S. 445; *District of Col.* v. *Hutton*, 143 U. S. 18, 26; *People* v. *Tisdale*, 57 California, 104, 106; *Telegraph Co.* v. *Brown*, 8 N. E. Rep. 171, 172; *Lindsey* v. *State*, 5 So. Rep. 99, 100; *State* v. *Allen*, 44 Pac. Rep. 121, 122; *State* v. *Ingersoll*, 17 Wisconsin, 651, 655; *Mullen* v. *People*, 31 Illinois, 444, 445; *Mongeon* v. *People*, 55 N. Y. 613, 615; *State* v. *Massey* (N. C.), 4 L. R. A. 308, 311; *Wharton* v. *State*, 5 Coldw. 1; *S. C.*, 94 Am. Dec. 214; *State* v. *Smith*, 62 Minnesota, 540; 2 Lewis' Sutherland Stat. Constr. 482.

The rule that the repeal and simultaneous reënactment, literally or substantially, of a statute, continues it, has no application to the case at bar. This court, as well as others, has rejected the rule where the reënactment is a complete revision of and substitute for the earlier statute. *Murdock* v. *Memphis*, 20 Wall. 590, 616; *Pana* v. *Bowler*, 107 U. S. 529, 538; *Murphy* v. *Utter*, 186 U. S. 95, 104, 105; *Tracy* v. *Tuffly*, 134 U. S. 206, 223; *Bank* v. *United States*, 107 U. S. 445; *Red Rock* v. *Henry*, 106 U. S. 596; *The Paquete Habana*, 175 U. S. 677, 685; *State* v. *King*, 12 La. Ann. 593, 594; *Coffin* v. *Rich*, 45 Maine, 507, 512, 513; *Goodno* v. *Oshkosh*, 31 Wisconsin, 127, 129; *Wilson* v. *Railway Co.*, 29 Pac. Rep. 869.

The rule cannot apply to the case at bar because there is no substantial reënactment of the earlier law.

The Circuit Court of Appeals applied the rule on the authority of *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 458; *Irrigation Co.* v. *Garland*, 164 U. S. 1; *Campbell* v. *California*, 200 U. S. 87; *Lamb* v. *Powder Co.*, 65 C. C. A. 570; *Wright* v. *Oakley*, 5 Metc.

(Mass.) 400; *Association* v. *Benshimol*, 130 Massachusetts, 325; *St. Louis* v. *Alexander*, 23 Missouri, 483; *Ely* v. *Holton*, 15 N. Y. 595; *Anding* v. *Levy*, 57 Mississippi, 51; *Fullerton* v. *Spring*, 3 Wisconsin, 588; *Glentz* v. *State*, 38 Wisconsin, 549; *Burwell* v. *Tullis*, 12 Minnesota, 572; *Gaston* v. *Merriam*, 33 Minnesota, 271; *State* v. *Baldwin*, 45 Connecticut, 134; *People* v. *Board*, 20 Colorado, 220; *Moore* v. *Kenockee*, 75 Michigan, 332; *Capron* v. *Strout*, 11 Nevada, 304; *McMullen* v. *Guest*, 6 Texas, 275; *Holden* v. *State*, 137 U. S. 483; *Commonwealth* v. *Herrick*, 6 Cush. 465; *State* v. *Gumber*, 37 Wisconsin, 298; *State* v. *Wish*, 15 Nebraska, 448; *State* v. *Miller*, 58 Indiana, 399; *Sage* v. *State*, 127 Indiana, 15; *State* v. *Kates*, 149 Indiana, 46; *State* v. *Herzog*, 25 Minnesota, 490; *State* v. *Prouty*, 115 Iowa, 657; *State* v. *Williams*, 117 N. Car. 753; *State* v. *Brewer*, 22 La. Ann. 273; *Territory* v. *Ruval*, 84 Pac. Rep. (Ariz.) 1096; *Junction City* v. *Webb*, 44 Kansas, 71.

Of the cases cited the first eighteen in the list involved private rights, and the remaining thirteen liability to punishments under statutes claimed to have been repealed. All the cases, except *St. Louis* v. *Alexander; Moore* v. *Kenockee; Capron* v. *Strout*, and *McMullen* v. *Guest*, support the abstract rule. It seems to us that none of them support the court's application of it.

The part of the Elkins law, applicable to this case, necessarily ceased to exist at the instant the Hepburn act took effect, because two repugnant laws covering the same subject matter cannot coexist; and also because that part of the Elkins law was omitted from the reënactment and a new and different provision substituted.

The repeal of the part of the Elkins law quoted was complete.

The Elkins law was repealed at least as to all concessions from tariff granted or received, whether knowingly or not, by others than corporations. The act or crime of the officer or agent alone constitutes an act or crime of the corporation. To hold that the Elkins law remains in force only as to the corporation is to penalize it, and through it innocent stock-

holders, while permitting the guilty officer to escape. Congress cannot have intended this.

The repeal cannot be severed. The part of the Hepburn act quoted in connection with § 10, repealed *in toto* the part of the Elkins law quoted. *Goodno* v. *Oshkosh*, 31 Wisconsin, 127, 130.

Congress, by § 10, of the Hepburn act, has manifested its intent that only penalties and forfeitures incurred under the repealed parts of the Elkins law for which prosecutions were pending at the date of the passage of the Hepburn act should be saved, and that penalties and forfeitures for which prosecutions had not at that date been instituted should be remitted.

By § 13, Rev. Stat., in the absence of a special saving clause in the repealing act all penalties previously incurred under the act repealed are saved. *United States* v. *Reisinger*, 128 U. S. 398; *Lang* v. *United States*, 133 Fed. Rep. 204; *People* v. *England*, 91 Hun, 152; *State* v. *Smith*, 62 Minnesota, 540, 543; *Kleckner* v. *Turk*, 63 N. W. Rep. 469.

In the absence of a statute to the contrary, where the repealing act saves rights accrued and penalties incurred under the previous law and at the same time modifies the procedure by which the right is to be enforced or the penalty recovered, the procedure in an action or prosecution to enforce the right or recover the penalty must be in accordance with the later act. *Railway Co.* v. *Grant*, 98 U. S. 398; *Railroad Co.* v. *Oglesby*, 76 N. E. Rep. 165, 166; *Taylor* v. *Strayer*, 78 N. E. Rep. 236, 238; *Palmer* v. *City of Danville*, 46 N. E. Rep. 629; *Holcomb* v. *Boynton*, 37 N. E. Rep. 1031.

Section 10 can have no effect other than to save penalties, forfeitures and liabilities incurred under the repealed laws, because a statute affecting substantial rights is usually construed to have only a prospective operation.

The word "causes" as used in the section includes criminal cases. *Blyew* v. *United States*, 13 Wall. 581, 591; *Erwin* v. *United States*, 37 Fed. Rep. 471, 479; *Taylor* v. *United States*, 45 Fed. Rep. 531, 539; *State* v. *Hancock* (N. J.), 24 Atl. Rep. 726, 728.

Section 13 is ineffectual to prevent the courts from giving effect by their decrees to the intent of a subsequent Congress, as that intent may be discovered from the subsequent enactment.

The judiciary is an independent department. To construe the law is of the essence of its duty. Cases cited *supra* and *Ableman* v. *Booth*, 21 How. 506, 520; *Gordon* v. *United States*, 117 U. S. 697; *United States* v. *Klein*, 13 Wall. 128, 147; *Marbury* v. *Madison*, 1 Cranch, 137, 176; *District of Columbia* v. *Hutton*, 143 U. S. 18, 27; *United States* v. *Claflin*, 97 U. S. 546, 548; *Powell* v. *Pennsylvania*, 127 U. S. 678, 697.

The Attorney General and *Mr. Milton D. Purdy*, Assistant to the Attorney General, for respondent:

The concluding portion of § 10 of the Hepburn act was intended by Congress to preserve existing methods of procedure with respect to causes pending in courts of the United States at the time of the passage of the act, and it should not be construed as extinguishing penalties, forfeitures and liabilities which had accrued under the old law but were not then before the courts for judicial determination.

Section 10 of the Hepburn act must be read in connection with § 13 of the Revised Statutes, which is "a law prescribing rules for the construction of acts and resolutions of Congress." *United States* v. *Reisinger*, 128 U. S. 398; *United States* v. *Barr*, 4 Sawyer, 254; *United States* v. *Ulrici*, 3 Dillon, 532; *United States* v. *Four Cases of Lastings*, 10 Benedict, 371; *Sims* v. *United States*, 121 Fed. Rep. 515. Combining the two the result would be as follows: "That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but this repeal shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under said laws, and such laws shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall

be prosecuted to a conclusion in the manner heretofore provided by law."

The only implication to be drawn from the language employed is that all causes then pending before the Interstate Commerce Commission, together with all rights of action not then initiated under the old law, shall be proceeded with in accordance with the modified procedure provided for by the new law. This is shown by the history of the enactment, of the causes which led to its adoption and a consideration of the law itself in its entirety.

The debates in Congress while this law was under consideration were perhaps the most notable in recent years, especially in the Senate, and it is worthy of note that at no time was the idea expressed or even suggested that penalties, forfeitures and liabilities which had accrued under the old law, but which were not pending before the courts for determination, should be extinguished. Neither was it intimated that the old law forbidding rebating was considered or thought to be harsh or unjust in any particular. On the contrary, the one dominating idea seems to have been that the old law should be strengthened, and that at least, with respect to individuals offending against that law, the court should be empowered to punish by imprisonment in addition to the imposition of a fine.

In fact, there is abundant reason for claiming that the Congress considered the old law as not sufficiently "drastic" to put a stop to those practices which apparently had been going on in utter defiance of the Elkins act.

To sustain the petitioners' contention the doctrine of repeal by implication must be invoked and applied. The rule of law that repeals by implication are not favored is so well recognized by the courts as to render a citation of authorities unnecessary. If, therefore, it is possible to construe the langage employed in § 10 of the Hepburn law in such a manner as to avoid the implication that § 13, Rev. Stat., has been repealed in so far as it would operate to save penalties, forfeitures, and liabilities which had accrued at the time this law

was passed, it would certainly be the duty of the courts to adopt such a construction.

MR. JUSTICE WHITE delivered the opinion of the court.

The act of Congress, commonly referred to as the Hepburn law, was enacted June 29, 1906. 34 Stat., chap. 3591, p. 584. In November, 1906, in a District Court of the United States for Minnesota, the Great Northern Railway Company and several of its officials were indicted for violations of the act of February 19, 1903, commonly known as the Elkins act. 32 Stat., chap. 708, p. 847. There were fifteen counts, all relating to acts done in May, June, July and August, 1905. Except as to varying dates of shipment and the sum of the concessions, the counts were alike. A reference to the first count will therefore make clear all the charges which the indictment embraced. After alleging the corporate existence of the railway company, the capacity of its named officials and agents and the fixing and publishing of rates, there was set out the carriage of certain grain by the railway company from Minneapolis, Minnesota, to Seattle, Washington, for account of the W. P. Devereux Company, a corporation. It was then alleged that by the tariff and schedule of rates as established, published and filed in conformity to the act to regulate commerce the legal charge was fifty cents for each one hundred pounds of grain carried from Minneapolis to Seattle, "but the grand jurors aforesaid, on their oath aforesaid, do present and charge that . . . within the jurisdiction of this court, . . . the said Great Northern Railway" (and the officers and agents named) "did unlawfully grant and give to the said W. P. Devereux Company . . . a concession of twenty cents (20c.) of the said rate as aforesaid upon every one hundred pounds of the property so transported . . . as aforesaid, whereby the said property was by said corporation common carrier transported in said interstate commerce . . . at a less compensation and rate than that named therefor in said tariff and schedules so as aforesaid

published and filed by the said common carrier and in force at the time upon its said route."

The indictment was demurred to by all the accused upon the following grounds:

"1. That neither the said indictment nor any count in the said indictment stated sufficient facts or grounds to constitute against the said defendants, or either of them, an offense against the laws of the United States, nor any offense.

"2. That the statute of the United States creating the offense or offenses pretended to be charged in the said indictment, and under which said indictment was found, was duly repealed and was not in force at the time when the said indictment was found."

The demurrer in this case was evidently heard along with demurrers in cases against others presumed to present like questions. The demurrer was overruled for reasons stated in an opinion, deemed controlling not only of this but also of the other cases. *Sub nomine United States* v. *Chicago, St. P., M. & O. Ry. Co.*, 151 Fed. Rep. 84. By consent there was a severance between the railway company and the individual defendants. On the trial, after the jury had been sworn and when the taking of testimony was about to begin, the bill of exceptions states that the counsel for the company declared that he desired, on behalf of the defendant, "in order to save our rights under the law questions involved, to make objection to the introduction of any evidence. And I desire to have it understood and agreed between the Government and the defendant that I may now enter this objection with the same force and effect as if a witness had been already called and sworn to testify on behalf of the Government." On this being assented to by the Government, objection was made to the introduction of any evidence based upon the two grounds which had been previously urged to support the demurrer. The following occurred:

"The COURT: I understand that last ground. Let us see the first ground.

"Mr. BROWN: The first ground is the general ground of the insufficiency of the indictment. The second is the same thing, only more specific.

"I think the objection will be sufficient if confined to the first one.

"The COURT: The point that you wish to make is that there can be no prosecution here, no matter what the evidence is, because of the repeal of this Elkins act by the Hepburn act.

"Mr. BROWN: That is right.

"The COURT: The objection will be overruled.

"Mr. BROWN: I would ask an exception to the ruling of the court.

"The COURT: An exception is allowed."

Thereupon the counsel for the company stated that there was an agreement with the Government that the company should make an admission as to the facts alleged in the indictment, subject to the right of the company to make "such objections and motions and to take such action, either in this court or upon appeal, as shall be deemed necessary and proper to have determined the question of the sufficiency of the indictment to state an offense, and the sufficiency of the facts admitted to state an offense; and it is further agreed that neither such admissions, nor the fact that they had been made in this trial, shall be used as evidence or otherwise upon any other trial of this case, or upon the trial of any case." To this the prosecution assented. The establishment and publication of the tariff rates, the shipments of grain as alleged in the indictment, etc., were then admitted by the accused, and it was further admitted as follows:

"That in case of the several shipments specified in the several counts of the indictment herein the concessions stated in the several counts respectively in the said indictment were given to W. P. Devereux Company by the direction and with the consent of the said defendant, the Great Northern Railroad Company."

Both parties then rested. The company requested an in-

struction in its favor, based on the grounds upon which it had demurred, for which it had objected to any evidence, and upon the additional ground "that the facts shown by the evidence are not sufficient to constitute against the defendant any offense against the laws of the United States, nor any offense." Upon this request the following colloquy between the court and the counsel occurred:

"The COURT: You admit all the material facts alleged in the indictment?

"Mr. BROWN: We do.

"The COURT: And practically admit that they are proved?

"Mr. BROWN: We can't say that. We admit the facts that are stated here—the Government has gone over—and I understand they are the facts of the indictment.

"The COURT: For the purposes of this case, we will say that you admit those facts.

"The motion will be denied, and an exception allowed the defendant."

The court then instructed the jury, as follows:

"The defendant has admitted by its counsel that all the material allegations of the several counts are true, and if you do not believe these allegations are proven you are obliged to find the defendant not guilty. I suppose it is proper for the court to say that it can hardly see how you can find any other verdict than that of guilty, but that is for you to say. If you do not believe these allegations are proven you can find the defendant not guilty."

An exception was allowed the defendant to that part of the charge instructing that if the facts stated in the indictment were believed to be true, that the defendant should be found guilty. The following then occurred:

"The COURT: That is equivalent to saying that the indictment itself is insufficient.

"MR. BROWN: Might I have that exception?

"The COURT: You may.

"Mr. BROWN: May I have it appear on the record that the

grounds of my exception are the same three grounds named as the basis of my motion to instruct a verdict, to wit:

"1. That neither the indictment, on which this prosecution is based, nor any count in the said indictment, states sufficient facts or grounds to constitute against the defendant an offense against the laws of the United States, nor any offense;

"2. That the statute, or statutes, of the United States creating the offense or offenses, pretended to be charged in the indictment, and in each count thereof, and upon which statutes the said indictment and each count thereof is based, had been duly repealed and were not in force, as to any of the offenses in the said indictment pretended to be charged, at the time when the said indictment was found;

"3. On the ground that the facts shown by the evidence are not sufficient to constitute against the defendant an offense against the laws of the United States, nor any offense.

"The COURT: You may."

There was a verdict of guilty, and the grounds upon which the exceptions previously taken had been rested were made the basis for a motion in arrest, which was overruled and excepted to. From the verdict and sentence thereon the case was taken to the Circuit Court of Appeals for the Eighth Circuit, where the judgment was affirmed (155 Fed. Rep. 945), and the case is here because of the allowance of a writ of certiorari.

There is a contention in the brief of counsel for the petitioner, that the demurrer to the indictment should have been sustained and that the motion to arrest as well as the exceptions to the charge should have prevailed, because the indictment in all its counts was insufficient to state an offense under the Elkins act, even if that act had not been repealed or modified by the Hepburn law.

We postpone presently determining whether this contention is open on the record, or, if open, is meritorious, in order to come at once to the important question for decision, which is:

1. Did the Hepburn law repeal the Elkins act so as to deprive the Government of the right to prosecute for violations of the Elkins act committed before the Hepburn law was passed? The conflicting contentions on these subjects are these: It is insisted on behalf of the railway company that the Elkins act was amended and reënacted by § 2 of the Hepburn law, and that thereby a repeal of the Elkins act was accomplished, and that the express terms of the Hepburn law manifest the intention of Congress that no offense theretofore committed against the Elkins act should be prosecuted, unless a prosecution was then pending. The Government whilst not challenging the doctrine that where a criminal statute is repealed and a right to prosecute for a prior offense is not saved, such right is extinguished, yet insists that the principle has no application to this case, because the reënactment of the Elkins act by § 2 of the Hepburn law did not amount to a repeal of the Elkins act to the extent of preventing prosecutions for offenses against that act committed prior to the adoption of the Hepburn law. And it is urged that this result is demonstrated not only by the clause of the Hepburn law reënacting the Elkins act, but also by other provisions of the Hepburn law interpreted in the light of the principles of construction which are made applicable by operation of the general law, that is, Rev. Stat. § 13.

In considering these contentions in their ultimate aspect it is clear that to dispose of them requires us, in any event, to interpret the Hepburn law and to determine how far the reenactment by that law of the provisions of the Elkins act operates to prevent prosecutions for offenses committed prior to the date when the Hepburn law was enacted. We come therefore at once to that question. In doing so, to disembarrass the analysis from what may be an irrelevant and certainly a confusing consideration, we concede for the sake of argument only that the effect of the amendment and reenactment of the Elkins act by § 2 of the Hepburn law was to repeal the Elkins act, and in the light of this concession we

propose to determine whether the right to prosecute for any prior offense committed before the going into effect of the Hepburn law was lost by reason of the adoption of that law.

We must read the Hepburn law in the light of § 13 of the Revised Statutes, which provides as follows:

"SEC. 13. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

This provision but embodies § 4 of the act approved February 25, 1871, c. 71, 16 Stat. 431, which was entitled "An Act prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and rules for the construction thereof." As the section of the Revised Statutes in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment. But while this is true the provisions of § 13 are to be treated as if incorporated in and as a part of subsequent enactments, and therefore under the general principles of construction requiring, if possible, that effect be given to all the parts of a law the section must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of § 13. For the sake of brevity we do not stop to refer to the many cases from state courts of last resort dealing with the operation of general state statutes like unto § 13, Rev. Stat., because we think the views just stated are obvious and their correctness is established by a prior decision of this court concerning that section. *United States* v. *Reisinger*, 128 U. S. 398.

The Hepburn law is entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved Febru-

ary fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission." The law is comprehensive. It undoubtedly, as we have said, in the second section, amends and reënacts the Elkins act and enlarges in important particulars the powers of the Interstate Commerce Commission, and changes the procedure in various ways essential to the conduct of controversies before the commission. Besides, the act in some respects modifies the means of enforcing the orders of the commission in the courts of the United States, the right of appeal, the judgment as to costs, attorneys' fees, etc. The crucial portion of the act, for the purposes of the present inquiry, is § 10, which provides: "That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in the courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

Clearly, the mere repeal of conflicting laws is in no way repugnant to the provisions of § 13 of the Revised Statutes, and, therefore, standing alone, leaves no room for contending that the enactment of the Hepburn law destroyed the effect of § 13. The difficulty of construction, if any, arises from the words following the general repealing clause: "but the amendments herein provided for shall not affect causes now pending in the courts of the United States, but such causes shall be prosecuted to conclusion in the manner heretofore provided by law." These words, we think, do not, expressly or by fair implication, conflict with the general rule established by § 13, Rev. Stat., since by their very terms they are concerned with the application to proceedings pending in the courts of the United States of the new methods of procedure created by the Hepburn law. Any other construction would necessitate expunging the words "shall be prosecuted to a conclusion in the manner heretofore provided by law." This follows, because if it were to be held that the intent and object of the

lawmaker in dealing with cases "pending in the courts of the United States," was solely to depart as to all but such pending cases from the general rule of Rev. Stat. § 13, then the provision as to future proceedings would be unnecessary, because the old and unrepealed as well as the newly enacted remedies would be applicable, as far as pertinent, to such pending causes. The provision commanding that the new remedies should not be applicable to causes then pending in the courts of the United States gives significance to the whole clause and serves to make clear the fact that the legislative mind was concerned with the confusion and uncertainty which might be begotten from applying the new remedies to causes then pending in the courts, and demonstrates therefore that this subject, and this subject alone, was the matter with which the provision in question was intended to deal. In other words, when the object contemplated by the provision is accurately fixed the subject is freed from difficulty, and not only the letter but the spirit of the provision becomes clear; that is to say, it but manifests the purpose of Congress to leave cases pending in the courts to be prosecuted under the prior remedies, thus causing the new remedies created to be applicable to all controversies not at the time of the passage of the act pending in the courts. And all the arguments relied upon to sustain the theory that the power to prosecute for past offenses not then pending in the courts was abrogated by the Hepburn law rest in substance upon the disregard of the true significance of the provision of § 10. Thus the argument that by the application of the elementary rule by which the inclusion of one must be considered as the exclusion of the other, it follows that the power to further prosecute all but cases then pending in the courts was destroyed by the Hepburn law, because pending causes are enumerated in § 10, and are hence not saved by Rev. Stat. § 13, simply assumes that the provision of § 10 was intended to save the right to further prosecute the cases then pending in the courts, and disregards the fact that the provision as to pending causes was solely addressed to the remedies to

be applied in the future carrying on of such cases. Again, the contention that unless the provision as to pending causes in § 10 be construed as relating to the further right to prosecute such cases, it becomes meaningless, but overlooks the fact that the purpose of the provision was, by express enactment, to prevent the application of the new remedies to the causes then pending in the courts of the United States, a result which would not necessarily have followed without the direction in question.

The purpose of Congress in enacting § 10 is aptly illustrated by previous legislation concerning the reënactment of the Interstate Commerce Law, and may well have been deemed to be advisable in consequence of the decision of this court in *Missouri Pacific Railway* v. *United States*, 189 U. S. 274. The construction which we have given § 10, resulting from its plain language, is fortified by a consideration of the context of the Hepburn law. Thus conceding for the sake of argument that the word "pending cases," as used in § 10, embraces criminal prosecutions, it clearly also relates to civil controversies. Now, § 16 of the prior act to regulate commerce, as amended and reënacted by § 5 of the Hepburn law, prescribes a limitation of two years "from the time the cause of action accrues" as to "all complaints for the recovery of damages" before the commission, and establishes a limitation of one year for the filing of a petition in the Circuit Court for the enforcement of an order of the commission for the payment of money. But the section contains a proviso saving the right to present claims accrued prior to the passage of the act, provided the petition be filed within one year. If it were true that § 10 abrogated, as asserted, the right to prosecute all claims not pending in the courts at the time of the passage of the Hepburn law, it would follow that that law destroyed the very rights which it specifically provides should be saved if prosecuted within a year. Moreover, as the clause of § 10 which is relied upon in terms embraces only cases pending in the courts of the United States, it would follow, if the contention here made were true, that the

Hepburn law, while saving pending cases in the courts, yet destroyed all claims pending at the time of the passage of that act before the commission. As no reason is suggested why, if the purpose of § 10 was to save pending causes, that section should have destroyed the right to further prosecute all causes pending before the commission, it would seem that the inclusion in § 10, only of causes pending in courts of the United States, could only have been the result of a purpose on the part of Congress not to distinguish without reason between pending causes by saving one class and destroying the other, but was solely based on the desire of Congress not to interfere with proceedings then pending in the courts, but to leave such proceedings to be carried to a finality, in accordance with the remedies existing at the time of their initiation. There are various other provisions of the Hepburn law which we think additionally irresistibly demonstrate the correctness of the construction which we affix to § 10, but we do not, for the sake of brevity, refer to them, as we think the reasoning hitherto stated adequately shows the unsoundness of the proposition that that section manifests in any respect the intention of Congress to depart from the general principle expressed in Rev. Stat. § 13. We say, however, that the view we have taken has in various forms of statement been upheld by a line of decisions in the lower Federal courts. *United States* v. *Standard Oil Company*, 148 Fed. Rep. 719; *United States* v. *Chicago, St. P., M. & O. Railway Company et al.*, 151 Fed. Rep. 84; *United States* v. *Delaware, Lackawanna & Western Railway Company*, 152 Fed. Rep. 269; *United States* v. *New York Central & Hudson River Railroad Company*, 153 Fed. Rep. 630. In citing the cases in question we do not wish to be considered as implying that we express any opinion as to the doctrines which they may announce upon other subjects than the one now before us. We say this, because it may be that some of the other subjects with which some of the cited cases deal may hereafter come before us for decision, and therefore we prefer not prematurely, even by indirection, to leave room

for the slightest implication that we express an opinion as to such other issues.

2. This brings us to the contention which we at the outset passed over, which is that the indictment was insufficient to state an offense under the Elkins act, although that act was not repealed. The proposition is, that as the indictment only charged that the concessions on the established rate were unlawfully given, it was insufficient because in order to cause a concession to be a crime under the Elkins act, as it stood before the Hepburn law, such concession must have been "either knowingly or willfully granted. If a criminal intent is necessary to the crime, it must be charged in the indictment." It is undoubted that the first ground of the demurrer filed to the indictment was broad enough to embrace this contention if it had been urged. That it was not urged on the hearing of the demurrer persuasively results from the fact that it was not noticed in the elaborate opinion filed by the court in disposing of the demurrer. It moreover results from the proceedings had at the trial after the jury was sworn. The judge who presided at that trial was the same judge before whom the demurrer was heard. When in stating the objection to the admissibility of any evidence on the part of the Government, the counsel for the accused restated both grounds, as expressed in the demurrer, the only contention which the court understood to be urged was the repeal of the Elkins act, since the court said: "I understand that last ground" (the one referring to the repeal of the Elkins act). "Let us see the first ground." It is clear that the counsel did not then consider that the first ground embraced the proposition now made, since in answer to the question of the court he said: "The first ground is the general ground of the insufficiency of the indictment. The second is the same thing, only more specific." That the court understood this declaration as indicating that the only question raised was the repeal of the Elkins act, beyond controversy appears from the statement then made by the court: "The point you wish to make is that there can be no prosecution

here, no matter what the evidence is, because of the repeal of the Elkins act by the Hepburn act." To which counsel answered: "That is right." True also is it that the general language of the exceptions subsequently taken are also broad enough to embrace the point now made, but consistently with that candor and directness of conduct which we should attribute to counsel, and which we do attribute, we cannot consider that the subsequent exceptions were intended by counsel, without notice to the court, to embrace a contention which had been expressly disclaimed and which could not be in the case consistently with the previous statement of counsel as to the one and sole point which they desired to raise. And this conclusion is moreover rendered necessary by the nature of the admission made, which expressly conceded that "the concessions stated in the several counts respectively in the said indictment were given . . . by the direction and with the consent of the said defendant, the Great Northern Railway Company." And particularly is this so in view of the express declaration made by counsel to the court after his admission as to the facts of the case, viz.: "I understand that they [the admissions] are the facts of the indictment." In addition to this not a syllable in the elaborate opinion of the Circuit Court of Appeals refers to the question now urged. On the contrary, that opinion contains affirmative statements by the court concerning concessions made by counsel for both parties in argument which exclude the possibility that the contention we are considering was ever directly urged or even indirectly called to the attention of that court. Finally, in the petition filed for certiorari, counsel, after stating the bringing of the indictment, the demurrer, the admissions and the exceptions made at the trial, summed up and precisely stated all the contentions which arose from the demurrer and the exceptions without a single reference to the point now relied upon, and that point was not referred to or noticed in the brief submitted in support of the petition for certiorari. Certain is it that the proposition now urged, in view of the admission made below, is of a purely

technical character. Because we decline to consider the contention under the circumstances stated, we must not be understood as intimating any opinion whatever upon it. Into that question we have not deemed that we are called upon to enter.

Affirmed.

PHILLIPS *v.* CITY OF MOBILE.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 113. Argued January 17, 1908.—Decided February 24, 1908.

An ordinance imposing a license on persons selling beer by the barrel is an exercise of the police power of the State, and as such is authorized by the Wilson Act, 26 Stat. 313, notwithstanding such liquors were introduced into the State in original packages.

The police power of the State is very extensive and is frequently exercised where it also results in raising revenue, and in this case an ordinance imposing a license tax on a class of dealers in intoxicating liquor was held to be a police regulation notwithstanding it also produced a revenue.

Where a license tax on dealers in a particular article is exacted without reference as to whether the article was manufactured within or without the State, the ordinance imposing it creates no discrimination against manufacturers outside of the State within the meaning of the equal protection clause of the Fourteenth Amendment.

146 Alabama, 158, affirmed.

THE plaintiff in error herein seeks to reverse a judgment of the Supreme Court of Alabama which reversed a judgment in his favor given by the City Court of Mobile.

The action was brought in the City Court by the city of Mobile, by a written complaint, wherein the city sought to recover from the plaintiff in error (defendant in that court) the sum of fifteen dollars, the amount of the fine imposed upon him by the recorder for the violation of what is termed the license ordinance of the city, approved March 14, 1904, by failing to obtain and pay for a license under the twenty-eighth subdivision of the second section of that ordinance, relating to the selling of beer in that city. The defendant filed a plea, setting up what he alleged was a defense.

Upon the trial in the City Court the parties agreed upon a statement of facts.

From such statement it appears that the city council, as authorized by the state legislature, had, prior to the complaint in question, adopted an ordinance, section one of which imposed a license tax for the fiscal year beginning March 15, 1904, "on each person, firm, corporation or association doing business or trading or carrying on any business, trade, or profession, by agent or otherwise, within the limits of the city of Mobile, . . . and such licenses are hereby fixed for such business, trade or profession . . . as follows."

Subsection 28 of § 2 fixes the amount, upon the payment of which the license may be granted in such a case as this, as follows:

"28. *Breweries*, each person, firm, corporation, dealer, brewer, brewery, agent or handler for a brewery, selling beer by the barrel, half barrel or quarter barrel, this clause is not to include license for wholesale or retail vinous or spirituous liquors, $200.00."

The statement of facts as agreed upon then continues as follows:

"That the defendant herein is an individual who resides in Mobile, Alabama, and that he is engaged in the business of being a retail beer dealer, for which, under the exhibit hereto, he has paid the amount of his license, as required by said ordinance for and during the fiscal year, beginning March 15, 1904, and ending March 14, 1905; and that said payment having been made, a license therefor was duly issued by the proper authorities of the city of Mobile, authorizing the defendant to carry on the business of retail beer dealer during said time; that the defendant, in addition to his other liquor business, carried on under the authority of said paid license under said ordinance, has likewise but at the same place and with the same employés before the institution of this prosecution in the Recorder's Court, and since March 15, 1904, been engaged in the business of buying and selling beer in kegs, but only

under the following circumstances: That the defendant would, by letter or telegram sent from Mobile, Alabama, order from a brewery or breweries owned and conducted by residents and citizens of States other than Alabama, certain quantities of lager beer, which, pursuant to said orders, would be shipped by continuous interstate transportation by said non-residents to the defendant at Mobile, Alabama, in kegs, which kegs were, without other packing, loaded into railroad freight box cars and transported by the railroad companies from said breweries in other States to the defendant at Mobile, Alabama. The said purchases by the defendant were outright, and that the defendant by and through said purchases became the owner of said lager beer, to do with as he pleased; that he paid for it usually after its arrival, but never until a bill of lading for each such shipment so paid for, had been received by the defendant at Mobile; that the packages in which said beer came were invariably kegs of the ordinary, usual and customary commercial sizes, in which the same is packed for sale and shipment, and that in such usual commercial original packages the same was taken from the car upon arrival at Mobile and stored in the storehouse or warehouse of the defendant in the city of Mobile until sold by the defendant; that the defendant made sales of said kegs in quantities of one or more to his various customers in and about the city of Mobile and the vicinity thereof, and that such sales were made in contemplation by defendant of deliveries by the defendant in said kegs as original packages, and that the deliveries were thereafter made by delivery wagons owned and operated by the defendant in the city of Mobile to such customers in such original packages. That from the time of the packing and shipment of said beer at the breweries in other States than Alabama until after sale and delivery thereof by the defendant to his various customers in the city of Mobile and the vicinity thereof, none of said kegs as original packages ever became broken or open, but the deliveries by the defendant to his respective customers of said beer was always in the same, original, usual, commercial pack-

ages in which the same was packed and shipped from the breweries in said foreign States. That each and all of the kegs herein mentioned contained more than one quart of beer. That this mode of business has been conducted by the defendant since March 15, 1904, and still continues, and that, except as is herein above stipulated, the defendant, neither as a brewery, person, firm, corporation, dealer, brewer, brewery agent or handler has ever sold beer by the barrel, half barrel or quarter barrel in the city of Mobile, Alabama, since March 15, 1904. That nearly fifty per cent of all the offenses against the ordinances of the city of Mobile ordained to secure peace and order is brought about by the use of intoxicating liquors. Neither the license sued for nor the fine assessed by the recorder has been paid."

The case was submitted to the jury upon this agreed statement.

The plaintiff, the city of Mobile, asked the court to charge the jury that if they believed the evidence they must find for the plaintiff. The defendant also asked the court to charge the jury if they believe the evidence in this case they ought to find for the defendant.

The court charged the jury in accordance with the request of the defendant, and a verdict was thereupon rendered in his favor.

On appeal from the judgment to the Supreme Court it was reversed, the court holding that the trial court should have refused the request of the defendant, and directed the jury to find a verdict for the plaintiff. The case was therefore remanded with such directions.

Mr. Richard William Stoutz, with whom *Mr. Walter A. White* was on the brief, for plaintiff in error in this case and in No. 112 argued simultaneously herewith: [1]

The business of buying and selling original packages of goods, traded in as commerce between the States, is not taxable by

[1] *Richard* v. *City of Mobile*, *post*, p. 480.

the States. *Lyng* v. *Michigan*, 135 U. S. 166; *Leisy* v. *Hardin*, 135 U. S. 100; *Austin* v. *Tennessee*, 179 U. S. 363, 364; *N. & W. R. R.* v. *Sims*, 191 U. S. 449, 450.

Beer in kegs is in the original packages. *Keith* v. *State*, 91 Alabama, 2; *Lyng* v. *Michigan*, 135 U. S. 166; *Leisy* v. *Hardin*, 135 U. S. 100; *Austin* v. *Tennessee*, 179 U. S. 351; *Brown* v. *Maryland*, 12 Wheat. 419; *Commonwealth* v. *Schollenberger*, 171 U. S. 1.

Even if the occupation tax is directed against individuals within the taxing State, who are themselves the owners of the goods, as original interstate importers, so long as the goods remain in the original packages the business of selling them cannot be taxed before they are sold.

The right to order beer from breweries in other States and bring it here in kegs, constituted importing the same, and gave the interstate importers a right to sell the beer in the original package, free of any state or municipal taxation on such business not exacted under the police power, and that, until said sale had taken place after importation and was an accomplished fact, the keg or kegs of beer forming the subject matter of the sale, did not become mingled with a mass of property in the State so that the business of selling same could be taxable therein. *Keith* v. *State*, 91 Alabama, 6.

If the property was sold in the original package it did not become mingled with the property in the State until after the sale, and it makes no difference to whom the sale might be made, whether to wholesaler, jobber, retailer or consumer. The test is original package, and that only. See *Schollenberger* v. *Pennsylvania*, 121 U. S. 22, in which the sale of a ten pound package of oleomargarine in the original tub was protected by the original package doctrine, even though the sale was by the importer to the consumer.

The purpose of the Wilson Act was simply to give to the State police power, and that alone, over liquors which come under the head of interstate commerce. 3 Fed. Stat. Ann. 854; *Reyman B. Co.* v. *Brister*, 179 U. S. 455; *In re Rahrer*,

140 U. S. 545; *Vance* v. *Vandercook*, 170 U. S. 438; *Pabst B. Co.* v. *Terre Haute*, 98 Fed. Rep. 330; *State* v. *Bengsh*, 170 Missouri, 81; *S. C.*, 70 S. W. Rep. 710, 720; *F. Miller B. Co.* v. *Stevens*, 102 Iowa, 60; *S. C.*, 71 N. W. Rep. 186; *Stevens* v. *State*, 61 Ohio St. 597; *S. C.*, 56 N. E. Rep. 178; *Tinker* v. *State*, 90 Alabama, 640.

But the act gives no right to levy a tax on the business of dealing in such liquors while the same retains its interstate import character, purely for purposes of revenue or taxation. The police power cannot be put forward as an excuse for oppressive and unjust legislation, not under the police power. *Austin* v. *Tennessee*, 179 U. S. 349, citing *Holden* v. *Hardy*, 169 U. S. 366, 392; *Pabst Brewing Co.* v. *Terre Haute*, 98 Fed. Rep. 330.

The ordinance of the city of Mobile of which the above-quoted provisions are a part, is purely a revenue ordinance and is not a police ordinance in any respect. *Stratford* v. *Montgomery*, 110 Alabama, 626; *Leloup* v. *Mobile*, 76 Alabama, 401, 403, reversed by *S. C.*, 127 U. S. 644; *Pabst Brewing Co.* v. *Terre Haute*, 98 Fed. Rep. 334; *Brennan* v. *Titusville*, 153 U. S. 289, 301, 302; *Swords* v. *Daigle*, 32 So. Rep. 94 (La.). The cases of *Kehrer* v. *Stewart*, 197 U. S. 60, and *American Steel Wire Co.* v. *Speed*, 192 U. S. 500, discussed and distinguished.

Mr. Burwell Boykin Boone for defendant in error in this case and in No. 112:

The license complained of makes no distinction between residents and non-residents, nor does it discriminate between breweries in the State of Alabama and breweries in other States. The business conducted by plaintiff in error within the city of Mobile was domestic business, which was not protected, from the imposition of a license, by the commerce clause of the Federal Constitution. *Kehrer* v. *Stewart*, 197 U. S. 60; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 519.

The facts in this case bring it clearly within the provisions of the Wilson Act, the purpose of which is to give to the States

full authority, for the purpose of prohibition as well as regulation and restriction, with reference to the sale of intoxicating liquors in original packages when so introduced into one State from other States. *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 30; *Delamater* v. *South Dakota*, 205 U. S. 98.

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

The plaintiff in error asserts that a license tax, such as is provided in this ordinance, is a tax upon the seller of the goods under the license, and therefore a tax upon the goods themselves (*Kehrer* v. *Stewart*, 197 U. S. 60), and as they were brought into the State from another State they cannot be taxed in their original packages, even under the Wilson Act, August 8, 1890, c. 728, 26 Stat. 313. The ordinance, it is said, is in the nature of a revenue act, and was not enacted in the exercise of the police powers of the State through the city. The Wilson Act provides that the liquors, upon arrival in a State or Territory to which the liquor may be sent, shall be subject to the operation and effect of the laws of the State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

It is insisted that Congress, by the passage of the Wilson Act, merely removed the impediment to the States reaching the interstate liquor through the police power, and that it intended to, and did, keep in existence any other impediment to state interference with interstate commerce in original packages.

But we are of opinion that this section of the ordinance was clearly an exercise of the police power of the State, and as such authorized by the act of Congress. The fact that the city derives more or less revenue from the ordinance in question does not tend to prove that this section was not adopted in

the exercise of the police power, even though it might also be an exercise of the power to tax. The police power is a very extensive one, and is frequently exercised where it also results in raising a revenue. The police powers of a State form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government; all which may be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass. *Gibbons* v. *Ogden*, 9 Wheat. 1–203; *City of New York* v. *Miln*, 11 Pet. 102, 139, 141; *Barbier* v. *Connolly*, 113 U. S. 27, 31.

The sale of liquors is confessedly a subject of police regulation. Such sale may be absolutely prohibited, or the business may be controlled and regulated by the imposition of license taxes, by which those only who obtain licenses are permitted to engage in it. Taxation is frequently the very best and most practical means of regulating this kind of business. The higher the license, it is sometimes said, the better the regulation, as the effect of a high license is to keep out from the business those who are undesirable and to keep within reasonable limits the number of those who may engage in it. We regard the question in this case as covered in substance by prior decisions of this court. See *Vance* v. *Vandercook Company* (No. 1), 170 U. S. 438, 446; *Reymann Brewing Company* v. *Brister*, 179 U. S. 445; *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17, 25; *Delamater* v. *South Dakota*, 205 U. S. 93. Even where the subject of transportation is not intoxicating liquor this court has held that goods brought in the original packages from another State, having arrived at their destination and being at rest there, may be taxed, without discrimination, like other property within the State, even while in the original packages in which they were brought from another State. *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500.

This license tax is exacted without reference to the question as to where the beer was manufactured, whether within or without the State, and hence there is no discrimination in the case.

It is unnecessary to continue the discussion. As we have said, the cases above cited are conclusive in favor of the correctness of the judgment of the Supreme Court of Alabama.

Judgment affirmed.

RICHARD *v.* CITY OF MOBILE.

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

No. 112. Argued January 17, 1908.—Decided February 24, 1908.

Decided on the authority of *Phillips* v. *City of Mobile*, *ante*, p. 472.

THE facts are stated in the opinion.

Mr. Richard William Stoutz, with whom *Mr. Walter A. White* was on the brief, for plaintiff in error.

Mr. Burwell Boykin Boone for defendant in error.[1]

MR. JUSTICE PECKHAM delivered the opinion of the court.

This is an appeal from a judgment of the Circuit Court of the United States for the Southern District of Alabama, sustaining the demurrer of the City of Mobile to a bill filed by the appellants, and dismissing the same. It appears that the appellants sought to obtain an injunction to restrain the city from collecting the amount of the license tax imposed under the ordinance of the city upon those who were engaged in selling beer in the city by the barrel, half barrel or quarter barrel.

[1] For abstracts of arguments see *ante*, p. 475.

The question involved is, as counsel for appellants admits, identical with that which has just been decided in the foregoing case, No. 113, and for the reasons therein stated the judgment of the Circuit Court is

Affirmed.

UGHBANKS *v.* ARMSTRONG, WARDEN OF THE MICHIGAN STATE PRISON.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 435. Submitted January 20, 1908.—Decided February 24, 1908.

The indeterminate sentence law of Michigan of 1903, as construed and sustained according to its own constitution, by the highest court of that State, does not violate any provision of the Federal Constitution. It is of a character similar to the Illinois act, sustained by this court in *Dreyer* v. *Illinois*, 187 U. S. 71.

When a subsequently enacted criminal law is more drastic than the existing law which in terms is repealed thereby, the claim that it is *ex post facto* as to one imprisoned under the former law and therefore void, and that the earlier law being repealed he cannot be held thereunder, has no force in this court where the state court has held that the later law does not repeal the earlier law as to those sentenced thereunder. In such a case this court follows the construction of the state court.

The Sixth and Eighth Amendments to the Federal Constitution do not limit the power of the State.

The Fourteenth Amendment to the Federal Constitution does not limit the power of the State in dealing with crime committed within its own borders or with the punishment thereof. But a State must not deprive particular persons or classes of persons of equal and impartial justice.

This court follows the construction of an indeterminate sentence law by the highest court of the State, to the effect that where the maximum term of imprisonment for a crime has been fixed by statute a maximum term fixed by the court of a shorter period is simply void.

The granting of favors by a State to criminals in its prisons is entirely a matter of policy to be determined by the legislature, which may attach thereto such conditions as it sees fit, and where it places the granting of such favors in the discretion of an executive officer it is not bound to give the convict applying therefor a hearing.

The provision in the indeterminate law of Michigan of 1903, excepting prisoners twice sentenced before from the privilege of parole, extended in the discretion of the Executive to prisoners after the expiration of

their minimum sentence, does not deprive convicts of the excepted class of their liberty without due process of law, or deny to them the equal protection of the laws.

THIS writ of error brings up a judgment of the Supreme Court of Michigan, denying the application of the plaintiff in error for a writ of *habeas corpus*, to inquire into the cause of his detention in, and to obtain his discharge from, the state prison at Jackson.

It appears from the record that on the seventeenth of March, 1904, the plaintiff in error was proceeded against in the Circuit Court for the county of Washtenaw, in the State of Michigan, on an information filed by the prosecuting attorney for that county, charging the plaintiff in error with having committed the crime of burglary on the fifteenth of March, 1904. Upon being arraigned upon such information he pleaded guilty and was, on the day mentioned, sentenced under the indeterminate sentence act of the State to be confined in the state prison at Jackson at hard labor for a period not less than one year and not more than two years. Public acts of Michigan, May 21, 1903, No. 136, p. 168. His term of imprisonment, counting the maximum period for which he was sentenced, ended, as he asserts, on March 17, 1906, even without any deduction for good behavior.

In his petition for the writ plaintiff in error stated that by the record kept and retained by the warden of the Michigan state prison at Jackson it appeared, as plaintiff in error was advised, that he had been twice before convicted of felony, and that he had served four years in Kingston, Canada, and four years in Jackson, Michigan, on account thereof, and that he was a resident of Canada and had never resided in the State of Michigan or in the United States.

He made application at the end of the minimum term of his sentence to the advisory board, provided for by § 4 of the above act, for his discharge on parole, but he was notified that his application could not be heard or considered for the reason

that it appeared that he had been twice before convicted of a felony, and the act provides that no person who has been twice previously convicted of a felony shall be eligible to parole.

After the expiration of the maximum term named in the sentence, being still detained in prison under the claim that the law provided a maximum term of imprisonment of five years in such a case as his, which term had not elapsed, the plaintiff in error applied to the Supreme Court of Michigan for a writ of *habeas corpus* to obtain his discharge, and upon the denial of the application brought the case here.

Mr. John B. Chaddock and *Mr. George E. Nichols* for plaintiff in error:

By the very language of the constitutional amendment and the resolution which preceded, it is evident that the legislature and the people must have intended to obtain power, through this amendment, to pass indeterminate sentence laws, as such laws are generally understood and accepted. The power of the legislature, therefore, was limited to the passage of such an indeterminate sentence law as was contemplated by the framers of the amendment.

It follows that any statute enacted under this constitutional amendment, which permits the imposition of any punishment, other than an indeterminate sentence, as contemplated thereby, is in violation of the constitutional amendment, and if it violates the provisions, or any of them, of the Federal Constitution, the acts are void, and all sentences pronounced under them are invalid, and the party restrained of his liberty thereby is entitled to his discharge, especially as in this case, if he has served his minimum sentence.

Both acts referred to not only authorize the imposition of a sentence, which in no sense of the word can be classed as indeterminate, but the machinery of the law for carrying the sentence into effect violates the state, as well as the Federal, Constitution, and deprives the citizen of his liberty without due process of law.

While the indeterminate sentence act says in terms that it shall apply to every sentence thereafter imposed, with only the two exceptions of persons sentenced for life, and children under fifteen years of age, yet it later provides that no prisoner who has been twice previously convicted of a felony shall be eligible to parole under the provisions of the act. See act 136, Public acts 1903, §§ 1, 4. Thus although plaintiff in error was sentenced as the law required under act 136, yet he cannot, if the charge against him be true, have any of its benefits or advantages.

If it is due process of law for the executive to determine and fix the period for which a person convicted of crime shall remain in prison, upon the conduct of the prisoner while in prison, and if such process meets the requirements of the punishment authorized by the constitutional amendment, providing for an indeterminate sentence, in one case, it does in all cases. The opportunity to earn release by good conduct is an essential feature of the indeterminate sentence amendment to the constitution. The power to limit and abridge this opportunity in either case implies the right to deny it entirely. To withhold in one case what has been granted as right in other and similar cases, is unjust and a grievous discrimination, contrary to § 1 of the Fourteenth Amendment. If all persons must be sentenced under the law, then it should apply equally to all. See *Easton* v. *State*, 11 Arkansas, 481.

The act of 1903 (act 136 of Public acts of 1903), under which plaintiff in error was sentenced, having been repealed by the act of 1905 (§ 17, act 184, Public acts of 1905), the only color of right which the warden now has to hold the plaintiff in error is under the act of 1905, and the latter act being *ex post facto* as to him, his detention is unlawful as in violation of the Constitution of the United States. The new act undoubtedly alters the situation of the prisoner to his detriment and so brings the case within the authorities. *Ex parte Medley*, 134 U. S. 164; *In the Matter of Canfield*, 98 Michigan, 644; *Murphy* v. *Com.*, 52 N. E. Rep. 505; *In re Murphy*, 87 Fed. Rep. 549;

Cring v. *State*, 107 U. S. 221; *State* v. *Tyree*, 77 Pac. Rep. 290.

Mr. John E. Bird, Attorney General of the State of Michigan, and *Mr. Henry E. Chase*, for defendant in error.

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

An act providing for an indeterminate sentence was first passed in Michigan on July 1, 1889, No. 228, p. 337, and was declared unconstitutional by the Supreme Court of that State. *People* v. *Cummings*, 88 Michigan, 249. A constitutional amendment was subsequently adopted (1901), which authorized the legislature to provide for an indeterminate sentence law, as punishment for crime, on conviction thereof. Art. 4, § 47, constitution of Michigan, as amended. See Laws of 1903, p. 452. Under the authority of this amendment the legislature, in 1903, passed act No. 136 of the public acts of that year. This act was held to be valid. *In re Campbell*, 138 Michigan, 597; *In re Duff*, 141 Michigan, 623. An act of a character very similar has been held to violate no provision of the Federal Constitution. *Dreyer* v. *Illinois*, 187 U. S. 71. While the act in question here was in force the crime of plaintiff in error was committed, and on the seventeenth of March, 1904, he was sentenced as already stated. The sentence fixed the maximum as well as the minimum term of imprisonment, but the fixing of a maximum term in the sentence has been held to be void, as not intended or authorized by the law of 1903, in any case where the statute providing for the punishment of a crime itself fixes the maximum term of imprisonment at a certain number of years. *In re Campbell; In re Duff, supra.*

In this case, where the maximum term for burglary is fixed by the statute at five years, the sentence fixing that term at two years was simply void, and the maximum term of imprisonment fixed by the statute takes the place of the maximum term

fixed in the sentence. *In re Campbell; In re Duff, supra.* Under this construction the term of imprisonment of the plaintiff in error has not yet expired.

He cannot, however, avail himself of the provisions of the statute in relation to applying for and obtaining his discharge on parole, after the expiration of the minimum term of the sentence, because he has been convicted of two previous felonies.

On June 7, 1905, Public acts of Michigan, No. 184, p. 268, the legislature passed another act on the same subject and repealed the act of 1903. The plaintiff in error contends that the provisions of the act of 1905 are more unfavorable to him than those of the act of 1903, and that it is invalid as to him because it is an *ex post facto* law, and, as the act of 1903 has been repealed, there is no act in force by which he can be further imprisoned.

Without stopping to inquire whether the act of 1905 would be in his case an *ex post facto* law, it may be stated that the Supreme Court of Michigan has held that the act of 1903 is not repealed as to those who were sentenced under it, and that as to them it is in full force, and the statute of 1905 has no application. *In re Manaca,* 146 Michigan, 697. In such a case as this we follow that construction of the constitution and laws of the State which has been given them by the highest court thereof. There is, therefore, no force in the contention made on the part of the plaintiff in error that the act of 1905 applies in his case and is *ex post facto.*

It is also urged that the result of the holding of the state court is that plaintiff in error is imprisoned under the indeterminate sentence act of 1903 for the maximum period (five years) provided by the general statute for the crime of which he has been convicted, without any discretion on the part of the court as to the term of his sentence, while he is also refused the right to apply under the act for a discharge upon his parole after the expiration of the minimum term of the sentence, because, it is alleged, that as to him there can be no

minimum sentence, as he has been twice before convicted of a felony, although he has had no opportunity of being heard as to that allegation. He now urges that he is imprisoned in violation of the Sixth and Eighth and the Fourteenth Amendments of the Federal Constitution.

The claim rests upon an entire misapprehension of the rights of the plaintiff in error under these Amendments. The Sixth and Eighth Amendments do not limit the powers of the States, as has many times been decided. *Spies* v. *Illinois*, 123 U. S. 131; *Eilenbecker* v. *District Court &c.*, 134 U. S. 31; *Brown* v. *New Jersey*, 175 U. S. 172–174; *Maxwell* v. *Dow*, 176 U. S. 581, 586. The plaintiff in error says that under the Fourteenth Amendment he is imprisoned without due process of law and is denied the equal protection of the laws. The last-named Amendment was not intended to, and does not, limit the powers of a State in dealing with crime committed within its own borders or with the punishment thereof, although no State can deprive particular persons or classes of persons of equal and impartial justice under the law. *In re Kemmler*, 136 U. S. 436, 448; *Caldwell* v. *Texas*, 137 U. S. 692. The act in question provides for the granting of a favor to persons convicted of crime who are confined in a state prison. *People* v. *Cook*, 147 Michigan, 127–132. It gives to a criminal so confined, subsequent to the expiration of the minimum term of imprisonment stated in the sentence, the privilege to make application for parole to the warden or superintendent of the prison where he is confined, and the warden is directed to send such application to the governor. Upon its receipt the governor may order such investigation by the advisory board in the matter of pardons as he may deem advisable and necessary, but the authority to grant paroles, under such rules and regulations as the governor may adopt, is conferred by the statute exclusively upon that officer. He is not bound to grant a parole in any case, and § 4 provides "that no prisoner who has been twice previously convicted of a felony shall be eligible to parole under the provisions of this act." As the State is thus provid-

ing for the granting of a favor to a convicted criminal confined within one of its prisons, it may (unless under extraordinary circumstances) attach such conditions to the application for, or to the granting of, the favor as it may deem proper, or it may in its discretion exclude such classes of persons from participation in the favor as may to it seem fit. If the State choose to grant this privilege to make application to the governor for a discharge upon parole in the case of one class of criminals and deny it to others, such, for instance, as those who have been twice convicted of a felony, it is a question of state policy exclusively for the State to decide, as is also the procedure to ascertain the fact, as well as the kind or amount of evidence upon which to base its determination. It is not bound to give the convict a hearing upon the question of prior conviction, and a failure to give it violates no provision of the Federal Constitution. The application for parole is, in any event, addressed exclusively to the discretion of the governor. Even after the convict is at large by virtue of the parole granted, he is still deemed to be serving out the sentence imposed upon him, and he remains technically in the legal custody and under the control of the governor, "subject at any time to be taken back within the inclosure of the prison from which he was permitted to go at large, for any reason that shall be satisfactory to the governor, and at his sole discretion; and full power to retake and return any such paroled convict to the prison from which he was permitted to go at large is hereby expressly conferred upon the governor." Section 5, act of 1903, *supra.*

We find nothing in the record which shows any violation of the Federal Constitution, and the judgment of the Supreme Court of Michigan must, therefore, be

Affirmed.

MR. JUSTICE HARLAN dissents.

JETTON, REVENUE AGENT OF THE STATE OF TENNESSEE, *v.* UNIVERSITY OF THE SOUTH.

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

No. 488. Argued January 28, 1908.—Decided February 24, 1908.

Although all the parties to this action are citizens of the same State the Circuit Court of the United States had jurisdiction because the case arises under the Constitution of the United States, as complainant insists that the tax sought to be restrained is imposed under a state statute that impairs the obligation of a legislative contract for exemption from taxation.

A charter exemption from taxation of land and buildings to be erected thereon so long as they belong to the educational institution exempted does not exempt from taxation the separate interests of parties to whom the institution leases portions of the property, and who erect buildings thereon; and a subsequent act of the legislature taxing such separate leasehold interest does not amount to taxing the property owned by the institution, and is not unconstitutional under the contract clause of the Constitution of the United States as impairing the obligation of the exemption provision in the charter. So *held* as to the act of Tennessee of 1903.

This court while not bound by the construction placed on a state statute by the state court, as to whether a contract was created thereby, and if so how it should be construed, gives to such construction respectful consideration, and unless plainly erroneous generally follows it; a decision of the state court, however, that a leasehold interest in exempted property cannot, during the exemption, be taxed against the owner of the fee, is not authority to be followed by this court, on the proposition that the leasehold interest cannot be taxed without impairing the obligation of the contract of exemption against the lessee in his own name and against his particular interest in the land.

A charter exemption from taxation cannot be extended simply because it would, as so construed, add value to the exemption; and an exemption from taxation of property belonging to an institution, so long as it belongs thereto, will not be extended to also exempt the leasehold interest of parties to whom the owner leases the same.

This court will not construe a state statute assessing leaseholds and making the tax a lien upon the fee as creating a lien on property exempted from taxation, and thereby violating the contract clause of the Constitu-

tion when the state court has not so construed the statute and the taxing officers of the State disclaim any intention of so construing it or levying any tax on exempted property.

An exemption of real property from taxation will not be construed as extending to the interest of the lessee therein, because a forced sale of the lessee's interest might put the property in the hands of parties to whom the exempted owner objects. Under the terms of the lease the owner can prevent such contingency by reëntering for non-payment of taxes.

The fact that the lessee does not own the buildings erected by him on leased property does not affect the right to tax his leasehold interest; it is material only on the question of value of his interest.

155 Fed. Rep. 182, reversed.

THIS is a suit in equity, brought in the United States Circuit Court for the Middle District of Tennessee, by the University of the South, a corporation, and by the several individual complainants named in the bill, who are residents of the county of Franklin, in that State, and lessees of certain lands from the university, to obtain an injunction against the individual defendants, who are a state revenue agent, and a trustee of Franklin County, and also against the county of Franklin, in the above-named State, to restrain them from taking any proceedings to collect taxes from the lessees of the university within the limits of the thousand acres mentioned in the complainants' bill.

The bill having been filed, a preliminary injunction was issued, restraining the collection of the taxes, as prayed for.

Thereafter a demurrer to the bill was filed by the defendants on several grounds, among others on the ground that, as to the individual complainants, the bill could not be maintained and the court had no jurisdiction to hear and determine the cause on their behalf.

The defendants also answered.

The demurrer was sustained as to the individual complainants and the bill dismissed, but was overrruled as to the university itself.

After a trial between the university and the defendants a final decree was entered in favor of the university, restraining the defendants from assessing, or attempting to assess, taxes

on the property and leasehold interests described in the bill, and situated within the thousand acres already referred to.

From this final decree the defendants have taken an appeal directly to this court, under the fifth section of the judiciary act of August 13, 1891, c. 517, 26 Stat. 826, as involving the application of the Constitution of the United States.

The material facts are as follows:

The University of the South is a Tennessee corporation, under a charter granted by the legislature of that State, January 6, 1858, and amended January 19, 1858. The corporation was created for the purpose of establishing a seminary of learning, to be located at Sewanee, on the Cumberland Mountain, in Tennessee.

The tenth section of the act, under which the question arises, is set forth in the margin.[1] That question is whether the assessments made against the lessees upon their interests in that portion of the one thousand acres of the lands leased to them respectively are valid or whether they are not a violation of the exemption from taxation granted by that section.

The Civil War coming on soon after the charter was granted very little work was done under it; but after peace was restored the university authorities, aided by subscriptions from those interested in the work, went on with it, and in process of time the thousand acres were duly surveyed and marked out and many buildings were erected for the university. Leases were also granted by it of lots within the thousand-acre limit to persons who, under such leases, built upon the lots severally leased to them. By this method a population of about 1,000 or 1,200 people had been gathered within the village called

[1] SEC. 10. *Be it further enacted*, That said university may hold and possess as much land as may be necessary for the buildings and to such extent as may be sufficient to protect said institution and the students thereof from the intrusion of evil-minded persons who may settle near said institution, said land, however, not to exceed ten thousand acres, one thousand of which, including buildings and other effects and property of said corporation, shall be exempt from taxation as long as said lands belong to said university.

Sewanee, situated within the limit stated, and which was a barren wilderness when the charter was granted. In fact, the very existence of the village is the result of the efforts of the university.

In the summer of 1906 proceedings were taken to assess taxes upon the interests of the lessees occupying various lots under the leases mentioned, and a hearing was had before the trustee of Franklin County, within which the lots were situated, and he held that under the act of the legislature of Tennessee, passed January 10, 1903, c. 258, being the general assessment act, the lessee of a leasehold interest of a lot in Sewanee was taxable on the value of such interest, and he thereafter assessed the tax in the case of an individual named, and announced his intention of doing the same with reference to all lessees similarly situated. This bill was then filed before any further assessments were made.

The several leases under which the various lessees of the university held their lots, among other things, provided that the lessees would pay the rent specified in the lease "and all taxes and assessments upon said premises." It was also provided in the leases that the premises should not be sublet or transferred without the consent of the commissioner of lands and buildings of the university, and that for any violation of the restrictions and provisions made in the lease the lessor might end and determine the lease and reënter upon the premises. Each lease also contained the following, the blanks being filled up in accordance with the terms which might be agreed upon between the parties:

"And at the expiration of the present term, the University of the South shall have the option of taking the premises by paying for all such improvements made thereon, or may renew the lease for another term of ——— years, on such terms as may be agreed upon by the parties respectively, and may also give a second renewal for ——— years; and in case the parties cannot agree upon the value of the improvements or the rental to be paid for the new term, the same shall be determined

by arbitration, one of the arbitrators to be selected by the commissioner of buildings and lands and the other by the lessee; and in case they cannot agree, they shall call in an umpire . . . provided, however, that in fixing the rental for the new term, the value of the improvements shall not be taken into account as against the said party of the second part . . . heirs or assigns. And it is further agreed that the improvements to the value of ———— hundred dollars be made and kept on said premises by the party of the second part."

At the time of the passage of the act of 1858 (the charter of the university) there was no statute providing for the separate taxation of the interest of a lessee in real estate, but the whole value of the entire real estate was assessed against the owner of the fee. The act of 1903, already mentioned, provided in subdivision 5 of § 5 that the interest of a lessee should be assessed to the owner of such interest separately from other interests in the real estate.

Section 32 of the same act provided that all taxes should be a lien upon the fee in the property, and not merely upon the interest of the person to whom the property was, or ought to be, assessed, and it was provided that the whole proceeding for the collection of taxes, from the delinquency to the sale, should be a proceeding *in rem.*

It is also asserted by complainant as a further ground of invalidity that § 2, subd. 2, of the act of 1903, providing a general exemption from taxation of religious, educational and other named classes of institutions, as therein stated, does not provide as broad an exemption as the special exemption granted the university by its charter, and if it be held that the above general exemption does not reach the complainant, while at the same time it is claimed to repeal the special exemption provided by the charter it impairs the contract between the State and the university, and is therefore void.

Mr. Charles T. Cates, Junior, Attorney General of the State of Tennessee, and *Mr. Felix D. Lynch,* with whom *Mr. Frank L.*

Lynch, Mr. I. G. Phillips and *Mr. Thomas B. Lytle* were on the brief, for appellants:

No Federal question was made by the bill. All of the parties, complainant and defendant, are citizens of the same State and no jurisdiction could be conferred upon the Circuit Court by the averments of the bill as to the alleged impairment of the obligation of a contract between the State of Tennessee and the University of the South. The continuing binding force of the contract between the State and the university has been solemnly admitted by the appellants, representing the State and the County of Franklin, and adjudged by the Supreme Court of the State of Tennessee. *University of the South* v. *Skidmore*, 87 Tennessee, 155 *et seq.*

When, notwithstanding these facts, appellee contends that its charter is impaired by the provisions of the Tennessee assessment act of 1903, c. 258, the reply is that the act in question, when properly construed, does not in any way affect appellee's property or place any lien or cloud thereon. The provision contained in § 32 of the act, that all taxes on real estate shall be a lien upon the fee in said property, must be construed to mean that such taxes shall be a lien upon the fee in property that is not exempt. This construction harmonizes and gives effect to all parts of said act, and sustains the same as a valid enactment in accordance with intention of the legislature. Lewis' Sutherland Stat. Const., §§ 381, 382. See also *Gold* v. *Fite*, 2 Baxt. (Tenn.) 248, 249; *Standard Oil Co.* v. *State*, 117 Tennessee, 618, 640, 641.

In ascertaining the intention of the legislature, it will not be presumed that the lawmakers intended to pass an act in conflict with the organic law. *Maxey* v. *Powers*, 117 Tennessee, 403; *Wise & Co.* v. *Morgan*, 101 Tennessee, 282; *Rose* v. *Wortham*, 95 Tennessee, 508.

The decision of the Supreme Court of Tennessee that appellee's property is exempt from taxation has the force of a law of the State, and will be treated as a part of the statute affecting said property.

It is not sufficient to give this court jurisdiction upon the grounds claimed, that by possibility there may be some cloud cast upon appellee's title by some possible action of the officers of the State, because the presumption in all cases is that the courts of the State and the officers thereof will do what the Constitution and laws of the United States require. *Shreveport* v. *Cole*, 120 U. S. 36; *Neal* v. *Delaware*, 103 U. S. 370.

The property rights of the several lessees of appellee in and to their respective leasehold estates and the improvements erected thereon under their several leases are lawfully subject to taxation by the State and county.

The legislature may provide that real estate shall be assessed as personalty or that personalty shall be taxed as realty. Cooley on Taxation (3d ed.), p. 641. And see § 63, Code of Tennessee (Shannon), the effect of which was to change the common law rule that a leasehold estate is personal property. *Alley & Bush* v. *Lanier*, 1 Cold. 540; *Burr* v. *Graves*, 4 Lea, 556.

The words "owner of land," as used in the statutes of Tennessee, do not necessarily mean the person owning the entire estate in such property, but may mean any person having an interest therein, whether in fee or for a term of years. *Alley & Bush* v. *Lanier*, 1 Cold. 540. See also Cooley on Taxation (3d ed.), pp. 633, 634, and cases there cited.

Under the provisions of the clauses herein in question, the improvements made by the lessees unquestionably belong to them and the plain implication of the leases is that, unless paid for by the university at the end of the term, the lessees might lawfully remove them. Under such circumstances a lessee making improvements on leased land is liable for taxes on such improvements. See *Russell* v. *City of New Haven*, 51 Connecticut, 259; *Philadelphia &c. R. R.* v. *Appeal Tax Court*, 50 Maryland, 397; *Zumstein* v. *Coal Co.*, 50 Ohio, 264; *Bentley* v. *Barton*, 4 Ohio St. 410; *Parker* v. *Redfield*, 10 Connecticut, 490; *People* v. *Bd. of Assessors*, 93 N. Y. 308, 311; *Ex parte Gaines*, 96 Arkansas, 227; *San Francisco* v. *McGinn*, 67 California, 110;

State v. *Campbell*, 23 La. Ann. 445; *People* v. *Shearer*, 30 California, 645, 656, 657; *State* v. *Moore*, 12 California, 56, 69, 70; *State* v. *Tucker*, 38 Nebraska, 56, 59, 60; *Luttrell* v. *Knox County*, 89 Tennessee, 257.

Appellee's charter exemption is personal to it. Immunity from taxation is not transferable; it is a privilege personal to the grantee. *Pickard* v. *E. T. V. & G. Ry. Co.*, 130 U. S. 631; *State* v. *Mercantile Bank*, 160 U. S. 161.

The intent to confer an exemption, and especially when it is insisted that the exemption passes to a transferee of the original grantee, must be clear, beyond a reasonable doubt. *Railroad Tax Cases*, 18 Wall. 226; *Providence Bank* v. *Billings*, 4 Peters, 565.

Mr. James J. Lynch and *Mr. Arthur Crownover*, with whom *Mr. William D. Spears*, *Mr. Isaac W. Crabtree*, *Mr. John J. Vertrees*, *Mr. Albert T. McNeal* and *Mr. William L. Myers* were on the brief, for appellee:

The assessment act of 1903 impairs the obligation of the contract of exemption between the State and the university.

At the time this charter was granted, and until the passage of the act of 1903 complained of, the common law rule that taxes on leased property should be assessed to the lessor prevailed in Tennessee. This rule is well established. Taylor on Landlord and Tenant, § 341. See also *East Tenn., Va. & Ga. Ry. Co.* v. *Mayor &c. of Morristown*, 35 S. W. Rep. 771. Thus when this exemption was granted the leasehold interests were assessable as a part of the whole estate to the university, as lessor, and formed a part of the estate exempted from taxation by this charter.

In the case of *University* v. *Skidmore*, 87 Tennessee, 155, it was decided that the *property* is exempt from taxation so long as the title remained in the University of the South. The State cannot now violate this contract and tax this exempt property by simply passing a statute changing the method of assessment. See *State of New Jersey* v. *Wilson*, 7 Cranch, 164, hold-

ing that the exemption attached to the property and passed to the purchaser, as it has been held that the exemption attached to this property so long as the title remains in the university, and that leasing the property does not take the title out of the university so as to destroy the exemption. The exemption is for the benefit of the university, and, as the record shows, materially enhances the value of its property in leasing same. It is this value that the act we are complaining of destroys.

By the terms of the leases the university is required to enter into a new contract, as to the amount of rent to be paid, at the expiration of each term. Necessarily, if the property is assessable for taxes, as against the lessee, it will not be so valuable to him as when free from taxation. As shown, this immunity from taxation entered into and became a part of the original lease contract, and was one of the things taken into consideration in fixing the annual rent thus contracted for. This element of value in the property of the university is thus destroyed by this act of which we complain.

This tax against the lessee is a tax on the right to occupy the land. Hence, in taxing the property when leased, or in taxing the interest leased, a tax is placed upon the only use to which the property can possibly be put, to be made of value to the university. The State insists that, while it may not tax the property directly, it may, nevertheless, tax its use or right of occupancy; while it may not tax the land, it may, nevertheless, tax the rent or income from the land, and thus burden its only value to the university. But see *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 427; *Dougherty* v. *Thompson*, 71 Texas, 202; *Moseley* v. *State*, 115 Tennessee, 52. Cases of *San Francisco* v. *McGinn*, 67 California, 110; *State* v. *Tucker*, 38 Nebraska, 56; *Luttrell* v. *Knox County*, 89 Tennessee, 257, and others, cited by appellants, discussed and distinguished.

It is not true, as stated by appellants, that the lessees own the buildings, and the arguments based upon this alleged ownership are therefore without force.

The Supreme Court of Tennessee in the *Skidmore case*, treated these improvements as the property of the university, and the decision in that case is based on that theory.

Even if the construction contended for by appellant that the lien should be limited to the lessee's interest in the property, the State would only have a right to sell the lessee's interest for the payment of taxes.

The injury to the university remains the same; if the State is permitted to assess the lessee's interest, and sell same for the payment of taxes, the university's control over this property is lost, and one of the greatest advantages provided for, in § 10 of the charter, is destroyed.

By retaining the title to, and the absolute control over, this one-thousand-acre reservation the university has been able to say who shall come near it. The leases all provide that they may not be assigned without the consent of the university. But, if the State can sell the property for taxes at public auction, the university is helpless to prevent the intrusion of outsiders. Its power to protect its students from contaminating influences will be gone, and one of its most cherished ideals will be destroyed.

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

The appellant insists that the Circuit Court had no jurisdiction of this suit, because all the parties are citizens of Tennessee. We think, however, that jurisdiction existed, because the case is one arising under the Constitution of the United States, the complainant insisting that under such Constitution the law of the State of Tennessee, passed in 1903, is invalid, because it impairs the obligations of a contract protected by that instrument. *Illinois R. R. Co.* v. *Adams*, 180 U. S. 28, 35. We therefore pass to the merits of the controversy.

As the complainant maintains that the exemption clause in the tenth section of its charter is broader than that contained in the second section of the act of 1903, we may at once refer

to the charter exemption, and if the contention of complainant is not justified by that exemption, it is unnecessary to consider that which is given by the act of 1903. It is by the charter exemption that we are to judge the matter.

Upon the question of the proper construction of the exemption clause in the charter, the case of the *University of the South* v. *Skidmore*, 87 Tennessee (3 Pickle), 155, is cited, and it is urged that within that case no tax can be assessed against the lessees of this property within the 1,000 acres. While in such a case as this we form our own judgment as to the existence and construction of the alleged contract, and are not concluded by the construction which the state court has placed on the statute that forms such contract, yet we give to that construction the most respectful consideration and it will in general be followed, unless it seems to be plainly erroneous.

Looking at the *Skidmore case*, we find that it does not uphold the contention maintained by the complainant. In that case the university filed a bill against Skidmore, trustee of Franklin County, to enjoin him from assessing for taxation against the university the property belonging to it within the 1,000 acres. In answer to the bill the State contended that the thousand acres would be exempt from taxation so long only as they were substantially owned by the university, but that when it gave a lease of the kind described in the case before us it ceased during the term of the lease to be the real and substantial owner of the land so leased, which by the lease was taken out of the exemption granted by the statute, and was from that time taxable against the university. The Supreme Court, however, held that the assessment made was void because the property, the land owned by the university, was exempt from taxation so long as it belonged to that corporation, and the making of the leases did not permit the property to be taxed against the university.

This is a different proposition from the one asserted by the complainant, and is not authority for its contention that the assessment cannot be made against the lessee in his own name

for his particular interest in the land while the university continues to own the fee.

It is plain that the state court has not construed the statute of 1858 as a contract that the interest of the lessee in the land granted to him for a term of years by the university cannot be assessed or taxed against him because of the exemption in question.

Counsel for the appellees, placing the *Skidmore case* aside for the moment, assert that when this exemption was granted leasehold interests were only assessable against the owner of the fee as part of the whole estate, and it was therefore a part of the estate exempted from taxation by the charter. We think this is not a correct construction of the contract of exemption.

As long as different interests may exist in the same land, we think it plain that an exemption granted to the owner of the land in fee does not extend to an exemption from taxation of an interest in the same land, granted by the owner of the fee to another person as a lessee for a term of years. The two interests are totally distinct, and the exemption of one from taxation plainly does not thereby exempt the other. The fact that at the time when the exemption was granted to the owner of the fee the State had not provided for taxation against the lessee in his own name, is not important. The different interests of an owner of the fee and an owner of an estate for years as lessee, existed, and such existence was recognized. An exemption of one did not necessarily include the exemption of the other. The contract of exemption did not imply in the most remote degree that the State would not thereafter, through its legislature, so change its mode of assessment as to reach the interest of a lessee directly, and not through the owner of the fee. In so doing the State does not tax the owner of the land in fee nor the fee itself. It taxes what it had a right to tax—a separate and distinct interest in the land, although the fee thereof be in the university, which cannot be taxed therefor. The doctrine that laws which are in force when a contract is made will generally enter into its obligations (*Osh-*

kosh &c. v. *Oshkosh*, 187 U. S. 437) is not denied, but it has no application. The laws existing when the contract was made have not been altered so as to impair the obligations of that contract by the passage of the act of 1903. Those obligations remain precisely as they were prior to its passage. The change wrought by the act affected third persons only (the lessees of real estate) and instead of leaving them to be taxed in the name of their lessor for their interest in the land as such lessees, the act provided for their separate taxation. Such act impaired no obligation of contract between the State and the university.

Nor is such an assessment the same in substance as one against the owner in fee of the land. We cannot see that *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, touches the case. This is not a tax on the rents or income of real estate. The university receives the rents or income free from any tax. The tax is, in both form and substance, upon a separate interest in real estate granted by the lessor, and is assessed against the owner of such separate interest. If the university could lease its lands and could also effectually provide that the interest of the lessee in the land so leased should be exempt from taxation, it may readily be seen that the amount of rent which it would receive would be larger than if no such exemption could be obtained, but that is a matter which is wholly immaterial upon the question of the impairment of the contract of exemption that was really made. That contract cannot be extended simply because it would, as so construed, add value to the exemption. The language used does not include the exemption claimed.

The lessee also agreed in the lease to pay the taxes in any event, and the claim that the agreement was intended only to refer to municipal taxation which might be provided for by the university cannot prevail against the plain words of the agreement.

That part of § 32 of the act of 1903, which makes the tax a lien upon the fee, even if void in that particular, does not make

the section void which provides for the separate assessment of the interest of the lessee. It is proper to mention that the appellants did not and do not claim that the thirty-second section gives a lien upon the fee for the tax against the lessee in cases where the fee is itself exempt from taxation, but they assert that the correct construction of that section is to apply the lien to the fee only in cases where the fee itself may be taxed; and in their answer they expressly aver that under that section neither the State nor county can have a lien upon any property which is exempt from taxation, and that no claim has ever been made, or was made in the proceedings instituted by the state revenue agent that the interest of the university in the leased premises could be assessed for taxation or could in any way be affected by the proceedings so instituted, and the defendants disclaimed any intention of assessing or levying any tax whatsoever against the property of the complainant university, and they denied that the assessment of the interests of the several lessees of the complainant university in the buildings and improvements erected by them upon said property would in any manner affect the interest of the university. What is the proper construction of that section on this point is not a matter of importance as to future assessments, because the State, having these objections before it, and, as we may presume, in order to avoid any such objection, even though possibly not well founded, passed another assessment act in 1907, repealing the one of 1903, and recognizing as valid all charter exemptions, and also providing that the lien of the tax should not apply to or affect any fee in property where the same was exempt from taxation. The question, however, remains, so far as the assessment here involved is concerned, and we are of opinion that the construction contended for by the defendants is the correct one. We cannot assume that the State would endeavor to create a lien upon property which it recognized as exempt from taxation, for the purpose of thereby attempting to obtain such a security for the payment of a tax due from another upon different property which is not exempt.

This never could have been the intention of the framers of the act of 1903.

Again, it is urged that if the interest of the lessee can be taxed, it might be sold for the non-payment of the tax, and thus some one might get into possession who would not be a proper person to be in such place, and the chief purpose of the charter in this respect would fail. If the interest of the lessee in the land could be sold for non-payment of the tax assessed thereon, such result would arise from the act of the university in creating it. But the lessor might under the terms of the lease at once reënter for non-payment of taxes.

What is the exact interest of the lessee in the land leased to him it is not necessary to here determine. It is plain that he has some interest in it, and that interest is distinct from the fee, and may be taxed when the fee is exempt from taxation. See cases to that effect in the margin.[1] In *Elder* v. *Wood*, decided January 27, 1908, *ante*, p. 226, it was held that a mere possessory right in a mining claim in land to which the United States had title was a right separate from the fee, and might be taxed under a state statute, although the fee could not because it was in the Government. *New Jersey* v. *Wilson*, 7 Cr. 164, is not in point. The exemption was assumed to be absolute, unconditional and unlimited in time. It seems that there was an act (that of 1796) which authorized the lands to be leased, but that act was not brought to the attention of the court. See *Given* v. *Wright*, 117 U. S. 648, 655, where a more full history of the case is given. The act repealing the exemption, passed after the sale of the lands by the Indians, was held void because it impaired the obligations of a contract. In the case before us the exemption lasts only so long as the university owns the lands, and when it conveys a certain interest in them

[1] *People* v. *Brooklyn Assessors*, 93 N. Y. 308; *People* v. *Tax Commissioners*, 80 N. Y. 573; *Parker* v. *Redfield*, 10 Connecticut, 490; *Russell* v. *New Haven*, 51 Connecticut, 259; *Brainard* v. *Colchester*, 31 Connecticut, 407; *Lord* v. *Litchfield*, 36 Connecticut, 116; *Philadelphia R. R.* v. *Appeal Tax Court*, 50 Maryland, 397; *Zumstein* v. *Coal Co.*, 54 Ohio St. 264; *Bentley* v. *Barton*, 41 Ohio St. 410.

to a third person it no longer owns that interest, which at once becomes subject to the right of the State to tax it. When the State exercises that right, as it did under the act of 1903, and taxes the interest in the name of its owner, the State thereby violates no contract, and the tax is valid.

It is said that although the lessee is bound to make improvements, yet he does not own them, even though their value is not to be taken into consideration against him when his lease is renewed. Whether he is the owner of the improvements made by him until the same are paid for at some time, is not material upon the question of the separate interests of the lessee and the owner of the fee, the ownership of the improvements being only material upon the question of the value of the interest of the lessee. Even if the university was entitled to become and was the owner of such improvements at the end of the second renewal, without paying for them, the question still remains as to the value of the separate interest of the lessee, which, even upon that assumption, might be greatly more than the rent to be paid. The value of whatever interest he has is to be assessed as real estate under the statute, and that value must be determined by the assessing officer. All we can say is that it is a separate and distinct interest from that of the owner of the fee and the assessment of that interest for taxation is not an assessment upon the interest of the university, and is not a violation of the exemption granted to it by the statute of 1858.

The decree of the Circuit Court must be reversed and the case remanded to that court with directions to dismiss the bill.

Reversed.

BENNETT v. BENNETT.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 98. Argued January 9, 10, 1908.—Decided February 24, 1908.

Under pars. 3983, 3984, §§ 105, 106, Code of Civil Procedure of Oklahoma Territory, of 1893, providing for the entry of judgment by default and giving the court power in opening the default to impose such terms as may be just, the court may, without abusing its discretion, in an action for divorce in which the husband defendant is flagrantly in default, impose as terms in granting him leave to answer that he pay within a specified period to the plaintiff a reasonable sum for alimony and counsel fees which had already been allowed, and in case of his failure so to do judgment for the relief demanded in the complaint may properly be entered against him. *Hovey* v. *Elliott*, 167 U. S. 409, distinguished.

15 Oklahoma Reports, 287, affirmed.

THE question in this case is whether, in a suit for divorce, the defendant being in default for not answering within the time allowed by statute, a court may make it a condition of permission to answer that he comply with the order of the court directing him to pay temporary alimony and attorney's fees.

It will avoid confusion to designate the parties as they were in the trial court, the appellee as plaintiff and the appellant as defendant.

The plaintiff brought suit for divorce against the defendant in the District Court of Lincoln County, Oklahoma Territory, on the twenty-first of May, 1903, alleging as the grounds thereof extreme cruelty. She alleged in her complaint that defendant was the owner of certain personal property and certain real estate, and that defendant had, for the purpose of defrauding her, conveyed such real estate to Harry M. Bennett, a son by a former marriage. She prayed for a divorce, just division of the real and personal property and the custody of a child which had been born to her and defendant. She also prayed for $1,000 temporary alimony and $1,000 attorney's fees.

Summons was issued requiring defendant to answer by the

tenth day of June, or the petition would be taken as true and judgment rendered accordingly.

The return of the sheriff recites that he served it on May 22, 1903, at 8:55 A. M., by leaving for defendant, "at his usual place of residence" in the county, "a true and certified copy" of the summons "with all the indorsements thereon."

On the day plaintiff filed her petition she applied for an order restraining defendant from disposing of his property, and that he pay into court the sum of $1,000 temporary alimony, "to support her and carry on her suit," as she was "unable, on account of sickness and late confinement, to do work of any kind or character," and that he pay into court $500 for the support and maintenance of the child born to her and defendant, and also $500 for attorney's fees. Notice of the application was personally served on defendant. The application was heard by order of the court at chambers on the twenty-third of May. The defendant did not appear. A restraining order was granted and defendant ordered to pay into the office of the clerk of the court within ten days "the sum of one thousand dollars, for the use and benefit of the plaintiff as temporary alimony and suit money," and the sum of $100, attorney's fees.

On the twenty-third of July, 1903, plaintiff filed an amended petition, in which she repeated the charges of cruelty, made fuller allegations as to the property of defendant and attempts at its disposition. In this petition Harry M. Bennett, a son of defendant by a former marriage, was made a party by his next friend and guardian. Service was made upon the defendants by publication and they were required to answer on or before the fourth day of September, 1903. It also appears from the record, under the head of "Journal entry," that defendant "was duly and legally served, personally, with an alias summons" after the filing of the amended petition. By this summons defendant was required to answer by the twelfth day of March, 1904. The record shows that on the twenty-fourth of September, 1903, the following proceedings took place:

"Come now the plaintiff and defendant, A. W. Bennett, by their respective counsel, and said defendant submits a motion to set aside service of summons herein, and the court being fully advised: It is by the court ordered—be given leave to amend return on said summons."

On the same day Harry M. Bennett was given additional time to answer, and on the thirtieth of September, did answer by his guardian *ad litem*, appointed by the court, denying each and every allegation of the petition.

The record contains an order, which recites that plaintiff and defendant appeared by attorneys on the sixth of April, 1904, being a regular court day, and also recites "this motion comes up for hearing, on the motion of Albert W. Bennett, who appears specially by his attorneys, for the purpose of this motion only, and for no other purpose, to set aside the summons in this case." The grounds of the motion are given. The court overruled the motion and defendant excepted. "Whereupon," the order recites, "the defendant Albert W. Bennett, by his attorneys, offered to file his answer in this cause, instanter, which said offer was refused by the court for the reason that the said defendant is in contempt of this court by reason of his failure and refusal to comply with the order of the court, heretofore made, to pay to the plaintiff in this cause the sum of one thousand dollars as and for temporary alimony, and one hundred dollars as attorney's fees in this case, but made the further order that the said defendant should be permitted to file said answer within five days on condition that he purge himself of said contempt by complying with said order within that time; to which order of the court the defendant Albert W. Bennett excepted at the time."

In the decree of the court the proceedings are stated as follows:

"The court further finds that on the fifth day of April, 1904, the defendant A. W. Bennett appeared by his attorneys and asked leave to file his answer herein out of time, which request was objected to by the plaintiff, for the reason that the said defendant had failed to comply with an order theretofore made

to pay to the clerk of the court for the use of the plaintiff the sum of one thousand dollars as and for temporary alimony and the further sum of one hundred dollars as and for attorney fees for her attorneys, and the court being advised that the defendant had not complied with said order or offered any excuse for his failure so to do, his application for leave to answer is refused until he shall comply with said former order or show cause why he has not, and he is given five days to make said showing and in which to file his said answer."

And the decree further recites that on the twenty-ninth day of April, 1904, the cause came on for trial, and plaintiff appeared and Harry M. Bennett also appeared, "and the defendant A. W. Bennett having failed to comply with the former order of the court or make excuse for not complying, and having failed to answer the petition of plaintiff herein, the said defendant A. W. Bennett is now called three times in open court, but makes default and fails to plead or otherwise appear in said cause, and the said A. W. Bennett is by the court adjudged to be in default for an answer and not entitled to answer or plead until he shall comply with the order heretofore made, wherein the said A. W. Bennett was ordered by the court to pay to the plaintiff $1,000.00 temporary alimony and $100.00 attorney fees for her attorneys."

The decree dissolved the marriage between plaintiff and defendant, awarded her the custody of their child, awarded her the homestead as her sole property and $6,000 permanent alimony and $500 attorney's fees. The decree vacated the order made for temporary alimony and the payment of $100 attorney's fees. The decree was affirmed by the Supreme Court of the Territory. This appeal is from that part of the decree awarding alimony and attorney's fees.

Mr. James R. Keaton, with whom *Mr. John W. Shartel* and *Mr. Frank Wells* were on the brief, for plaintiff in error and appellant:

Under the laws of Oklahoma Territory, before any person

can be legally adjudged guilty of contempt of court, by reason of his having refused to obey an order of the court or judge, he must be complained against in writing, cited to appear before the court and show cause why he should not be punished for such contempt, and given an opportunity to be heard. Okla. Rev. Stat., §§ 2125, 2126, 2127; General, § 4037. See also *Johnson* v. *Superior Court,* 63 California, 578.

Under § 4037 the court's power to enforce compliance with an order awarding temporary alimony is limited to the attachment of defendant, followed by fine and imprisonment if he is found guilty of willfully disobeying such order. *Hutchison* v. *Canon,* 6 Oklahoma, 725, 728.

See, also, as to statutory limitation of such power, *Johnson* v. *Superior Court, supra; Hovey* v. *Elliott* (N. Y.), 39 N. E. Rep. 841.

In this case no application for an attachment was ever made and, in fact, no order was ever passed directly adjudging defendant in contempt. *McClatchy* v. *Superior Court,* 51 Pac. Rep. 696, 698; *Galland* v. *Galland,* 44 California, 475; *Palmer* v. *Palmer,* 18 So. Rep. 720.

Even if defendant had been legally adjudged guilty of contempt for his willful failure to comply with said order to pay temporary alimony and counsel fees, still the trial court committed prejudicial error in denying him the right to file his answer and make his defense to said action. *Hovey* v. *Elliott,* 167 U. S. 409.

The power of a court to deny a favor to a person in contempt does not include the power to refuse to a person in contempt the right to defend in the principal cause on its merits. *Hovey* v. *Elliott,* 167 U. S. 409.

Mr. L. T. Michener, with whom *Mr. John Embry* and *Mr. W. W. Dudley* were on the brief, for defendant in error and appellee:

The order of the trial court refusing to permit the defendant to file an answer, unless within five days he should comply with

the previous order of the court for the payment of temporary alimony and attorney's fees, cannot be reviewed here.

It was clearly within the exercise of the discretion of the trial court to make the order referred to, and the subject or the ruling is one which cannot be reviewed by this court, unless it should be obvious that the trial court violated the Oklahoma statutes, or a fundamental rule of a court of equity, or was guilty of a clear abuse of discretion.

It is clear that the trial judge, by the order which is here attacked, kept himself clearly within the provisions of the statute. Defendant had neither answered at the time or times named, nor had he complied with the order of the court. He was in default nearly a year.

There was no abuse of the discretion of the court, nor the obvious violation of a fundamental rule of a court of equity, in the making of this order.

Matters resting entirely in discretion are not re-examinable in a court of errors. *Pomeroy's Lessee* v. *State Bank*, 1 Wall. 592, 598; *Packet Co.* v. *Sickles*, 19 Wall. 611, 615; *Van Stone* v. *Stillwell &c. Mfg. Co.*, 142 U. S. 128, 134; *Earnshaw* v. *United States*, 146 U. S. 60, 68; *Mexican Cent. Ry.* v. *Pinkney*, 149 U. S. 194, 200, 201.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court.

The assignment of errors attacks the decree of the Supreme Court because (1) the court decided or assumed that the defendant was in contempt for not complying with the order for temporary alimony. (2) In so holding or deciding, though defendant had not been cited to show cause why he should not be adjudged in contempt for not complying with the order. (3) (4) In affirming the action of the trial court refusing permission to defendant to answer to, or make defense against, the amended petition except on condition that he should comply in five days with the order for temporary alimony. (5) In

affirming the decree of the court awarding plaintiff $6,500 permanent alimony and attorney's fees and certain real property, constituting the homestead of the parties.

The assignments of error are based upon a misunderstanding of the action of the trial court and the opinion of the Supreme Court. They proceed upon the supposition that he was not in culpable default to the law and the orders of the court—a default after amplest opportunity to be heard and to contest every charge and claim against him.

The summons issued upon the original petition was served upon him by leaving a copy of it at his usual place of residence, as under the law it could be served. Par. 3938, § 64, Okla. Stat. 1893. It contained the notification that unless he answered by the sixteenth of June, 1903, the petition would be taken as true, and judgment would be rendered accordingly. He paid no attention to it. Yet there is more than the legal presumption that he received it, for on the day preceding there had been served on him a notice of the application for the temporary alimony and attorney's fees, the order to pay which makes the pivot of this controversy. He does not seem to have been sensitive to the charges against him, and, it may be, he thought his property was secure from the demands of the plaintiff by the conveyance to his son on the day before. The order upon the application was made May 23, 1903. He did not obey it. On the twenty-first of July, 1903, the amended petition was filed. It was served by publication, he having changed his residence to Nevada. He was notified to answer on or before September 4, 1903. He did not answer, but on that day he appeared by counsel and submitted a motion to set aside service of summons, upon which motion the record shows the court made the following order: "It is by the court ordered—be given leave to amend return on said summons." He was subsequently personally served with an alias summons.

It required an answer to the petition on or by the twelfth of March, 1904. An answer was not filed. On the sixth of April following a special appearance was entered and a motion

made to set aside the summons and the alias summons on various grounds, which motion was denied after hearing. The defendant then offered to file an answer "instanter," and the offer was refused on the ground that he was in contempt of court for not complying with the order for temporary alimony. It was, however, ordered that he should be permitted to file an answer "within five days on condition that he purge himself of said contempt by complying with said order within that time." From the decree of the court it appears that its order was not so absolute but that he was given an opportunity to show why he had not complied with the order for alimony. Had the court the power to impose the conditions? Could the court have imposed any conditions or terms at all, and what was the limit of its power? If the court had a discretion it cannot be reviewed unless it was unreasonably exercised. And the court certainly had a discretion. We have seen that par. 3933, § 59 of the statutes of the Territory prescribes the result to a defendant for default in not appearing to be that the petition against him will be taken as true and judgment shall be rendered accordingly. If there is any modification of this in a suit for divorce it gives no rights to a defaulting defendant. Par. 3983, § 105 of the Code of Civil Procedure of the Territory of 1893 provides that a defendant must demur or answer within twenty days after the day on which the summons is returnable, and par. 3984, § 106 is as follows:

"The court, or any judge thereof in vacation, may, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this act, or by an order enlarge such time."

The question, then, can only be whether the court abused the discretion given to it by that section. Were the terms which the court imposed just?

The record demonstrates that the order for alimony was reasonable in itself and reasonable in relation to the means and obligations of defendant to plaintiff. According to plaintiff's petition, and presumably according to proof submitted

to the court upon the application for alimony of which defendant had notice, plaintiff was compelled by his cruelty to leave him with her child, then only a month old. She had no means to support herself and child. She was sick and unable to seek work. She was without means to carry on her suit for divorce. This was her situation as presented to the court, and defendant did not appear to deny it. He did not appear to deny that he owned real estate in the county where he lived of the value of $20,000, and in other places of the value of $14,000; that he had bank deposits of $10,000, and other personal property of the value of $15,000. He did not appear to deny that his cruelty—a cruelty of a peculiar kind—had driven her with her infant from his house. To this he was not sensitive. He was, however, not without anxiety for some of the consequences of the charge, and immediately set about to dispose of his property. After this he seemed to feel secure, either in misunderstanding of his rights or in some perverted notion that he could evade or defy the law. At any rate, he did not appear and he did not obey the order of the court. Whether it could have been directly and expeditiously enforced against him may be doubted. He had put his property in the name of others. An execution, therefore, would have encountered that obstacle, and personal coercion might not have been possible, for certainly as early as July, 1903, he had changed his residence to Virginia City, Nevada. Besides, under the circumstances, plaintiff cannot urge that compliance with the order of the court could have been enforced in some other way than that adopted. It may be that the poverty which made the order of the court a necessity to her prevented her from enforcing the order, and the defendant may have deliberately planned to that end. And it may have appeared to the court at the hearing of April 5, 1904, that he had done so. It may have appeared to the court that his contumacy was without just cause or reason, and it would be continued to defeat the order of the court, though he should receive from its discretion a remission of the consequences of his default. Take the order of

the court in its most absolute sense and, we say again, it was reasonable. Take it as described in the final decree and it was indulgent. It added another opportunity to be heard in addition to those defendant had been given.

The plaintiff in error, without any discussion of the section of the Oklahoma statutes, which we have quoted, attempts to avoid their effect by the contention that he had never been adjudged guilty of contempt, and, even if he had been, the power of the court to punish him was limited by a statute of the Territory to imposition of a fine or a sentence of imprisonment. He hence seeks to invoke the doctrine of *Hovey* v. *Elliott*, 167 U. S. 409. The contention is based, as we have said, upon the argument that the assignments of error are upon a misconception of the action of the court. The principle of *Hovey* v. *Elliott*, therefore, is not applicable. Indeed, the point was reserved in that case, whether one in contempt could be refused a right under a statute invoked by him as actor. But we need not stop to consider whether the reasoning, which we may say now we entirely approve, or the cases cited, carry the principle of the case to the point reserved, for we are of opinion that the pending case is not within the principle. The question here, we repeat, is the simple one whether, under the statute giving the power to a court to allow a defaulting defendant to answer "upon such terms as may be just," the order in controversy was within the power. And being of opinion that an affirmative answer is justified, the decree of the Supreme Court of the Territory is

Affirmed.

MR. JUSTICE BREWER dissents.

CRARY *v.* DYE.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 103. Argued January 13, 14, 1908.—Decided February 24, 1908.

The views of the territorial courts are very persuasive on this court as to the construction of local statutes.

This court holds, following the construction by the Supreme Court of New Mexico of the statutes of that Territory, that there is no authority in New Mexico for the issuing of an alias writ of attachment, and that levying upon property under such a writ gives the court no jurisdiction thereover, and the purchaser acquires no title through sale under such a levy.

One claiming to have been influenced by the declarations or conduct of another in regard to expending money on real estate must, in order to assert estoppel against that person, not only be destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring knowledge in regard thereto; where the condition of the title to real property is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.

One whose mining property was sold under a void attachment *held* in this case not to have been estopped from asserting his title to the property as against the vendee from the purchaser at the sheriff's sale by reason of statements made by him to such vendee prior to the final payment.

Held also in this case that the actions and declarations of the owner of a mining claim sold under a void attachment did not amount to an abandonment of his claim so that he could not reassert his title to the property as against the purchaser at the sale or his vendee.

78 Pac. Rep. 533, affirmed.

THE facts are stated in the opinion.

Mr. H. B. Fergusson, with whom *Mr. Elfego Baca* was on the brief, for plaintiffs in error.

Mr. W. B. Childers for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action of ejectment for certain mining ground in the Territory of New Mexico. Plaintiffs in error claimed title by virtue of a sheriff's sale in proceedings against Dye, one of the

defendants in error, reinforced by certain declarations of the latter, which, it is contended, constitute an estoppel against him to assert the invalidity of the sale or claim of title thereunto. There have been two trials of the action. The first resulted in a verdict for plaintiffs in error, which was reversed by the Supreme Court of the Territory. 78 Pac. Rep. 533. The second trial resulted in a judgment for defendants in error, which was affirmed by the Supreme Court. This writ of error was then sued out.

The validity of the sale and an estoppel, based on the facts hereinafter referred to, were relied on by plaintiffs in error at the first trial, and they secured a verdict by the instructions of the court. The Supreme Court of the Territory reversed it, adjudging the sale to be invalid on the ground that an alias attachment was not authorized by the laws of the Territory. 78 Pac. Rep. 533. On the second appeal the court refused to review this decision, holding it to be the "law of the case," and not open to further review. It confined its consideration to the question of estoppel and decided the question adversely to the contention of plaintiffs in error, and affirmed the judgment against them. This writ of error brings up both questions, which we will consider in their order.

1. The statutes of the Territory distinguish between original and ancillary attachments. Sections 2686 and 2721 of the Compiled Laws of New Mexico. There is no provision for an alias attachment, and it was hence concluded by the Supreme Court of the Territory that an alias attachment was not authorized, and that a judgment dependent thereon was void and could be attacked collaterally. The procedure in attachment is provided for in chapter II of the Compiled Laws of New Mexico, §§ 2686 to 2737, both inclusive. A summary of the applicable sections is inserted in the margin.[1]

[1] SEC. 2686. Creditors whose demands amount to $100 or more may sue their debtors in the District Court by attachment, when, among other cases, the debtor is not a resident of or does not reside in the Territory, or has concealed himself, or absconded, or absented himself from his usual place

There is no provision for an alias attachment, and we think the implication of the statute is against it, certainly against it except upon filing a new affidavit and bond and a new publi-

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of abode, "so that the ordinary process of the law cannot be passed upon him."

SEC. 2690. A creditor wishing to sue his debtor by attachment may place in the clerk's office a petition or other "lawful statements" of his cause of action and file an affidavit and bond, and thereupon he "may sue out an original attachment" against the property of the debtor.

SEC. 2691. An affidavit must be made by the plaintiff, or by some person for him, stating that the defendant is indebted to plaintiff and the amount of the indebtedness and on what account, and the existence of one or more of the causes mentioned in section 2686.

SECS. 2692, 2694. A bond shall be executed by the plaintiff, the penalty of which and the sufficiency of the sureties shall be approved by the clerk, and shall be conditioned that the plaintiff shall prosecute the action without delay, and with effect, and, to quote from the statute "refund of sums of money that may be adjudged to be refunded to the defendant or garnishee by reason of *this attachment*, or any process of judgment thereon." The clerk is directed to indorse his approval on the bond "and the same, together with the affidavit and petition or other lawful statement of the cause of action, shall be filed before an attachment shall be issued."

SECS. 2696, 2697. Original writs of attachment shall be directed to the sheriff of the proper county, commanding him to execute the same, "with a clause of the nature and to the effect of an ordinary citation, to answer the action of the plaintiff." And shall be issued and returned in like manner as ordinary writs of citation, and when the defendant is cited to answer the action the like proceedings shall be had between him and the plaintiff as in ordinary actions or contracts, and a general judgment may be rendered for or against the defendant.

SEC. 2701. When the defendant cannot be cited and his property and effects shall be attached, if he do not appear and answer to the action at the return term of the writ, within the first two days thereof, the court shall order a publication to be made, stating the amount of the plaintiff's demand and notifying him that his property has been attached, and that unless he appear at the next term judgment will be rendered against him and his property sold to satisfy the same. Publication in a newspaper is directed.

Section 2702 enlarges section 2701, and provides that the law of the Territory in regard to attachments is so amended that where the defendant cannot personally be served with the process and shall have no place of residence in the Territory, and the property of the defendant shall have been attached in time to make the necessary publication as now required by law, the officer executing the process, or the agent or attorney of the plaintiff in the case, is authorized to make publication of notice to the de-

cation of notice. We have seen that an affidavit and bond are required and the proceedings are that when a defendant cannot be cited and his property shall be attached, if he did not appear within the first two days of the return term of the writ the court shall order publication to be made stating the amount of the demand, that his property has been attached and that unless he appears at the next term judgment will be rendered against him and his property (property attached, § 2703) sold to satisfy the same. In other words, the attachment must precede the publication and constitutes the ground of publication. The summons to the defendant is through his property and does not extend beyond it. The only consequence of his default is the sale of the property attached—not some other property or property attached subsequently to publication. The publication cannot be ordered until the execution of the writ of attachment and its return. Section 2701. And to the same effect, as we have seen, in § 2702.

It is, however, contended by plaintiffs in error that subsection 24 of § 2685 prescribed the procedure of publication of summons, not §§ 2701, 2702, and that subsection 24 provides that upon filing a sworn pleading or affidavit showing cause for

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fendant in such attachment in the manner prescribed by law, which shall have the same force and effect to compel the appearance of the defendant as if such publication had been in conformity to an order of the court, and upon proof of the publication being made to the court plaintiff may proceed in the case as if the process had been served personally upon the defendant.

SEC. 2703. Judgment by default may be entered, but the judgment shall only bind the property attached.

SEC. 2707. A defendant may contest the truth of the affidavit, and if he succeeds the action is dismissed.

SECS. 2713, 2714, 2715. Where the debt exceeds the sum of $100 the creditor has an election of suing out the attachment, either from the district court or from the probate court of the county in which the suit is brought, by filing affidavit and bond with the clerk of such court. The form of the affidavit and bond is given, and it is required in its condition to recite "that, whereas the above-named A. B. has this day sued out an attachment," etc. Ancillary attachments are provided for in section 2721, and may be issued in a pending suit "when the summons against the defendant has been returned Executed."

publication the clerk shall give notice of the pendency of the action in some newspaper published in the county where the action is pending, which notice shall contain the names of the parties to the cause, the court in which it is pending and a statement of the general objects of the action, and shall notify the defendant that unless he enters his appearance before the day named therein judgment will be rendered against him by default. If this contention be true it is difficult to account for §§ 2701, 2702, and the scheme provided for the commencement of actions by attachment. Nor do we think the contention is supported by the fact that by subsection 175 of § 2685 it is provided that the act "shall not affect actions of replevin or writs of attachment, except as to the form of action," and the amendment subsequently made excepting from the operation of § 2685, "proceedings by attachment." The amendment was made, no doubt, to put the meaning of § 175 beyond any controversy. Besides, subsection 179 provides that "the former practice in law and equity shall be retained in all cases and proceedings not comprehended within the terms and intention of this code."

But even if plaintiffs in error be right about subsection 24, an alias attachment would not thereby be justified. The Supreme Court of the Territory has expressly decided that an alias attachment is not authorized, and we have recently decided that the views of the local courts are very persuasive of the construction of the local statutes.

In the pending cause a petition in the attachment suit was filed in the District Court of the county of Lincoln on the fifth of March, 1898, and on the same day an affidavit was filed stating that the defendant could not be served "in the ordinary way or in any way except by publication." A writ of attachment was issued on the eighth of March. The sheriff made his return thereon on the sixteenth, certifying that he had levied upon and attached certain real estate, which was described, and "that the defendant, Benjamin H. Dye, is not in my county and supposed to be in the State of Ohio."

The record shows an alias attachment issued on the eleventh of May, 1898. The return of the sheriff shows that the alias writ came to his hands on the twenty-seventh of May, and that he levied the same on the twenty-eighth of May, on the mining claim now in controversy.

The first publication of the notice was on the seventeenth of March, 1898, and the last on the fourteenth of April, 1898. Pasted to the affidavit stating those facts is a paper headed "Notice of Suit," by which Benjamin H. Dye is notified "that a suit of assumpsit by attachment has been commenced against him," and that unless he enter his appearance on the fourth of June, 1898, judgment would be rendered against him in said cause by default. The record contains no other publication or notice, but it leaves no doubt that it was upon that publication the default of the defendant was based. This is established by the motion for judgment, filed by the attorney in the case, which alleges service by publication and that the appearance day was June 4, 1898. This motion was filed August 19, 1898, but proof of publication was not filed until December 31, the day judgment was taken. The judgment recites that the cause coming on to be heard, "it is considered that the defendant is in default for failure to answer, and, therefore, the court hears the evidence of plaintiff and assesses the damages on the two causes of action contained in the complaint at $143. And the court finds that the grounds of attachment are well taken and true in effect, and the defendant, having failed to deny same, it is ordered by the court, considered and adjudged that the attachment herein be sustained."

The record shows only one affidavit and bond, but it is contended by plaintiffs in error that even if it be considered necessary that another affidavit and bond should have been filed to justify the alias writ it must be presumed that they were filed in the absence of evidence to the contrary; that the mere silence of the record is sufficient. To support the contention *Voorhees* v. *United States Bank*, 10 Pet. 449, and *Cooper* v. *Reynolds*, 10 Wall. 308, are cited. But if a presumption may

be entertained as to another affidavit and bond a presumption cannot be entertained that another publication succeeded the alias attachment. The record shows the reverse. The publication was complete before the alias attachment was issued, and, therefore, the attachment referred to in the notice was the first attachment, not the alias attachment. As we have said, the attachment must precede the publication. The attachment virtually commences the action, the publication is the summons to the defendant, giving the court jurisdiction to apply the property attached to the satisfaction of the plaintiffs' demand. It follows, therefore, that the court had no jurisdiction to render the judgment relied on and that the plaintiffs in error acquired no title through sale under it.

2. The principle of estoppel is well settled. It precludes a person from denying what he has said or the implication from his silence or conduct upon which another has acted. There must, however, be some intended deception in the conduct or declarations, or such gross negligence as to amount to constructive fraud. *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326; *Hobbs* v. *McLean*, 117 U. S. 567. And in respect to the title of real property the party claiming to have been influenced by the conduct or declarations must have not only been destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. *Brant* v. *Virginia Coal & Iron Co.*, *supra*. These principles are expressed and illustrated by cases in the various text books upon equitable rights and remedies. Does the conduct relied upon in the case at bar satisfy these principles?

The property was sold by the sheriff February 18, 1899, to Jones Taliaferro. On June 5, 1900, he leased the property to H. C. Crary and E. Heiniman, giving them an option to purchase. They went into possession and discovered by their labor upon the property a vein of rich gold-bearng ore in June

and later in August. They subsequently purchased the property under their contract, paying therefor the sum of $1,500. Dye returned to the Territory in the latter part of April, 1899, but took no steps to ascertain the condition of the attachment proceedings—indeed assumed or believed them to be valid, for he declared to several persons that his interest in the property had gone to pay a debt and that he considered it well sold. One of the persons to whom he made the declarations communicated them to Crary and Heiniman. And on the twenty-fifth of October, Mr. Heiniman testified that Dye visited the mine, "and while there, in the presence of Mr. Alexander and Mr. Crary, I told him that I was about to make the payment for the property in full, and I asked him if he knew of any conflicting claim or any other claims on the Compromise. He immediately answered there was. The Scranton claim on the west took off one hundred feet, and he said as to other claims there would be nobody but myself. And he says I have allowed all my time to lapse and I have no claim whatever. With that he wished me success, and hoped that it would prove to be a good mine. He says if it does, it is bound to benefit me, because I own an interest in the Little Nell claim, just north of you, which is only 155 feet north of the Compromise shaft."

To these statements the witness said he expressed his gratification that all were working "in harmony in the camp," and that Dye remarked further: "I wish you the best. I hope you will make a million." And he testified that if Dye had told him not to make payment under his contract, or that he was going to try to recover the mine, the witness would not have made the payment. And further, he first learned of Dye's intention to make a claim by the service in the suit of the papers by the sheriff, and that Dye had not in any of his visits intimated that he had a claim against the mine, or of his intention to assert a claim or give warning of any suit. "He always expressed himself, while visiting the mine, that it was one of the brightest prospects in the camp and that he was glad" that witness was one of the owners. Crary also testified

to conversations with Dye, the first being a few days after ore was "struck" in the mine, although witness had seen Dye frequently and Dye knew witness was working the mine. This conversation need not be given at length. It took place while witness was showing Dye the mine and the work which had been done preceding the discovery of ore. Dye said that he had owned the property, knew of the ore in the mouth of an old tunnel, "and had taken ore out of it, but did not regard it of sufficient value to warrant working it; that he had allowed his time to expire," and hoped that witness and Heiniman would do well on it; "that he made no claim to it, as he owned the property on the other side of the gulch; and if they could get good ore there it would make his Little Nell property more valuable." And the witness said: "I felt elated over the discovery of this ore, and both of us talked a good deal and both of us felt good." In corroboration of Heiniman the witness testified:

"Mr. Dye was there, and Mr. Heiniman asked him, I can hardly remember the exact words, but in substance whether the title to this property, the Compromise mine, was all right. Mr. Dye replied that there was some drawn ground between it and the Scranton, and it on the side that would belong to the Scranton. It was an overlap; that there could be no other claimant, unless it was him, and he had allowed his time to lapse and made no further claims to the property. He also added, 'I hope you will do well with the property, and make lots of money out of it.' "

He further testified that he did not think he would have completed the payment for the property if he had learned at that time that Mr. Dye expected to assert any claim to it, and further; "We done the work, and paid the payment on the repeated assurance of Mr. Dye that he made no claim to it, and would not have touched the property in the first place had we known that he made a claim or had a claim." The conversation between Dye and Heiniman has some corroboration from one of the employés of the mine who was working nearby.

It is manifest that Dye took for granted that the attachment proceedings were good and, indeed, declared it—declared it before the discovery of gold on the claim—declared it afterwards when he knew that Crary and Heiniman were expending considerable sums of money upon the claim and had money yet to pay upon it. Such declarations were natural enough before the discovery of gold; they were not natural after the discovery of gold—a discovery which apparently proclaimed the mine to be one of great richness. Let it be conceded, therefore, that his inattention to his rights was grossly negligent; that his admissions of their loss were grossly negligent, and so far might satisfy one of the conditions of estoppel. But another, and the consummating condition, is that Crary and Heiniman must have been without equal means of information. This, however, was not their situation. They had means of information equal to those of Dye, and nothing was purposely done or said to divert them from inquiry. The only source of information was the record, and that they had examined and took legal advice upon its sufficiency. They testify, however, that they also relied upon the declarations of Dye, as well as the advice received, and that they would not have expended what they had expended (four or five thousand dollars) or made the final payment ($1,500) but for those declarations. The letter of this testimony must be weighed against other considerations. The declarations of Dye were but the expression of an opinion of the legal effect of the attachment proceedings, made strong, perhaps, from the right he had to attack the proceedings directly, but it is hard to think Dye's declarations were as determinative as other considerations.

The lease and option to purchase the mine were not induced by anything done or said by Dye. In taking them Heiniman and Crary acted upon their own judgment, based upon the prospects or chance of value, and their judgment was luckily or skillfully exercised. Within a few days ore was discovered. In the latter part of August the "big strike" was made that demonstrated the mine to be of great value. This value must

be considered in estimating the relative strength of the inducements upon which Crary and Heiniman acted. When they took the lease and option to purchase the mine it was considered by Dye as worth no more than his debt to Taliaferro, to wit, $112 and the costs of the attachment suit. Taliaferro would have been glad to have taken $500 for it, Heiniman testified. At the time this suit was brought, December, 1900, six months after the lease, it was worth $100,000, according to Heiniman's testimony; $50,000 or $60,000 according to other estimates. This value they might acquire by the payment of $1,500. They would certainly lose it if they did not make such payment. The case, therefore, is very simple. It is a case of mining property bought upon speculation and title to which came through a sheriff's sale, the validity of which sale was either assumed or risked; the development of the mine undertaken in like speculation, but continued in certainty of reward within three days by the discovery of what Heiniman calls in his testimony "the large ore—the pay ore chute." Whether this was the real discovery or that of August following which finally revealed the richness of the mine, matters not. Within a few days there was evidence of value and inducements to the expenditures testified to. Within four months a property which was sold for a few hundred dollars was estimated by mining experts to be worth $100,000. Such inducement existing for Heiniman and Crary to complete their contract, we are asked to believe that they were misled by the declarations of Dye to action detrimental to their interest. We are unable to yield to the contention. That they felt satisfaction at the declarations may be. That they labored an extra day or spent an extra dollar upon the faith of them the record fails to establish.

Another contention remains to be noticed. Dye owned five-sixths of the mine; the other one-sixth was owned by the Apex Gold Mining Company. Dye did not do the assessment work upon the mine for 1898, and the work was done by the mining company. There was an attempt at forfeiture of Dye's interest, but the notice of publication was not given by the mining com-

pany but by one T. C. Johns, who described himself as coöwner with Dye. Johns was the manager of the company. Subsequently Taliaferro paid to one T. R. Walsh for Johns Dye's proportion of the expenditure for the work. Dye did not do or offer to do any assessment work for 1898.

Upon these facts plaintiff in error seemed to have contended in the Supreme Court of the Territory that Dye had forfeited his rights to Johns, considered as coöwner with Dye, and that Taliaferro by paying Johns became substituted to his rights. To this contention the Supreme Court made answer that a forfeiture had not been effected, because Johns was not a coowner with Dye, but that the Apex Mining Company was, and that the company had not given notice of forfeiture. Plaintiffs in error now change their contention or the form of it. They now contend that after Taliaferro purchased the property at sheriff's sale, and before the forfeiture occurred under the advertisement against Dye by his co-tenant Taliaferro paid to the coöwner or its agent the amount claimed, and thereby protected himself under § 3126 [1] of the Compiled Laws of New Mexico, 1897, and ended also Dye's interest. But this contention involves again the validity of the sheriff's sale and the attitude of Dye to the sale. Besides, the liability for the assessment work had not taken the form of a lien.

It is further contended that an undivided interest in a mining claim can be abandoned, and that Dye's acquiescence in the sheriff's sale constituted an abandonment of the claim and an election to accept the sale as a disposition of his property. We do not concur in the view that Dye's acts constituted an abandonment of his claim.

Judgment affirmed.

[1] When any property shall be sold subject to liens and encumbrances, the purchaser may pay the liens and encumbrances and hold the property discharged from all claims of the defendant in execution; but the defendant may redeem the property within one year after the sale thereof, paying to the purchaser, his heirs or assigns, the purchase money with interest. When redeemed, the purchaser shall have the growing crops and shall not be responsible for rents and profits, but he shall account for wastes.

STARR v. CAMPBELL.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

No. 132. Argued January 23, 24, 1908.—Decided February 24, 1908.

The restrictions on the right of alienation of lands to be allotted in severalty under the Chippewa Treaty of 1854 extend to the disposition of timber on the land as well as to the land itself; and the consent of the President to a contract for cutting timber does not end his control over the matter; he may put conditions upon the disposition of the proceeds. *United States* v. *Paine Lumber Co.*, 206 U. S. 467, distinguished.

THE facts are stated in the opinion.

Mr. W. M. Tomkins for plaintiff in error:

Indian allottees under the Chippewa treaty of 1854 are vested with sufficient title in their allotments to authorize the sale by them of their standing timber without the approval of the President. *United States* v. *Paine Lumber Co.*, 206 U. S. 467.

In this case the United States has parted with the legal title by a patent in the usual form, except that it contains a restriction, that the grantee shall not sell, lease or in any manner alienate the tract of land without the consent of the President. Such a patent conveys the title in fee simple to the grantee. *Libby* v. *Clark*, 118 U. S. 250; *Schrimpscher* v. *Stockton*, 183 U. S. 290; *Lykins* v. *McGrath*, 184 U. S. 169.

The restriction in the patent is simply upon the alienation of the "tract of land." By the terms of the treaty the land is assigned to the allottee for his separate use. The allottee can use timber land if he cannot dispose of the timber. *United States* v. *Paine Lumber Co.*, 206 U. S. 467.

What the allottee can himself do, he can also do by an agent. If he has the right to cut the timber himself he can certainly authorize another to cut it for him.

The sale of the standing timber in this case was consented to by the President. The land is not the land of the United States, and the timber when cut did not become the property of the United States.

When consent to alienation is given, the President's authority over the matter is ended. Permission once given cannot be revoked. *Doe* v. *Beardsley*, 2 McLean, 412. Limitations and restrictions on the use of property are not favored, and although they will be enforced when the intent is clear, ordinarily all doubts will be resolved against them. *Wakefield* v. *Van Tassell*, 95 Am. St. Rep. 267, note A, page 214. The consent of the President is no formal proceeding; it is a mere matter of permission. *Lomax* v. *Pickering*, 173 U. S. 26.

Where the United States conveys property to an Indian absolutely, that is, without any condition or restriction on its alienation, he can dispose of the same at his pleasure and give good title to his grantee. *United States* v. *Ritchie*, 17 How. 525; *Mann* v. *Wilson*, 23 How. 457; *Crews* v. *Burchman*, 1 Black, 352; *Wilson* v. *Wall*, 6 Wall. 83; *Pennock* v. *Commrs.*, 103 U. S. 44; *Elwood* v. *Flannigan*, 104 U. S. 563; *Jones* v. *Meehan*, 175 U. S. 1.

The patent in this case is not one of the so-called trust patents, provided for in the Dawes Act of February 8, 1887, under which the United States retains the legal title, and is the trustee with the rights of such trustee to the trust property in whatever form it may be found.

Here the patent conveys to the Indian the absolute title in fee subject only to the restriction upon alienation.

The Solicitor General for defendant in error:

That conferring citizenship upon an Indian does not necessarily free him from the guardianship of the United States in respect to property granted him by the General Government has been recognized both by this and other Federal courts. *United States* v. *Rickert*, 188 U. S. 432; *Matter of Heff*, 197 U. S. 488, 508, 509; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294,

307, 308; *United States* v. *Thurston Co.*, 143 Fed. Rep. 287, Circuit Court of Appeals, Eighth Circuit; *National Bank of Commerce* v. *Anderson*, 147 Fed. Rep. 87, Circuit Court of Appeals, Ninth Circuit; *Hitchcock* v. *United States ex rel. Bigboy*, 22 App. D. C. 275.

The restriction upon alienation embraces the sale of the standing timber. *Hitchcock* v. *United States ex rel. Bigboy*, *supra*. It is an elementary principle of the common law that standing timber is a part of the realty. *United States* v. *Cook*, 19 Wall. 591, 593; Blackstone's Commentaries, Bk. 2, p. 18; Williamson, Real Property, pp. 78, 79.

It seems fair to say that, as Congress had been repeatedly advised by the reports of the Interior Department of the conditions as to "logging" upon the Bad River and other reservations in Wisconsin, it is both the legislative and executive construction of the treaty of September 30, 1854, with the Chippewas, that the restriction upon alienation covered the timber upon such lands. *United States* v. *Paine Lumber Co.*, 206 U. S. 467, discussed and distinguished.

Assuming that the sale of the timber would be an alienation of the land within the meaning of the treaty of 1854, and the patents issued thereunder, and that such timber could not therefore be sold without his consent, the President, as a condition of his consent, might make any proper regulation with regard to the disposition of the proceeds thereof that the welfare of the allottee might appear to him to require. *United States* v. *Thurston Co.*, 143 Fed. Rep. 287; *National Bank of Commerce* v. *Anderson*, 147 Fed. Rep. 87.

By leave of court, *Mr. Charles Quarles* and *Mr. Francis H. De Groat* filed a brief herein on behalf of the Red Cliff Lumber Company, as interested in the decision of this cause.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This writ of error is directed to a judgment sustaining a demurrer to a complaint in an action to recover certain moneys

collected by the defendant who is an Indian agent, for timber cut from plaintiff's allotment. The case comes directly from the Circuit Court as involving the construction of a treaty.

The plaintiff is an infant Indian of the Chippewa Indians of the Lake Superior, and Tomkins is his duly appointed guardian.

A summary of the complaint is as follows:

On the first of October, 1901, the plaintiff then residing on the Bad River Indian Reservation, the President of the United States, in accordance with the provisions of the third article of the treaty, concluded September 30, 1854, with the Chippewa Indians of the Lake Superior, approved a selection of land made by plaintiff and assigned to him the west half of the southeast quarter of section four, township forty-six north, of range three west, of the fourth principal meridian in the State of Wisconsin.

Article three of the treaty is as follows (Indian Affairs Treaty, Volume of 1904, p. 648; 10 Stat. 1109):

"Article three. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family, or a single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions on the power of alienation as he may see fit to impose. And he may, also at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights. All necessary roads, highways and railroads, the lines of which may run through any

of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

By the act of Congress of February 11, 1901, c. 350, 31 Stat. 766, the right to allotments was extended to all Indians then residing on the La Pointe or Bad River Reservation, irrespective of age or condition. A patent was duly issued on the twenty-ninth of June, 1905, to plaintiff, and the land conveyed, exclusive of the merchantable timber standing thereon, is of the value of $1,000. On the eighth of January, 1902, the plaintiff made a contract with one Justus S. Stearns, by which he agreed to sell him the merchantable lumber under the rules and regulations approved by the President, December 8, 1893, standing or fallen, on said lands, and the said Stearns agreed to cut and remove the same, employing Indian labor therein, and pay to the United States Indian agent for the La Pointe agency, in trust for the plaintiff, certain designated sums, according to the kind of lumber cut. There were other details, which need not be mentioned. The agreement was subject to the approval of the Commissioner of Indian Affairs.

A copy of the regulations made in 1893 is attached to the contract, Rule 7 of which is the only one material, and is as follows:

"7. After deducting one-half of the cost of the scaling and other necessary expenses chargeable against the same, the proceeds of timber sold from the unallotted portions of the reservation shall be paid to the Indian agent, to be expended for the relief and benefit of the Indians of the reservation under the direction of the Commissioner of Indian Affairs, and the proceeds of timber taken from the allotted lands of the reservation shall, after the deductions above stated, be deposited in some national bank subject to check of the Indian owner of the allotment, countersigned by the Indian agent of the La Pointe agency, unless otherwise stipulated in contracts with particular Indians."

In December, 1902, the President amended that rule by adding thereto the following:

"If the Indian agent shall in any case be of the opinion that the allottee is not competent to manage his own affairs, he shall, subject to the approval of the Commissioner of Indian Affairs, have authority to fix the sum or sums, if any, such allottee shall be permitted to withdraw from deposit."

The Commissioner of Indian Affairs modified the agreement so as to make it subject to the amendment, and approved it as modified.

Between January, 1902, and the first of October, 1905, Stearns cut and removed under the contract timber of the value of at least $15,000, and paid that amount to the defendant for the use and benefit of the plaintiff, and that of that sum defendant has paid plaintiff only the sum of $3,100. Demand was made upon the defendant for the payment of the balance, but he refused, and still refuses, to pay the same, and announces that he will only pay plaintiff the sum of $10 per month, and claims the right to hold the same and pay the same out as he may be directed by the Commissioner of Indian Affairs.

Prior to the amendment of Rule 7 it had been for many years the established custom of the agents of the La Pointe Indian agency to pay the allottees under timber contracts the amount payable as fast as demanded by such allottees, such payments being left entirely to the Indian agents, the Commissioner of Indian Affairs in no manner interfering or attempting to control such payments, and that the defendant was the first to adopt the rule and practice of limiting payments to $10 per month, as he in his discretion thought best, giving as a reason therefor instructions from the Commissioner of Indian Affairs.

Plaintiff alleges that it does not fall within the scope of the authority of the Commissioner to interfere with the disposition of the money by the Indian agent, and that the guardian of the plaintiff is the proper party to determine how much shall be paid to and expended for plaintiff.

Damages are alleged at $11,900, and judgment is prayed for that amount.

The argument of this case has taken a somewhat wide range,

and counsel in other litigations for the Red Cliff Lumber Company have, by permission of this court, submitted a brief in support of the judgment of the Circuit Court. We think, however, the case is in narrow compass and depends for its decision upon the power reserved to the President by article three of the treaty, the patent and the terms of the contract with Stearns. It must at the outset be kept in mind that a policy of control over the Indians has always been observed by the Government. The many exercises of the policy which have been sustained by this court we need not stop to comment on. This policy is exercised in article three in the power reserved to the President to put in the patent "such restrictions upon the power of alienation as he may see fit to impose." In the exercise of this power the patent to plaintiff contains the condition that he shall not "sell, lease or in any manner alienate" the tract conveyed "without the consent of the President of the United States." There is a careful repetition of the conditions in the *habendum* that "all the rights, privileges, immunities and appurtenances" conveyed should be limited by the condition.

On December 6, 1893, the President made rules and regulations to govern contracts for the sale of timber by the Indians to whom allotments had been made and patents issued, prescribing certain conditions and prices, and requiring such contracts to be approved by the Commissioner of Indian Affairs, which approval, it was provided, should "operate as specific consent of the Executive to the sale of the timber to which the contract relates." Rule 7, which we have already given, was part of these rules and regulations. In December, 1902, however, the President made an order amending Rule 7, giving the Indian agent, subject to the approval of the Commissioner of Indian Affairs, authority to fix the sum or sums, if any, an allottee should be permitted to withdraw from deposit. Subject to this addition to Rule 7 the contract with Stearns was made and the timber cut. We cannot yield to the contention that the consent of the President to the contract ended his authority over the matter. In other words, that he could put

no conditions upon it. *United States* v. *Thurston County*, 143 Fed. Rep. 287; *National Bank of Commerce* v. *Anderson*, 147 Fed. Rep. 87.

The restriction upon alienation, however, it is contended, does not extend to the timber, and *United States* v. *Paine Lumber Co.*, 206 U. S. 467, is adduced as conclusive of this. We do not think so. There, as said by the Solicitor General, the land granted was arable, and could be of no use until the timber was cut; here the land granted is all timber land. And that the distinction is important to observe is illustrated by the allegations of the complaint. It is alleged that the value of the land, exclusive of the timber, is no more than $1,000; fifteen thousand dollars' worth of lumber has been cut from the land. The restraint upon alienation would be reduced to small consequence if it be confined to one-sixteenth of the value of the land and fifteenth-sixteenths left to the unrestrained or unqualified disposition of the Indian. Such is not the legal effect of the patent.

Judgment affirmed.

DRUMM-FLATO COMMISSION COMPANY *v.* EDMISSON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 139. Submitted January 27, 1908.—Decided February 24, 1908.

In this case this court finds that the evidence was so far conflicting as to remove the verdict of the jury from reversal by an appellate tribunal.

Under par. 4277, § 399 of the Code of Civil Procedure of Oklahoma of 1893, the original books of entry must be produced on the trial; their production before the notary taking the deposition of the witness who kept the books is not sufficient, and copies made by the notary cannot be used where the objecting party gives notice that the production of the books themselves will be insisted upon.

While there may be a general rule that in actions for tort an allowance for interest is not an absolute right, under par. 2640, § 23 of the Oklahoma Code of 1893, the detriment caused by, and recoverable for, the wrongful

conversion of personal property is the value of the property at the time of the conversion with interest from that time.

Where the local statute provides, as does par. 4176, § 298 of the Oklahoma Code of 1893, that on request the court may direct the jury to find upon particular questions of fact, the verdict will not be set aside because the jury fails to answer an interrogatory improvidently submitted in regard to a fact which was only incidental to the issue.

Objections to remarks of the trial court which counsel consider prejudicial must be taken at the time so that if the court does not then correct what is misleading its action is subject to review.

87 Pac. Rep. 311, affirmed.

THE facts are stated in the opinion.

Mr. James S. Botsford, with whom *Mr. Buckner F. Deatherage* and *Mr. Odus G. Young* were on the brief, for plaintiff in error.

Mr. Elijah Robinson and *Mr. Charles Swindall* for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action brought by defendant in error against plaintiff in error for $8,000, for the conversion of 410 head of cattle. The case was tried to a jury, which returned a verdict for the sum of $7,436.06. The jury also returned with the general verdict answers to special interrogatories which were submitted at the request of the Commission Company. Judgment was entered upon the verdict, which was affirmed by the Supreme Court of the Territory of Oklahoma. This writ of error was then sued out.

The assignments of error assail the sufficiency of the evidence to justify the verdict and judgment and certain rulings of the trial court.

1. As to the sufficiency of the evidence to justify the verdict, we may say that we agree with the courts below. Upon the questions of fact presented the evidence was so far conflicting as to remove the verdict of the jury and the action of the lower courts from reversal by an appellate tribunal. The

issue between the parties was clearly defined. Edmisson had become indebted to the Commission Company in large amounts of money, secured by certain notes and chattel mortgages on the cattle which are the subject of the action.

In full satisfaction of the indebtedness the company and he entered into an agreement on November 22, 1899,[1] by which he agreed to deliver to the company 1,900 of the cattle as they run on the range, if that number could be found, of various ages. And it was further agreed that if, after the delivery of that number, Edmisson should gather as many as 200 head he should turn over 100 of them to the company, or if he delivered as many as 2,000 head, "any residue thereafter" was "to be retained by said Edmisson." Edmisson contended that he delivered 1,700 head in compliance with this agreement and was ready and had "rounded up" about 350 head of other cattle and held them for a time ready to deliver to the company. These cattle, after being held for a time, were turned

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[1] This agreement, made and entered into this 22d day of November, 1899, by and between Drumm-Flato Commission Company, party of the first part, and R. C. Edmisson, party of the second part.

Witnesseth, That said R. C. Edmisson, the second party, hereby agrees to deliver to Drumm-Flato Commission Company nineteen hundred (1,900) head of cattle as they run on the range (provided the same can be found to make this number of head) of various ages, and on which said Drumm-Flato Commission Company hold a chattel mortgage.

The parties of the first part agree, in consideration of the delivery of the above-mentioned number of cattle, to deliver to said second party, R. C. Edmisson, all of his notes, mortgages and other indebtedness due said Drumm-Flato Commission Company to this date.

It is further agreed by the parties mentioned that if Mr. Edmisson gathers as many as 200 head after the delivery to Drumm-Flato Commission Company of said nineteen hundred head of cattle, he is to turn over 100 head of the 200 gathered, or in case said Edmisson delivers to said Drumm-Flato Commission Company as many as two thousand head of cattle, any residue thereafter is to be retained by said Edmisson.

In witness whereof, we have hereunto set our hands the day and year above written.

R. C. Edmisson,
Drumm-Flato Com. Co.,
Per A. Drumm, P't.

loose in a larger pasture. And Edmisson further contended that the company, by its agents, forcibly took from his ranges and pastures in excess of the number the company was entitled to under the agreement, and for this conversion the action was brought. Edmisson's evidence was addressed to the proof of these contentions.

The counter contentions of the Commission Company were that Edmisson delivered to it only 1,550 head of cattle, and that he refused to deliver any more, and, instead of delivering enough more to comply with his agreement, he scattered them through the various pastures in bunches at distances of forty or fifty miles from his range and it was with difficulty that the company, through its agents, collected 356 head, making in all 1,881 head. In support of these contentions evidence was adduced and the jury rendered the verdict already mentioned.

2. The next assignment of error is that the court erred in rejecting the books of account kept by the Commission Company, showing the number of cattle received and sold by the company. In support of the contention involved in this assignment of error the Commission Company relies on par. 4277 of the statutes of Oklahoma of 1893 and the case of *Kesler* v. *Cheadle*, 12 Oklahoma, 489, and *Drumm-Flato Commission Company* v. *Gerlach Bank*, 81 S. W. Rep. 503.

Par. 4277, § 399, is as follows: "Entries in books of account may be admitted in evidence when it is made to appear by the oath of the person who made the entries, that such entries are correct, and were made at or near the time of the transaction to which they relate, or upon proof of the handwriting of the person who made the entries, in case of his death or absence from the county."

To the contention the Supreme Court of the Territory replied that the entries were not part of the *res gestæ*, that besides the books were not produced, and that neither they nor the original entries were attached to the deposition of the witness, nor were they shown to be lost or destroyed. "We

know of no rule of evidence," the court said, "that would permit a witness to state the entries or the contents of a book of account unless the book were lost or destroyed."

It is, however, contended that the books were before the notary public who took the deposition of the bookkeeper, and that copies of the entries were made by the notary. But when the copies were offered as evidence they were immediately objected to as incompetent and immaterial and not the best evidence. The Commission Company was therefore put upon notice that the production of the books themselves would be insisted on. The notary was not trying the case, and before the court and jury who were trying it the objections to the copies of the entries were renewed. We think that the books should have been produced. They were intended as independent evidence—independent of the witness from whose returns they were made. But if it should be granted their exclusion was error, it is difficult to see how the Commission Company was prejudiced. The persons who received the cattle at the place they were delivered to the company, and the employé of the company who sold them after they were received and from whose report the books were made up, all were permitted to testify. And it may be that the entries in the books were inadmissible for the other reasons given by the Supreme Court. They were not entries of any transaction relating to the cattle between the Commission Company and Edmisson. They were entries of sales made by the Commission Company after the cattle had been delivered to its agent and shipped to it by that agent.

3. Error is assigned upon the instruction of the court that if the jury found a conversion of the property seven per cent interest should be added to its value from the time of its conversion. The contention is that interest can only be given in actions by a creditor against a debtor, and that par. 2615, § 7 of the Oklahoma statutes of 1893 controls. That section reads as follows:

"In an action for the breach of an obligation not arising from

contract, and in every case of oppression, fraud or malice, interest may be given in the discretion of the jury."

The Supreme Court of the Territory rejected the contention, deciding that par. 2640, § 23, governed the case. It provides as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: First. The value of the property at the time of the conversion, with interest from that time." There was no error in this ruling. It may be that in the absence of statute the general rule is that in actions for tort the allowance of interest is not an absolute right; *Lincoln* v. *Claflin*, 7 Wall. 132; *The Scotland*, 118 U. S. 507; *District of Columbia* v. *Robinson*, 180 U. S. 92; *Frazer* v. *Bigelow Carpet Co.*, 141 Massachusetts, 126; but the Oklahoma statute has made interest a part of the detriment caused by the conversion of personal property. Other States have done the same.

4. The next assignment of error is based upon the refusal of the court to require an answer to interrogatory number 5, as to the number of Edmisson's cattle the agent of the Commission Company shipped from Curtis to Kansas City.

To establish error in the refusal of the court plaintiffs in error cite par. 4176, § 298, of the Civil Code of the Territory, which provides that in all cases the jury shall render a general verdict, and the court shall in any case, at "the request of the parties thereto, or either of them, in addition to the general verdict, direct the jury to find upon particular questions of fact, to be stated in writing by the party or parties requesting the same."

It certainly cannot be contended that the statute requires every interrogatory to be answered, however remote the fact it inquires about may be from the issue. The Supreme Court of the Territory pointed out that the fact inquired into was only incidental to the issue, and was besides undefined and uncertain as to time. The number of cattle shipped might have some bearing or relation of proof to the number delivered, which was the issue in the case, but under the circumstances and conditions of the other proofs it was within the discretion

of the court to decide whether a specific answer should or should not have been required. Indeed, the interrogatory seems to have been improvidently submitted, for the Supreme Court, in its opinion, says:

"The evidence disclosed that a large number of Edmisson cattle had been shipped to Kansas City, in various shipments. Bryson testifies that the total number of cattle shipped was 2,578. There was no dispute on the part of the plaintiff as to the number of cattle that were shipped. The entire controversy was as to the number of cattle that were delivered by the plaintiff to the agent of the defendant, and the number converted after allowing the defendant all that it was entitled to under and pursuant to the contract."

5. Plaintiffs in error finally complain as ground of error of certain remarks by the court which, it is contended, were prejudicial. The Supreme Court replied to this assignment of error that no objection had been taken to the remarks complained of. Counsel now say that to have made objection would have made "a bad matter much worse." But we cannot accept the excuse. We have examined the remarks complained of, and we do not think they had the misleading strength that is attributed to them. At any rate, it was the duty of counsel to object to them, and if then the court made matters worse, or did not correct what was misleading or prejudicial, its action would be subject to review.

Judgment affirmed.

RANKIN, RECEIVER OF THE CAPITOL NATIONAL BANK OF GUTHRIE, OKLAHOMA, *v.* CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.[1]

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

No. 51. Argued November 12, 13, 1907.—Decided February 24, 1908.

In a transaction between two banks the president of one gave his personal note to the other, accompanied by an agreement of his bank, signed by himself as president, that the proceeds of the note should be placed to the credit of his bank by, and remain with, the discounting bank until the note was paid; while there were certain transfers of checks between him and his own bank the record did not show that the maker of the note personally received the proceeds thereof, and no contention was made that the agreement was illegal. *Held*, that:

Under the circumstances of this case, the discounting bank was entitled to hold the proceeds of the note, as represented by the credit given on its books therefor, as collateral security for the payment of the note and to charge the note against such credit, and relieve itself from further responsibility therefor.

The receiver of a bank stands in no better position than the bank stood as a going concern.

144 Fed. Rep. 587, affirmed.

THE facts are stated in the opinion.

Mr. C. B. Ames, with whom *Mr. D. T. Flynn* and *Mr. W. C. Scarritt* were on the brief, for plaintiff in error.

Mr. John A. Eaton for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This suit was brought by the receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, which we shall call the Guthrie Bank, to recover the amount of an alleged deposit in the City National Bank of Kansas City, Missouri,

[1] Originally docketed as *Cherry, Receiver*, v. *City National Bank;* by order of the court *George C. Rankin*, successor of the former receiver, was substituted as plaintiff in error.

which we shall call the City Bank. At a trial without a jury in the Circuit Court the facts were found and judgment was given for the defendant, which judgment was affirmed by the Circuit Court of Appeals. *Cherry, Receiver,* v. *City National Bank,* 144 Fed. Rep. 587; *S. C.,* 75 C. C. A. 343. We give an abridgment of the findings of the Circuit Court.

The bank examiner had complained of excessive loans by the Guthrie Bank and especially of three notes for ten thousand dollars each, made, respectively, by the Missouri, Kansas and Oklahoma Company, the Wild West Show Company, and the Western Horse Show Company, and had directed them to be reduced. Thereupon one Billingsley, its president, who managed its business with the defendant, wrote to the defendant's cashier, saying "I want you to take my note of 30,000.00 and Cr. my Bank with like amount in a special account with the understanding that said account is not to be checked against. My reason for wanting this is that I have that amount of excessive loans that the Department is kicking about. . . . You will not be out any money and loan and deposit will offset each other on your books." The Guthrie Bank had a general deposit with the City Bank, but this on its face was a scheme for a separate paper transaction. The proposal was accepted, Billingsley sent his note, and wrote saying that he had given the Guthrie Bank his check on the City Bank for the amount, adding: "and it is agreed that said [Guthrie Bank] is to keep this 30 Th with you until note is retired together with as large a balance as possible. . . . Chas. E. Billingsley, Pres't."

Billingsley gave the above-mentioned check to the Guthrie Bank, which credited it to his personal account, in which the bank's money was kept, as will be stated later. The same day he gave to the bank a check against his personal account for the same sum, which was charged to that account and credited to bills receivable, and thereupon the three notes objected to by the bank examiner were taken out of the bank's assets and possession. What became of them does not appear. It was argued from several circumstances not necessary to mention

that they were paid by Billingsley, but that fact is not found. Billingsley does not seem to have been personally liable upon them, and all that can be said is that the scheme to get them off the books was carried out. The cashier of the City Bank was away when the letter with Billingsley's note arrived, and there were telegrams; after which the City Bank on September 10 or 11, 1903, charged the note to bills receivable, the check to Billingsley, and credited the Guthrie Bank with $30,000 on general account. On September 14, the cashier, having returned, transferred $30,000 to a special account according to the plan. Billingsley was notified and all transactions in this matter thereafter were entered by the City Bank on this special account.

On November 9, 1903, Billingsley's note falling due, the account was charged with the amount and interest. The same day a letter from Billingsley was received asking an extension. The cashier replied that they had charged his account with the note, but would renew it on satisfactory collateral, and returned the note. Billingsley answered, enclosing a note for $30,000, and requesting that the former arrangement be continued. In answer to this the president of the City Bank wrote that they preferred a demand note, and that to satisfy the comptroller they would rather that it should be for $25,000 instead of $30,000. On November 30, 1903, Billingsley enclosed his note for $25,000 in a letter to the president, requesting that the proceeds be placed as a special deposit to the credit of the bank, and repeating the old agreement: "It being expressly understood and agreed that this fund is not subject to check but is to remain with the City National Bank for the payment of the note, and you are hereby authorized to charge this note to said account at any time you desire." Originally the note was signed "Chas. E. Billingsley Pt." and the letter with his name without addition. On December 12, the president of the City Bank wrote that the note should be signed individually and the letter as president, and enclosed the letter for the change. Billingsley admitted the mistake, added "Prest." to

his signature and returned the letter, at the same time authorizing the City Bank to strike off the "Pt." from the signature on the note, which was done.

On November 30, 1903, in order to make the balance of the City Bank account on the books of the Guthrie Bank correspond with the books of the City Bank, Billingsley gave the teller of the Guthrie Bank his check upon it in favor of the City Bank for $5,000, which was stamped paid, and the amount credited to the City Bank on the books of the Guthrie Bank. On December 7, the City Bank credited the Guthrie Bank with $25,000 on the special account. It credited two per cent interest at the end of each month while the account was open, and there was a small deduction as the result of the first stage for interest on the $30,000 note, so that on April 4, 1904, the special credit to the Guthrie Bank was $24,994.54. On that day the City Bank, having no knowledge that the Guthrie Bank was in a failing condition, charged the note to the account, returned the same duly cancelled, and closed the account. Later on the same day the Guthrie Bank failed and went into the hands of a receiver. The receiver notified the City Bank that the note was not a liability of the Guthrie Bank and that the City Bank would be held.

There are few other facts needing mention. Statements of account were made monthly by the banks to each other up to February 1, 1904, and after that daily reconcilements were made. The statements of the City Bank showed the special or No. 2 account as well as the general one, and these were entered in the Guthrie Bank reconcilement book as No. 1 and No. 2. The Guthrie Bank also recognized the existence of the special account in corrections sent to the City Bank. But the whole amount appeared in its general account. It should be added that the Guthrie Bank was in the habit of borrowing money by issuing notes and crediting the proceeds to Billingsley's personal account, the notes being paid by Billingsley's checks. Billingsley also entered his personal deposits and drew his personal checks upon the same account. It should be added

further that in the Circuit Court both counsel agreed that it was not contended that the contract was illegal because it enabled a false showing to be made of the condition of the Guthrie Bank.

The plaintiff, the receiver of the Guthrie Bank, argues that the foregoing transaction was really a loan to Billingsley with an attempted pledge of a deposit of the Guthrie Bank in the City Bank, and is shown to have been so by the facts that he gave his personal note, that he gave his check on the City Bank for the amount to the Guthrie Bank, and that by means of another corresponding check the three notes objected to by the bank examiner were taken out of its assets and possession. It is added that Billingsley was interested in two at least of these notes, as he was vice president of the companies that made them, and that the entries on the books and other facts show that they were paid. But, as we have said, neither legal interest on Billingley's part nor payment is found, and we cannot find those facts here. *Generes* v. *Campbell*, 11 Wall. 193. Leaving them on one side, the argument for the plaintiff stands mainly on the technicality that Billingsley, instead of merely writing the letter in which the agreement was embodied, and having the credit on special account issued without more to the Guthrie Bank, gave his check on the City Bank as the means of getting the credit on to the Guthrie Bank's books. We will deal with these arguments in our own order and way.

This suit it will be remembered is to recover an alleged deposit, and the first thing to notice is that the whole business, from beginning to end, was and was intended to be a mere juggle with books and paper to deceive the bank examiner. The City Bank never received anything from the Guthrie Bank, the Guthrie Bank never parted with anything to the City Bank, or with anything for the loss of which the City Bank is responsible, if it parted with anything at all. It would stretch the findings to say that the Guthrie Bank does not still own the three notes. But if it does not the City Bank had nothing to do with its giving them up. The supposed surrender was not a consideration to the City Bank, and so far as appears

never was known by it to have taken place. It was a transaction wholly between Billingsley and his own bank. So far as the surrender of the notes goes, the parties stand exactly as if that had taken place without a check, in consideration of Billingsley making the note on which the credit was given to the Guthrie Bank. It is said that the Guthrie Bank got the money, but did not get the benefit of the loan. As between the banks no one got any money, and the only benefit of the loan in fact or contemplation was a swindle upon the bank examiner. If the City Bank should be held it would be held without ever having received a *quid pro quo* except in the most narrowly technical sense. The consideration would be the delivery of Billingsley's note by the Guthrie Bank.

Again, the alleged deposit was a parol contract made by the letters of which we have given extracts. There is no other contract but the one so made. But by those letters the City Bank did not promise to hold $30,000, or at the later stage $25,000, to the credit of the Guthrie Bank out and out. On the contrary, it merely agreed to credit these sums against the notes which it held, on the express condition that no checks should be drawn against them, and that when the first note matured, or, after the second, whenever the bank pleased, the notes should be charged against the account and extinguish it. We perceive no sufficient ground for substituting a fiction for the only promise the City Bank ever really made. If the Guthrie Bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank.

This promise, however, the City Bank made to the Guthrie Bank at the first step of the transaction, and not to Billingsley. The plan was proposed as a plan for the help of the Guthrie Bank. It provided from the start for a credit to the Guthrie Bank. At the moment when the agreement was reached and Billingsley sent his note he signed a promise as president, embodying the terms. He corrected the letter with his second note to an official promise in like form. This meant a promise

by the Guthrie Bank, and shows that the Guthrie Bank, not Billingsley, was the other partly to the bargain. It is true that Billingsley's personal obligation was given to the City Bank, but the only reasonable interpretation is that he lent his credit to the bank of which he was the leading spirit, to help it to perpetrate its fraud. It seems to us too plain for further argument that the contract concerning the credit was made between the banks at the beginning and governs all that happened later.

The only material thing that happened was Billingsley's drawing his check on the City Bank for the amount of the loan and depositing it to his credit in his own Guthrie Bank. Even if this, as in other cases, was regarded as a deposit of the bank's money, still it was not quite logically consistent with his contract that Billingsley should make his check upon the City Bank for money which it had agreed with the Guthrie Bank to credit to it. But the check was only a documentary form to justify the entry of a deposit. To the City Bank it was immaterial, as the result no less was the credit to the Guthrie Bank upon the special account and subject to the terms to which both parties had agreed. The subsequent check on the Guthrie Bank to the Guthrie Bank was another documentary form to give a plausible justification for getting the three notes out of the assets. But with that, as we have said, the City Bank had nothing to do.

In view of the statement of counsel, at the argument, to the circuit judge, that they did not contend that the contract was illegal, a disclaimer repeated to us, and in view of the possibility that the facts were found as they were with that agreement in view, we shall not consider that aspect of the case. It would not help the plaintiff. *McMullen* v. *Hoffman*, 174 U. S. 639. We are of opinion upon the facts that we have set forth that the courts below were right.

Judgment affirmed.

MR. JUSTICE WHITE and MR. JUSTICE MCKENNA dissent.

FIRST NATIONAL BANK OF ALBUQUERQUE *v.* ALBRIGHT.

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

No. 123. Argued January 22, 1908.—Decided February 24, 1908.

A county treasurer accepting that part of the tax which a party assessed admits to be due is not thereby estopped to demand more.

Equity will not interfere to stop an assessing officer from performing his statutory duty for fear he may perform it wrongfully; the earliest moment is when an assessment has actually been made; and in this case *held* that the court would not, at the instance of a national bank, enjoin assessors in advance from making an assessment on a basis alleged to be threatened and which if made would be invalid under § 5219, Rev. Stat.

86 Pac. Rep. 548, affirmed.

THE facts are stated in the opinion.

Mr. Alonzo B. McMillen for appellant:

The right of the territorial legislature to impose taxes upon national banks is limited to two classes of property:

1. Shares of stock in the name of the shareholder, provided that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens, and that shares of non-residents shall be taxed in the city or town where the bank is located.

2. Real property of national banks to the same extent, according to its value, as other real property is taxed. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborne* v. *Bank of the United States*, 9 Wheat. 738; *Mercantile Bank* v. *New York*, 121 U. S. 156; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664.

The Territory is without power to authorize the taxation of the personal property of a national bank, and therefore the taxing officers have no power to levy a tax thereon.

Under chapter 40 of the territorial laws of 1891, if the real

estate of a national bank be assessed, such assessed value should be deducted from the value of the shares of stock of the stockholders.

The threatened reassessment of the bank's real estate without making a corresponding deduction from the assessment of the shares of stock, constituted a cloud upon the title to the property of the bank which the court has power to remove by injunction directed to the taxing officers.

The adoption of the general rule announced by the assessor that he would tax the shares of stock in banks at a rate based upon a valuation of sixty per cent of their capital stock and surplus, is a clear violation of the provision of the national banking act that taxation of the shares of stock of a national bank shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens. *Whitbeck* v. *Mercantile Bank*, 127 U. S. 194.

The allegations of the complaint in this case show gross discrimination against bank stock as compared with all other property, which necessarily includes money in the hands of individuals. *Bank of Garnett* v. *Ayers*, 160 U. S. 660; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440; *Bank of Commerce* v. *Seattle*, 166 U. S. 463, and *National Bank of Wellington* v. *Chapman*, 173 U. S. 219, are not in conflict with this contention. As to the extent and nature of the term "other moneyed capital," see *Mercantile National Bank* v. *New York*, 121 U. S. 155.

A discrimination forbidden by the national banking act is illegal whether it arises from a difference in the rate of assessment or from a difference in the valuation of the property, if the result is to make owners of shares of stock pay a greater tax than is imposed upon other moneyed capital in the hands of individuals. *People* v. *Weaver*, 100 U. S. 539; *Pelton* v. *National Bank*, 101 U. S. 143; *Boyer* v. *Boyer*, 113 U. S. 695.

The territorial court had jurisdiction to enjoin the illegal assessment complained of and should have done so, in view of the facts of this case. *Pelton* v. *National Bank*, 101 U. S.

143; *Cummings* v. *National Bank,* 101 U. S. 153; *Hills* v. *Exchange Bank,* 105 U. S. 319; *San Francisco National Bank* v. *Dodge,* 197 U. S. 75; *Stanley* v. *Supervisors of Albany,* 121 U. S. 550; *Union Pacific Ry.* v. *Cheyenne,* 113 U. S. 516; *Supervisors* v. *Stanley,* 105 U. S. 305; *Evansville Bank* v. *Briton,* 105 U. S. 322; 5 Pomeroy, Equity Jurisprudence, § 371; *Louisville Trust Co.* v. *Stone,* 107 Fed. Rep. 305; *S. C.,* 46 C. C. A. 299; *Taylor* v. *Louisville N. R. Co.,* 88 Fed. Rep. 350; *S. C.,* 31 C. C. A. 537.

If the allegations of the complaint are to be taken as true, the bank paid all the taxes that might be assessed against the shares of stock and real estate upon any theory, and no valid reassessment could be made.

Mr. Frank W. Clancy, for appellees, submitted:

There being no valid assessment, it was the duty of the assessor or collector to make one. *New Mexico* v. *U. S. Trust Co.,* 174 U. S. 549–551; *U. S. Trust Co.* v. *New Mexico,* 183 U. S. 539, 541; *U. S. Trust Co.* v. *Territory,* 10 N. M. 421, 422.

The mere fact that other property is assessed at a smaller percentage of its real value than the property of this plaintiff or any other special class of property, is not sufficient to invalidate the higher assessment. *Nickerson* v. *Kimball,* 1 N. B. C. 409; *Wagner* v. *Loomis,* 37 Ohio St. 580, 581; *Carroll* v. *Alsup,* 64 S. W. Rep. 199, 200.

The assessment makes no discrimination against national banks. The restriction imposed by Congress is equality of assessment not with other property generally, but with that property which passes under the description of moneyed capital. *Talbot* v. *Silver Bow,* 139 U. S. 447; *Mercantile Bank* v. *New York,* 121 U. S. 155.

It is not alleged by complainant that there is any other moneyed capital in New Mexico in favor of which there is any discrimination against national banks. Taking the complaint most strongly against the pleader there is no such discrimination, especially when it is alleged by the pleader that all banks, national or other, are treated alike.

Congress has specifically authorized the taxation of the real estate of national banks. *Davidson* v. *New Orleans*, 96 U. S. 106; *Tennessee* v. *Whitworth*, 117 U. S. 136, 137; *New Orleans* v. *Houston*, 119 U. S. 277, 278.

No case of equitable jurisdiction is made out by the complaint in this case. It will be time for a court of equity to interpose when an assessment has actually been made and can be shown to offend in any or all of the particulars mentioned in the complaint.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a complaint or bill against the Assessor, the Treasurer and *ex officio* Collector, and the District Attorney of the County of Bernalillo, New Mexico, to enjoin the reassessment of a tax on stock and real estate for the year 1903 upon the plaintiff bank, which the plaintiff is informed and believes the defendants will attempt. The bill alleges that the plaintiff gave the Assessor a list in which capital stock, surplus and real estate were lumped in a single item with a single valuation of $90,000. Thereupon the Assessor made a different valuation, lumping the capital stock and valuing it at sixty per cent of its par value, and giving separate figures for the surplus and the several parcels of real estate, the total being $150,542. This was affirmed by the Territorial Board of Equalization on appeal. Afterwards the plaintiff paid the amount admitted by it to be due, and was sued for the residue; but the suit was dismissed, the District Attorney giving out that a new assessment would be made. It is alleged that the Assessor, in 1903, announced as his method of valuation that all property except bank property and bank shares would be assessed at one-third of its real value, but that he would assess banks at sixty per cent of the capital stock and surplus in addition to their real estate; that he did as he announced, and also assessed the real estate without deducting the value "from the valuation of other property assessed against said banks." Beside the prayer for an in-

junction there is another that the Treasurer and *ex officio* Collector be ordered to cancel the above mentioned assessment upon his books. There was a demurrer, which was overruled below but sustained by the Supreme Court of the Territory with directions to dismiss the complaint.

The complaint admits that the plaintiff's return was not in accordance with the law, and the Supreme Court of the Territory says that both that and the assessment were bad, and that a reassessment is authorized by local law. We see no reason to reverse its decision upon that point. If a reassessment is made, that now on the Treasurer's books will be disposed of and will be no cloud upon the plaintiff's title, so that the whole question is whether a reassessment shall be made. The plaintiff's objection is not the technical one that no reassessment is authorized by statute, but the substantial apprehension that the shares will be taxed "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens," contrary to the words of Rev. Stat. § 5219, and that the value of real estate separately assessed and taxed will not be deducted from the valuation of shares, as it is thought to be implied by that section and required by the territorial law of February 20, 1891, c. 40; Compiled Laws, 1897, § 259, that it should be.

We assume that such an assessment of shares as is apprehended would be invalid under Rev. Stat. § 5219. *First National Bank of Wellington* v. *Chapman*, 173 U. S. 205, 219, 220. We assume that it would be invalid none the less if disguised as a tax on sixty per cent of the par value, if other moneyed capital was uniformly and intentionally assessed at one-third of its actual value and if sixty per cent of the par value of the bank shares was more than one-third of their actual value. Accidental inequality is one thing, intentional and systematic discrimination another. See further *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20. We agree with the plaintiff that the only taxes contemplated by § 5219 are taxes on the shares of stock and taxes on the real estate. *Owensboro Nat.*

Bank v. *Owensboro*, 173 U. S. 664, 669. Hence, while the law does not consider the nature of the bank's investments not taxed in fixing the value of its stock, *Palmer* v. *McMahon*, 133 U. S. 660, it may be argued consistently with the decisions that real estate taxed to the bank, and land out of the Territory, which could not be taxed by it at all, *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, are meant to be deducted by Rev. Stat. § 5219, and are required to be by the territorial law. But we agree with the Supreme Court of the Territory that the time for deciding these and other questions has not come.

The acceptance of what was admitted to be due created no estoppel to demand more. There are no such precise averments in the complaint as would warrant our assuming that no assessment could be made for a further amount, still less that none in any form could be made, when there is no valid one upon the books. We cannot tell, and much more positive averments of intent than those before us would not warrant a court in prejudging, what the assessing officer will do. It is not for a court to stop an officer of this kind from performing his statutory duty for fear he should perform it wrongly. The earliest moment for equity to interfere is when an assessment has been made. Probably it will be made with caution, after this case.

Judgment affirmed.

HERRING-HALL-MARVIN SAFE COMPANY *v.* HALL'S SAFE COMPANY.

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

No. 136. Argued January 30, 1908.—Decided February 24, 1908.

Donnell v. *Herring-Hall-Marvin Safe Co., ante,* p. 267, followed as to construction of the contract involved in that case and this, and as to the rights of stockholders to carry on business under their own name.

Although the trade-name may not be mentioned in the sale of a business taken over as a going concern, a deed conveying trade-marks, patent-rights, trade-rights, good will, property and assets of every name and nature is broad enough to include the trade-name under which the vendor corporation and its predecessors had achieved a reputation.

The name of a person or town may become so associated with a particular product that the mere attaching of that name to a similar product without more would have all the effect of a falsehood, and while the use of that name cannot be absolutely prohibited, it can be restrained except when accompanied with a sufficient explanation to prevent confusion with the product of the original manufacturer or original place of production.

146 Fed. Rep. 37, modified and affirmed.

THE facts are stated in the opinion.

Mr. Lawrence Maxwell, Junior, with whom *Mr. Charles H. Aldrich* was on the brief, for petitioner:

"Hall's Safes" was a trade-name of the old concern indicating the source of manufacture.

The safes made by the old concern were called "Hall's Safes," and advertised by that name. It was the short name for them in the trade; in other words, their trade-name. It did not denote a particular kind of safe, but the origin of manufacture. This is admitted by the answer.

The trade-name passed to the purchaser as part of the good will of the old concern. Sebastian on Trade-Marks (4th ed.), 308; *Menendez* v. *Holt,* 128 U. S. 514; *Brown Chemical Com-*

pany v. *Meyer*, 139 U. S. 540, 548; *Le Page Co.* v. *Russia Cement Co.*, 51 Fed. Rep. 941, 943; *Russia Cement Co.* v. *Le Page*, 147 Massachusetts, 206.

The defendants were not entitled to appropriate the good will of the old concern by carrying on business under a corporate title substantially the same, and by calling their product "Hall's Safes." *Menendez* v. *Holt*, 128 U. S. 514, 521, 522; *Russia Cement Co.* v. *Le Page*, 147 Massachusetts, 206; *Hoxie* v. *Chaney*, 143 Massachusetts, 592; *Chas. S. Higgins Co.* v. *Higgins Soap Co.*, 144 N. Y. 462; *Dodge Stationery Co.* v. *Dodge et al.*, 145 California, 380; *Holmes, Booth & Haydens* v. *Holmes, Booth & Atwood Mfg. Co.*, 37 Connecticut, 278; *Myers* v. *Kalamazoo Buggy Co.*, 54 Michigan, 215; *Smith* v. *Brand & Co.*, 58 Atl. Rep. (N. J.) 1029; *Trego* v. *Hunt*, App. Cas. 7; *Duryea* v. *Nat. Starch Mfg. Co.*, 79 Fed. Rep. 651; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118, discussed and distinguished from case at bar.

The injunction awarded by the Circuit Court of Appeals is inadequate on any theory of the plaintiff's rights. It does not give proper protection against infringement by the defendants of plaintiff's rights. It is not sufficiently definite and specific. *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 404; *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169, 204; *Dodge Stationery Co.* v. *Dodge et al.*, 145 California, 380.

The cross bill was properly dismissed. The claim that the plaintiff was not entitled to a decree on its bill because it had been guilty of false representations, and that the defendant was entitled to a decree on its cross bill, is based upon the erroneous assumption that the plaintiff did not acquire the right to use the old name in connection with the business which it purchased. Good will or a trade-mark or a trade-name may not be sold by itself, but it may be transferred in connection with the sale of a plant, and it is no fraud on the public for the purchaser to use the old name or mark. *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540, 548; *Menendez* v. *Holt*, 128 U. S.

514; *Kidd* v. *Johnson*, 100 U. S. 617; *Richmond Nervine Company* v. *Richmond*, 159 U. S. 293, 302.

Mr. Judson Harmon and *Mr. William G. Cochran* for respondents:

The contentions of the petitioner in this case are concluded by the decision of this court in the case of *Howe Scale Company* v. *Wykcoff, Seamans & Benedict*, 198 U. S. 118. Wherever the parallel between the two cases fails, the case against the Remingtons was much stronger than the case against the Halls. The following cases are to the same effect: *National Starch Co.* v. *Duryea*, 41 C. C. A. 244; *Montreal Lithographing Co.* v. *Sabiston*, App. Cas. 610; *Knoedler* v. *Boussod*, 47 Fed. Rep. 465, 466; *Knoedler* v. *Glaenzer*, 55 Fed. Rep. 895; *Bassett* v. *Percival*, 5 Allen, 345, 347; *Lawrence* v. *Hull*, 169 Massachusetts, 250; *Marcus Ward & Co.* v. *Ward*, 40 N. Y. St. Rep. 792; *Morgan* v. *Schuyler*, 79 N. Y. 490, 494; *Williams* v. *Farrand*, 88 Michigan, 473. See also *Moreau* v. *Edwards*, 2 Tenn. Ch. 347, 349; *McGowan Bros. Pump Co.* v. *McGowan*, 22 Ohio St. 370; *Chattanooga Med. Co.* v. *Thedford*, 58 Fed. Rep. 347, 349; *Fish Bro. Wagon Co.* v. *LaBelle Wagon Works*, 82 Wisconsin, 546, 563; *Hazelton Boiler Co.* v. *Hazelton*, 142 Illinois, 495, 507, 508 (distinguishing *Frazer* v. *Frazer Lubricator Co.*, 121 Illinois, 147); *Helmbold* v. *Helmbold Mfg. Co.*, 53 How. 457, 459; *Horton Mfg. Co.* v. *Horton Mfg. Co.*, 18 Fed. Rep. 817.

In view of the absence of any express license to use the name of Hall's Safe & Lock Company, the provision, on the contrary, that the name of the new company shall be Herring-Hall-Marvin Company, the further provision for the dissolution of Hall's Safe & Lock Company, and the above authorities, Judge Clark erred in holding that the Herring-Hall-Marvin Company acquired the good will, with the right to use the trade-name, if it chose to do so, and undoubtedly with the exclusive right to manufacture and sell the trade product known to the markets of the country as the Hall's Safes, and the Circuit Court of Appeals was right in modifying the injunction and

permitting the use of the family name "Hall" in the name of the new company.

The principles for which we contend are recognized in many of the cases cited by complainant. See *Holmes, Booth & Haydens* v. *Holmes, Booth & Atwood Co.*, 37 Connecticut, 295; *Trego* v. *Hunt*, App. Cas. 7.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is the suit referred to in *Donnell* v. *Herring-Hall-Marvin Safe Company, ante*, p. 267. It was brought by the petitioner against the respondents to enjoin them from carrying on their business under their present name or any name calculated to make purchasers believe that they are dealing with the establishment founded by Joseph L. Hall, or with the plaintiff, and also to enjoin them from advertising or marking their product as Hall's Safes. The facts are stated in the case referred to. In brief, the petitioner is the successor by purchase to the business of Hall's Safe and Lock Company, an Ohio corporation founded by Joseph L. Hall, a safe maker of repute, the stock of which belonged to his estate and his children. The respondents are sons of Joseph L. Hall and an Ohio corporation formed by them in September, 1896, immediately after they were discharged from their contracts with the purchasing company. It has been decided that the Halls did not give up the right to do business in their own name by the part they took when the original company sold out, and that the petitioner has the right, but not the exclusive right, to use the name Hall. Its rights arise by way of succession, out of the priority of the original company, not out of contract. This case requires us to discuss a little further what the respective rights of the parties are. The decision below is to be found in 146 Fed. Rep. 37, and 76 C. C. A. 495.

We think it clear, as was conceded in the other case, that the plaintiff got all the grantable rights of the original company, including that of using the name Hall. It is true that trade names were not mentioned in the deed, but its language

was broad enough to include them. The deed, along with the plant, patterns, stock of safes, accounts, papers, etc., conveys all "trade marks, patent rights, trade rights, good will, and all its property and assets of every name and nature," and agrees that the business is "taken over in all respects as a going concern." If a particular phrase is needed in addition to the general language and the nature of the transaction, "trade rights" will do well enough. The name Hall was used and was expected to be used as a part of the name of the first purchasing company, The Herring-Hall-Marvin Company. There was a stipulation in the deed that the seller should be wound up, but that, far from being, as was argued, a provision in favor of the seller to avoid the use of its name by the purchaser, was a covenant to the purchaser in aid of the seller's undertaking not to engage in any business thereafter. The Hall Safe and Lock Company expressly and in reiterated terms sold all its property and assets of every description as a going concern, agreed to disappear and disappeared. It had no reason for retaining any right and retained none, except the right to be paid. The circumstances of the case raise none of the nice questions that sometimes have arisen as to when the name is sold along with the other assets. It may be that, although the deed conveyed all that it could convey, the plaintiff could not use the corporate name proper of the original corporation, because that is a charter right, and could not be exercised without the consent of the legislature. *Montreal Lithographing Co.* v. *Sabiston* [1899], A. C. 610. But that is not what it wants to do. It only wants so far as it may to appropriate the name "Hall" for its safes.

The original company, from 1867 to 1892, was attaching to Hall's safes the reputation that made the name famous and desired. Whoever achieved it did so through the medium of the company. The good will thus gained belonged to the company, and was sold by it, with all its rights, when it sold out. See *Le Page Co.* v. *Russia Cement Co.*, 51 Fed. Rep. 941, 943. So that the question is narrowed to what its rights would have

been at the present day if it had kept on. The advantage which it would have had, and to which the petitioner has succeeded, is that of having been first and alone for so long in the field. Some of the Halls might have left it and set up for themselves. They might have competed with it, they might have called attention to the fact that they were the sons of the man who started the business, they might have claimed their due share, if any, of the merit in making Hall's safes what they were. *White* v. *Trowbridge*, 216 Pa. St. 11, 18, 22. But they would have been at the disadvantage that some names and phrases, otherwise truthful and natural to use, would convey to the public the notion that they were continuing the business done by the company, or that they were in some privity with the established manufacture of safes which the public already knew and liked. To convey that notion would be a fraud, and would have to be stopped. Therefore such names and phrases could be used only if so explained that they would not deceive.

The principle of the duty to explain is recognized in *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118. It is not confined to words that can be made a trade-mark in a full sense. The name of a person or a town may have become so associated with a particular product that the mere attaching of that name to a similar product without more would have all the effect of a falsehood. *Walter Baker & Co.* v. *Slack*, 130 Fed. Rep. 514. An absolute prohibition against using the name would carry trade-marks too far. Therefore the rights of the two parties have been reconciled by allowing the use, provided that an explanation is attached. *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 163 U. S. 169, 200, 204; *Brinsmead* v. *Brinsmead*, 13 Times L. R. 3; *Reddaway* v. *Banham* [1896], A. C. 199, 210, 222; *American Waltham Watch Co.* v. *United States Watch Co.*, 173 Massachusetts, 85, 87; *Dodge Stationery Co.* v. *Dodge*, 145 California, 380. Of course the explanation must accompany the use, so as to give the antidote with the bane.

We must assume that the name Hall in connection with safes has acquired this kind of significance. This, or very nearly this, is alleged by the answer and must have been the finding of the courts below. It was suggested that really the value of the name was due to the use of patents that have run out. But we think it appears that the meaning of the name is not confined to the use of Hall's patents, and further, has had a particular succession of makers so associated with it that the principle of the injunction granted is right. The defendants say that they have corrected advertisements, and so forth, that might be deemed fraudulent, when called to their attention. But the name of the defendant company of itself would deceive unless explained. It may have repented but it has transgressed, and it even now asserts rights greater than we think it has. Therefore the injunction must stand.

We are not disposed to make a decree against the Halls personally. That against the company should be more specific. It should forbid the use of the name Hall, either alone or in combination, in corporate name, on safes, or in advertisements, unless accompanied by information that the defendant is not the original Hall's Safe and Lock Company or its successor, or, as the case may be, that the article is not the product of the last named company or its successors. With such explanations the defendants may use the Hall's name, and if it likes may show that they are sons of the first Hall and brought up in their business by him, and otherwise may state the facts.

There is a cross bill seeking to prevent the plaintiff from making use of the names Hall's Safe and Lock Company, Hall's Safe, &c., but it does not need separate consideration. The defendant shows nothing of which it can complain or which should bar the plaintiff from its relief. The portion of the decree dismissing the cross bill is affirmed.

Decree modified and affirmed.

UNITED STATES *v.* SISSETON AND WAHPETON BANDS OF SIOUX INDIANS.

SISSETON AND WAHPETON BANDS OF SIOUX INDIANS *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 338, 339. Argued January 7, 8, 1908.—Decided February 24, 1908.

While there are no general rules of law determining what payments are chargeable against Indian annuities, when annuities which have been confiscated on account of an outbreak of the annuitant Indians are restored, sums paid by the Government for the support of the annuitants on account of their destitution must be taken into account, and in this case the restored annuities are also chargeable with the amount of depredations during the outbreak for which the Indians were liable under a treaty made subsequently to that granting the annuity and before the outbreak.

This court affirms the judgment of the Court of Claims adjusting the claim of the Sisseton and Wahpeton Bands of Sioux Indians for their confiscated annuities restored under acts of Congress and in regard to which jurisdiction was conferred by the act of June 21, 1906, c. 3504, 34 Stat. 372.

42 C. Cls. Rep. 416, affirmed.

THE facts are stated in the opinion.

Mr. George M. Anderson, with whom *Mr. Assistant Attorney General Thompson* was on the brief, for the United States.

Mr. William H. Robeson and *Mr. Marion Butler*, with whom *Mr. Charles A. Maxwell*, *Mr. George S. Chase* and *Mr. Josiah M. Vale* were on the brief, for the Sisseton and Wahpeton Sioux.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim for annuities granted by the treaty of July 23, 1851, 10 Stat. 949, but declared forfeited by the act of February 16, 1863, c. 37, 12 Stat. 652, in consequence of a great outbreak and massacre by the Indians. The claim is made

under the Indian appropriation act of June 21, 1906, c. 3504, 34 Stat. 325, p. 372, the material part of which is as follows:

"That jurisdiction be, and hereby is, conferred upon the Court of Claims in Congressional case numbered twenty-two thousand five hundred and twenty-four, on file in said court, entitled 'The Sisseton and Wahpeton bands of Sioux Indians against the United States,' to further receive testimony, hear, determine, and render final judgment in said cause, for balance, if any is found due said bands, with right of appeal as in other cases, for any annuities which would be due to said bands of Indians under the treaty of July twenty-third, eighteen hundred and fifty-one (Tenth Statutes at Large, page nine hundred and forty-nine), as if the Act of forfeiture of the annuities of said bands, approved February sixteenth, eighteen hundred and sixty-three, had not been passed; and to ascertain and set off against the amount found to be due to said Indians, if any, all payments or other provisions of every name or nature made to or for said bands by the United States, or to or for any members thereof, since said Act of forfeiture was passed, which are properly chargeable against unpaid annuities.

"Upon the rendition of such judgment and in conformity therewith, the Secretary of the Interior is hereby directed to determine which of said Indians now living took part in said outbreak and to prepare a roll of the persons entitled to share in said judgment by placing on said roll the names of all living members of the said bands residing in the United States at the time of the passage of this Act, excluding therefrom the names of those found to have participated in the outbreak; and he is directed to distribute the proceeds of such judgment, except as hereinafter provided, per capita to the persons borne on the said roll; and the court shall consider the evidence now on file in said cause in connection with such other evidence as may hereafter be adduced therein."

The act of June 21, 1906, was passed in pursuance and extension of an earlier act of March 3, 1901, c. 832, 31 Stat. 1058, p. 1078, which gave the Court of Claims full jurisdiction to

report to Congress what members of these bands of Indians were not concerned in the depredations of the outbreak, and to report what annuities would now be due to the loyal members if the act of forfeiture had not been passed. The court was "further authorized to further consider, ascertain, and report to Congress what lands, appropriations, payments, gratuities, or other provisions have been made to or for said bands or to any of the members thereof since said Act of forfeiture was passed." "And if said court shall find that said bands preserved their loyalty to the United States, they shall ascertain and state the amount that would be due to said Indians on account of said annuities had said Act of Congress of February sixteenth, eighteen hundred and sixty-three, not been passed, stating in connection therewith what credits shall be charged against said annuities on account of the lands, appropriations, payments, gratuities or other provisions as hereinbefore stated." A petition was filed, but the court found that it was impossible to determine what members of these bands remained loyal to the United States; but that a large majority, if not all, aided and abetted the massacres and depredations. 39 C. Cls. Rep. 172. Thereupon the later act was passed, referring to the above petition, and the present supplemental petition was filed.

The Court of Claims stated the account and ordered a judgment for the balance, from which both parties appeal. The account is as follows:

CREDITS.

By fifty installments of $73,600, treaty July 23, 1851.....	$3,680,000 00
By amount allowed to chiefs for removal and subsistence by said treaty.....	275,000 00
By amount allowed to chiefs for manual labor schools, etc...	30,000 00
	$3,985,000 00

DEBITS.

Item.	
1. To twelve installments of annuity appropriated under the treaty of 1851 (10 Stat. L., 949) prior to outbreak, less $104.66 returned to the Treasury ($883,200—104.66),	

Item.			
	Amount credits carried forward		3,985,000 00
	$883,095.34, less $122,509.12 appropriated but not paid at date of forfeiture	$760,586 22	
	(See p. 17, Senate Doc. 68, for various statutes.)		
2.	To amount paid to the chiefs for removal and subsistence, and for manual labor schools under the treaty of 1851	305,000 00	
3.	To amount appropriated and unpaid at date of forfeiture act, but forfeited and afterwards expended for damages growing out of the outbreak of 1862–3 (12 Stat. L., 652)	122,509 12	
4.	To one-half of $100,000 advance annuity appropriated February 16, 1863 (12 Stat. L., 652)	50,000 00	
5.	To one-half amount paid to scouts and soldiers of the four bands (26 Stat. L., 1038; 27 Stat. L., 624; 28 Stat. L., 889)	103,176 65	
6.	To one-half amount expended for damages and for support, but not for removal	807,824 71	
	(See p. 20, Senate Doc. 68, for various statutes.)		
7.	To amount paid for support, etc., under the treaty of February 19, 1867	464,953 40	
	(See p. 17, Senate Doc. 68, for various statutes making the appropriations.)		
8.	To amounts paid under agreement of December 12, 1889	581,978 37	
			$3,196,028 47
	Leaving a balance due of		$788,971 53

The amount of the unpaid annuities is not in dispute, but the questions raised by the appeals concern the items of set-off and involve the principle upon which they are to be charged. The Indians contend that only sums specially charged by Congress against annuities come into the account, while the United States goes to the opposite extreme. We agree with the Court of Claims that the contention of the Indians, at least, must be rejected, for the reason stated by it, that if it was correct Congress did not need the help of the court; the figures were patent. Furthermore the language of the act implies that the court is called upon for an active exercise of judicial reason

and to do something that has not yet been done. It is "to set off" all payments to said bands or to any members thereof since the acts of forfeiture which are properly chargeable against the unpaid annuities. The result is assumed to be uncertain, as the judgment is to be for the balance, if any is found due.

There are no general rules of law established for deciding what payments properly are chargeable against Indian annuities. The fact that payments of certain kinds, or gratuities, have been granted in time of peace in addition to annuities is not conclusive. There had been an Indian war. The United States in passing these acts was doing what it pleased. In the earlier statute it plainly indicated that the most sweeping deductions, including gratuities, were to be made from its possible bounty. In the later one it qualified the deduction of payment by the words "which are properly chargeable against said unpaid annuities," it is true. But the careful particularity of the direction to set-off "all payments or other provisions of every name and nature," even if qualified as to the bands as well as to the particular members to whom some payments properly left out of consideration had been made, shows that large set-offs still were expected. It is said that the court was to proceed "as if the act of forfeiture had not been passed." But that was only in ascertaining the amount of annuities that would be due in that case and in rendering a judgment that otherwise would be unauthorized. Those words do not require the court to treat all payments upon the fiction that nothing had happened, or to give them a different complexion from that which they had when they were made. Common sense, the then recent decision of the Court of Claims as to the general conduct of the bands and the position of the words in the section, show that they could have had no such intent.

It follows from what we have said and from a consideration of the nature of the payments and the circumstances, which the Court of Claims rightly considered, as well as from the treaties and acts of Congress, that the claimants properly were charged with their share of payments on account of depredations. On

general grounds of fairness such payments are properly chargeable against the sum that the United States by its condonation consented to pay. Congress as well as the court is of that opinion, for the appropriation of the annuities to the indemnification of persons whose property had been destroyed by the Indians was declared just, and two-thirds of the sums payable then and the next year were applied to that end by the forfeiture act of February 16, 1863. 12 Stat. 652. In this connection the act is as important as ever it was. See further act of March 3, 1885, c. 320. 23 Stat. 344. Again, by a treaty of June 19, 1858, article 6, 12 Stat. 1037, 1039, later than that granting the annuities, which was made in 1851, the Indians had agreed that in case of depredation it should be paid for out of their moneys in the hands of the United States. The effect of this treaty as against those breaking it is not to be got rid of by dignifying their acts with the name of war, while at the same time the court is asked to treat all that was done by the United States as if there had been unbroken peace. The successful party to a war is apt to demand indemnity, and when that party is doing an act of grace and restoring annuities forfeited because of damage done it is absurd to ask that it should leave consideration of the charge for damage out of account. Some further arguments of detail may be passed unnoticed by reason of the general point of view from which we regard the case. We may add here that, as we do not go behind the findings of fact, *McClure* v. *United States*, 116 U. S. 145; *District of Columbia* v. *Barnes*, 197 U. S. 146, 150, there has been some waste of energy in arguing from public documents of which we are asked to take notice, and that we see no reason to revise the finding that the claimants should be charged with half the total payments of which their share is to be set off.

We pass to the items of the account. Item 1 of the debits is admitted to be correct, except that the court twice deducted $104.66, once expressly, the second time in the $122,509.12 from the gross debits, $883,200. The item should be $760,690.88.

We perceive no reason for questioning item 2.

Items 3 and 4 are disposed of by what we have said. The United States admits a repetition of the mistake mentioned under item 1 in item 4.

Item 5 is disputed only as charging one-half instead of one-sixth, alleged to be the fair proportion, upon evidence properly not reported, and found by the Court of Claims to be untrustworthy. As we have said, we see no reason for not accepting the conclusion of the Court of Claims.

Item 6 needs mention only because it embraces expenditures for support, which, it is said, by the general practice would be granted alongside of the annuities were they running. The question of damages has been disposed of. The other will be dealt with in connection with item 7.

Item 7 is one of the chief objects of the claimants' attack. By the treaty of February 19, April 22, 1867, 15 Stat. 505, the claimants ceded rights of way to the United States, and the United States, in consideration of the cession, the services of the friendly bands, and the forfeiture of their annuities, purported to set aside for them certain reservations. This was by Articles 2–4. Article 6 was as follows: "And further, in consideration of the destitution of said bands of Sisseton and Warpeton Sioux, parties hereto, resulting from the confiscation of their annuities and improvements, it is agreed that Congress will, in its own discretion, from time to time, make such appropriations as may be deemed requisite to enable said Indians to return to an agricultural life," etc. Payments under Article 6 make up item 7. It is argued that the Indians already owned the land set aside for them, that there was no consideration for their grant except the promise in Article 6, that the destitution of the Indians was not a consideration to the United States and hence again that the promise should be set against the cession and that they ought not to be charged with this sum. But without going outside the record for other matters of dispute, it is enough to say that the question is not as to the facts, but as to the assumption and purport of the document. The treaty makes the assignment of the reserva-

tion, be it better or worse, the consideration for the cession by the Indians, and the agreement in Article 6 a gratuitous promise induced by consideration of the Indians' want. The words "in consideration of" do not import a technical consideration, such as is needed in a private bargain not under seal, but the inducement that led Congress to make the promise. It indicates the only inducement, and a different one cannot be substituted in its place, on the ground that assumpsit would not lie on the one named.

By the words of the treaty then the sixth article promised the payments in question because the claimants were in want because their annuities had been confiscated. Or, striking out the middle term and looking to the result, the payments were made because the annuities had been confiscated; that is to say, so far as appears, they would not have been made except for that cause. But, if so, then, when the annuities are restored, the sums paid on the footing that the annuities were lost must be taken into the account. It does not matter whether the Indians had a demand in conscience against the United States for their cession or not, or whether or not such demands were settled by subsequent treaties; the sum stood on its own ground and must be dealt with on the footing on which it was paid. If further argument is necessary one might be drawn from the reference to House Document 1953, Fiftieth Congress, First Session, in Article 3 of the agreement of December 12, 1889, ratified by the act of March 3, 1891, c. 543, § 26, 26 Stat. 989, pp. 1035, 1037, an act not repealed by those under which this suit is brought. But as this document is not made part of the report and is said not to have been before the Court of Claims, we do not care to invoke for this or other purposes a help that the decision does not seem to us to need.

As to the payments for support charged in item 6, they are to be considered in the light of the act of forfeiture and the attitude of Congress indicated in Article 6 of the treaty just discussed. The Indians were in the position of people having no recognized claim. They were dependents because of the

forfeiture. Payments made for their support in such circumstances cannot be compared to those that may have been made to tribes in good standing. It is mere conjecture to inquire whether similar allowances might have been granted if they had kept the peace. They were made in fact because by reason of the forfeiture the Indians must be supported or starve. The considerations that apply to Article 6 apply, although it must be admitted less strongly, to other payments for support and the like. The act of 1901, 31 Stat. 1058, p. 1078, cannot be left wholly out of sight in construing that of 1906, and as has been said, that act contemplated that every gratuity should be brought in. We are not prepared to overrule the decision of the Court of Claims on this point.

Item 8 is not disputed. There are some further matters of detail which we do not discuss, but have not failed to consider. Upon the whole case and in view of the cross appeal of the United States we are of opinion that under the judgment below the claimants came off as well as they reasonably could expect. If we were to follow the claimants outside the record, some of the questions raised by the United States might be serious, but as the case stands we are of opinion that the judgment should be affirmed, with the correction mentioned under item 1.

Judgment affirmed.

MR. JUSTICE MCKENNA dissents.

DISCONTO GESELLSCHAFT *v.* UMBREIT.

ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY (BRANCH NO. 1), STATE OF WISCONSIN.

No. 63. Argued December 10, 11, 1907.—Decided February 24, 1908.

It is too late to raise the Federal question on motion for rehearing in the state court, unless that court entertains the motion and expressly passes on the Federal question.

While aliens are ordinarily permitted to resort to our courts for redress of wrongs and protection of rights, the removal of property to another jurisdiction for adjustment of claims against it is a matter of comity and not of absolute right, and, in the absence of treaty stipulations, it is within the power of a State to determine its policy in regard thereto.

The refusal by a State to exercise comity in such manner as would impair the rights of local creditors by removing a fund to a foreign jurisdiction for administration does not deprive a foreign creditor of his property without due process of law or deny to him the equal protection of the law; and so held as to a judgment of the highest court of Wisconsin holding the attachment of a citizen of that State superior to an earlier attachment of a foreign creditor.

While the treaty of 1828 with Prussia has been recognized as being still in force by both the United States and the German Empire, there is nothing therein undertaking to change the rule of national comity that permits a country to first protect the rights of its own citizens in local property before permitting it to be taken out of its jurisdiction for administration in favor of creditors beyond its borders.

127 Wisconsin, 676, affirmed.

THE facts are stated in the opinion.

Mr. F. C. Winkler for plaintiff in error:

The Federal questions on both points were brought before the Supreme Court of the State and claim made under them in the argument for rehearing. The motion was denied and opinion rendered expressly overruling the claim based on the treaties and by necessary implication, also the claim based on the Constitution of the United States.

The rulings upon them are therefore subject to review. *McKay* v. *Kalyton*, 204 U. S. 458; *Leigh* v. *Green*, 193 U. S.

79; *Columbia Water Power Co.* v. *Columbia Street Railway Co.*, 172 U. S. 465.

The plaintiff's suit was brought under the statutes of Wisconsin. The defendant was in Wisconsin. The property attached had been brought by him and placed on deposit in the State of Wisconsin. No court in the world could exercise jurisdiction either over his person or over his property except the courts of Wisconsin. No statute debars an alien from seeking justice in Wisconsin courts where the protection of his rights requires it.

The plaintiff is denied the benefit of the proceedings and of its judgment because being a foreigner it has no rights in the State of Wisconsin except such as "comity," which is "good nature," will accord it. Even under the ruling of the state court that the right of the plaintiff to pursue its absconding debtor into this country and to invoke the latter's remedial processes against him rests upon the comity, it is, however, the comity of the sovereignty, not of the court. Wharton, Conflict of Laws, § 1*a*.

Comity cannot be given or withheld at will. Civilization demands its exercise where justice requires it. It cannot be denied, in whole or in part, except on clear, clean principles of justice.

Under the treaty between the United States and the Kingdom of Prussia, made in 1828, if a proper and liberal interpretation be given thereto, the plaintiff in error is entitled to the same standing in court as a citizen of the United States would be in a like case. Public Treaties (Govt. Printing Office, 1875), p. 656; *Tucker* v. *Alexandroff*, 183 U. S. 424, 437. The cases cited by the Supreme Court of Wisconsin, viz.: *Eingartner* v. *Illinois Steel Co.*, 94 Wisconsin, 70; *Gardner* v. *Thomas*, 14 Johnson, 134; *Johnson* v. *Dalton*, 1 Cowen, 543; *DeWitt* v. *Buchanan*, 54 Barb. 31; *Olsen* v. *Schierenberg*, 3 Daly, 100; *Burdick* v. *Freeman*, 120 N. Y. 421, can easily be distinguished from the case at bar.

The state court erred in stating that plaintiff sues as the

agent of a foreign trustee in bankruptcy. That trustee has and claims no rights to the bankrupt's property in Wisconsin. Foreign law does not operate on property beyond its jurisdiction. *Segnitz* v. *G. C. Banking & Trust Co.*, 117 Wisconsin, 171, 176.

The property in question was not transferred to the trustee and that left its legal title in the debtor. The plaintiff being a creditor brought suit on his own claim in his own right.

The circumstance that the creditor after suit commenced promised to turn over the proceeds he should recover to the trustee for distribution does not impair his rights as a creditor.

The course of the plaintiff in no way "sets at naught" the rule of our law that the trustee in bankruptcy does not obtain title to property in Wisconsin by reason of the proceedings in Germany. No claim is made on this score in the intervenor's answer.

The decision of the Supreme Court of Wisconsin deprives the plaintiff of its property rights without due process of law, in violation of the Constitution of the United States.

The judgment which the intervenor obtained, although in the form of the statute, is in point of fact no better than an *ex parte* affidavit. The defendant was to the intervenor's knowledge a prisoner in Germany. The only notice given was by publication of the summons in a Milwaukee paper. No copy of the summons and complaint was ever mailed to the defendant as required by § 2640, Statutes of Wisconsin.

The defendant Terlinden, when the intervenor's suit was commenced against him, had not the slightest interest in the property sought to be reached. All his interest had passed to the plaintiff. The plaintiff was the only party adversely interested to the intervenor. It had an adjudicated lien good against all the world (except the claim of the intervenor).

An alien, too, is entitled to due process of law under the Constitution of the United States. *In re Ah Fung*, 3 Sawyer, 144; *Ah Kow* v. *Nunan*, 5 Sawyer, 562; *In re Ah Chung*, 2 Fed. Rep. 733.

The judgment against Terlinden was, as against this plaintiff, absolutely without process of law. It adjudicated nothing. The plaintiff was not a party therein, nor was it notified, and it had no opportunity to defend against it.

Mr. Joseph B. Doe for defendant in error:

Domestic creditors will be protected to the extent of not allowing the property or funds of a non-resident debtor to be withdrawn from the State before domestic creditors have been paid. Every country will first protect its own citizens. *Catlin* v. *Silver Plate Co.*, 123 Indiana, 477; *Chafey* v. *Fourth Nat. Bank*, 71 Maine, 414, 524; *Bagby* v. *Railway Co.*, 86 Pa. St. 291; *Lycoming Fire Ins. Co.* v. *Wright*, 55 Vermont, 526; *Thurston* v. *Rosenfelt*, 42 Missouri, 474; *Willitts* v. *Waite*, 25 N. Y. 577.

Citizens and residents of the country where insolvency proceedings have been instituted are bound by such proceedings and cannot pursue the property of the insolvent debtor in another country. *Cole* v. *Cunningham*, 133 U. S. 107; *Linville* v. *Hadden*, 88 Maryland, 594; *Chafey* v. *Fourth Nat. Bank*, *supra; Einer* v. *Beste*, 32 Missouri, 240; *Long* v. *Girdwood*, 150 Pa. St. 413; *Bacon* v. *Horne*, 123 Pa. St. 452.

A creditor, by proving his claim in bankruptcy or any insolvency proceedings, submits to the jurisdiction of the court in which the proceeding is pending and cannot pursue his remedy elsewhere. *Clay* v. *Smith*, 3 Peters, 411; *Cooke* v. *Coyle*, 113 Massachusetts, 252; *Ormsby* v. *Dearborn*, 116 Massachusetts, 386; *Batchelder* v. *Batchelder*, 77 N. H. 31; *Wilson* v. *Capuro*, 41 California, 545; *Wood* v. *Hazen*, 10 Hun, 362.

Where both parties, plaintiff and defendant, are residents of a foreign State, the plaintiff cannot come into our country and obtain an advantage by our law which he could not obtain by his own.

If he seeks to nullify the law of his own State and asks our courts to aid him in so doing, he cannot have such assistance, if for no other reason than that it is forbidden by public policy

and the comity which exists between states and nations, which comity will always be enforced when it does not conflict with the rights of domestic citizens. *Bacon* v. *Horne, supra; In re Waite*, 99 N. Y. 433; *Bagby* v. *Railway Co., supra.*

Citizens of a foreign State or country will not be aided by the courts of this country to obtain, by garnishment, a preference of their claim against a foreign debtor, in disregard of proceedings in their own country for the sequestration of the debtor's estate and the appointment of a trustee thereof in bankruptcy. *Long* v. *Girdwood, supra.*

It is the uniform rule and doctrine of all courts that the principles of comity do not require that courts confer powers upon a foreign receiver or trustee in bankruptcy or permit him to bring and maintain actions in this State that interfere with and impair the rights of domestic creditors. *Humphreys* v. *Hopkins*, 81 California, 551; *Ward* v. *Pac. Mutual Life Ins. Co.*, 135 California, 235; *Hunt* v. *Columbian Ins. Co.*, 55 Maine, 290; *Pierce* v. *O'Brien*, 129 Massachusetts, 314; *Rogers* v. *Riley*, 80 Fed. Rep. 759; *Catlin* v. *Wilcox Silver Plate Co.*, 123 Indiana, 477.

Mr. Justice Day delivered the opinion of the court.

The Disconto Gesellschaft, a banking corporation of Berlin, Germany, began an action in the Circuit Court of Milwaukee County, Wisconsin, on August 17, 1901, against Gerhard Terlinden and at the same time garnisheed the First National Bank of Milwaukee. The bank appeared and admitted an indebtedness to Terlinden of $6,420. The defendant in error Umbreit intervened and filed an answer, and later an amended answer.

A reply was filed, taking issue upon certain allegations of the answer, and a trial was had in the Circuit Court of Milwaukee County, in which the court found the following facts:

"That on the 17th day of August, 1901, the above-named plaintiff, the Disconto Gesellschaft, commenced an action in

this court against the above-named defendant, Gerhard Terlinden, for the recovery of damages sustained by the tort of the said defendant, committed in the month of May, 1901; that said defendant appeared in said action by A. C. Umbreit, his attorney, on August 19, 1901, and answered the plaintiff's complaint; that thereafter such proceedings were had in said action that judgment was duly given on February 19, 1904, in favor of said plaintiff, Disconto Gesellschaft, and against said defendant, Terlinden, for $94,145.11 damages and costs; that $85,371.49, with interest from March 26, 1904, is now due and unpaid thereon; that at the time of the commencement of said action, to wit, on August 17, 1901, process in garnishment was served on the above-named garnishee, First National Bank of Milwaukee, as garnishee of the defendant Terlinden.

"That on August 9, 1901, and on August 14, 1901, a person giving his name as Theodore Grafe deposited in said First National Bank of Milwaukee the equivalent of German money aggregating $6,420.00 to his credit upon account; that said sum has remained in said bank ever since, and at the date hereof with interest accrued thereon amounted to $6,969.47.

"That the defendant Gerhard Terlinden and said Theodore Grafe, mentioned in the finding, are identical and the same person.

"That the interpleaded defendant, Augustus C. Umbreit, on March 21, 1904, commenced an action in this court against the defendant Terlinden for recovery for services rendered between August 16, 1901, and February 1, 1903; that no personal service of the summons therein was had on the said defendant; that said summons was served by publication only and without the mailing of a copy of the summons and of the complaint to said defendant; that said defendant did not appear therein; that on June 11, 1904, judgment was given in said action by default in favor of said Augustus C. Umbreit and against said defendant Terlinden for $7,500 damages, no part whereof has been paid; that at the time of the commencement of said action process of garnishment was served, to wit, on March 22,

1904, on the garnishee, First National Bank of Milwaukee, as garnishee of said defendant Terlinden.

"That the defendant Terlinden at all the times set forth in finding number one was and still is a resident of Germany; that about July 11, 1901, he absconded from Germany and came to the State of Wisconsin and assumed the name of Theodore Grafe; that on August 16, 1901, he was apprehended as a fugitive from justice upon extradition proceedings duly instituted against him, and was thereupon extradited to Germany.

"That the above-named plaintiff, The Disconto Gesellschaft, at all the times set forth in the findings was, ever since has been and still is a foreign corporation, to wit, of Germany, and during all said time had its principal place of business in Berlin, Germany; that the above-named defendant, Augustus C. Umbreit, during all said times was and still is a resident of the State of Wisconsin.

"That on or about the 27th day of July, 1901, proceedings in bankruptcy were instituted in Germany against said defendant Terlinden, and Paul Hecking appointed trustee of his estate in such proceedings on said date; that thereafter, and on or after August 21, 1901, the above-named plaintiff, The Disconto Gesellschaft, was appointed a member of the committee of creditors of the defendant Terlinden's personal estate, and accepted such appointment; and that the above-named plaintiff, The Disconto Gesellschaft, presented its claim to said trustee in said bankruptcy proceedings; that said claim had not been allowed by said trustee in January, 1902, and there is no evidence that it has since been allowed; that nothing has been paid upon said claim; that said claim so presented and submitted is the same claim upon which action was brought by the plaintiff in this court and judgment given, as set forth in finding No. 1; that said action was instituted by said plaintiff, The Disconto Gesellschaft, through the German consul in Chicago; and that the steps so taken by the plaintiff, The Disconto Gesellschaft, had the consent and approval of Dr. Paul Hecking as trustee in bankruptcy, so appointed in the bank-

ruptcy proceedings in Germany, and that after the commencement of the same the plaintiff, The Disconto Gesellschaft, agreed with said trustee that the moneys it should recover in said action should form part of the said estate in bankruptcy and be handed over to said trustee; that, among other provisions, the German bankrupt act contained the following: 'Sec. 14, Pending the bankruptcy proceedings, neither the assets nor any other property of the bankrupt are subject to attachment or execution in favor of individual creditors.' "

Upon the facts thus found the Circuit Court rendered a judgment giving priority to the levy of the Disconto Gesellschaft for the satisfaction of its judgment out of the fund attached in the hands of the bank. Umbreit then appealed to the Supreme Court of Wisconsin. That court reversed the judgment of the Circuit Court, and directed judgment in favor of Umbreit, that he recover the sum garnisheed in the bank. 127 Wisconsin, 651. Thereafter a remittitur was filed in the Circuit Court of Milwaukee County and a final judgment rendered in pursuance of the direction of the Supreme Court of Wisconsin. This writ of error is prosecuted to reverse that judgment. At the same time a decree in an equity suit, involving a fund in another bank, was reversed and remanded to the Circuit Court. This case had been heard, by consent, with the attachment suit. With it we are not concerned in this proceeding.

No allegation of Federal rights appeared in the case until the application for rehearing. In this application it was alleged that the effect of the proceedings in the state court was to deprive the plaintiff in error of its property without due process of law, contrary to the Fourteenth Amendment, and to deprive it of certain rights and privileges guaranteed to it by treaty between the Kingdom of Prussia and the United States. The Supreme Court of Wisconsin, in passing upon the petition for rehearing and denying the same, dealt only with the alleged invasion of treaty rights, overruling the contention of the plaintiff in error. 127 Wisconsin, 676. It is well settled in this court that it is too late to raise Federal questions review-

able here by motions for rehearing in the state court. *Pim* v. *St. Louis*, 165 U. S. 273; *Fullerton* v. *Texas*, 196 U. S. 192; *McMillen* v. *Ferrum Mining Company*, 197 U. S. 343, 347; *French* v. *Taylor*, 199 U. S. 274, 278. An exception to this rule is found in cases where the Supreme Court of the State entertains the motion and expressly passes upon the Federal question. *Mallett* v. *North Carolina*, 181 U. S. 589; *Leigh* v. *Green*, 193 U. S. 79.

Conceding that this record sufficiently shows that the Supreme Court heard and passed upon the Federal questions made upon the motion for rehearing, we will proceed briefly to consider them.

The suit brought by the Disconto Gesellschaft in attachment had for its object to subject the fund in the bank in Milwaukee to the payment of its claim against Terlinden. The plaintiff was a German corporation and Terlinden was a German subject. Umbreit, the intervenor, was a citizen and resident of Wisconsin. The Supreme Court of Wisconsin adjudged that the fund attached could not be subjected to the payment of the indebtedness due the foreign corporation as against the claim asserted to the fund by one of its own citizens, although that claim arose after the attachment by the foreign creditor; and, further, that the fact that the effect of judgment in favor of the foreign corporation would be, under the facts found, to remove the fund to a foreign country, there to be administered in favor of foreign creditors, was against the public policy of Wisconsin, which forbade such discrimination as against a citizen of that State.

Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights. 4 Moore, International Law Digest, § 536, p. 7; Wharton on Conflict of Laws, § 17.

But what property may be removed from a State and subjected to the claims of creditors of other States, is a matter of comity between nations and states and not a matter of abso-

lute right in favor of creditors of another sovereignty, when citizens of the local state or country are asserting rights against property within the local jurisdiction.

"'Comity,' in the legal sense," says Mr. Justice Gray, speaking for this court in *Hilton* v. *Guyot*, 159 U. S. 113, 163, "is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows in its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

In the elaborate examination of the subject in that case many cases are cited and the writings of leading authors on the subject extensively quoted as to the nature, obligation and extent of comity between nations and states. The result of the discussion shows that how far foreign creditors will be protected and their rights enforced depends upon the circumstances of each case, and that all civilized nations have recognized and enforced the doctrine that international comity does not require the enforcement of judgments in such wise as to prejudice the rights of local creditors and the superior claims of such creditors to assert and enforce demands against property within the local jurisdiction. Such recognition is not inconsistent with that moral duty to respect the rights of foreign citizens which inheres in the law of nations. Speaking of the doctrine of comity, Mr. Justice Story says: "Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded." Story on Conflict of Laws, § 33.

The doctrine of comity has been the subject of frequent discussion in the courts of this country when it has been sought to assert rights accruing under assignments for the benefit of creditors in other States as against the demands of local creditors, by attachment or otherwise in the State where the property is situated. The cases were reviewed by Mr. Justice Brown,

delivering the opinion of the court in *Security Trust Company* v. *Dodd, Mead & Co.*, 173 U. S. 624, and the conclusion reached that voluntary assignments for the benefit of creditors should be given force in other States as to property therein situate, except so far as they come in conflict with the rights of local creditors, or with the public policy of the State in which it is sought to be enforced; and, as was said by Mr. Justice McLean in *Oakey* v. *Bennett*, 11 How. 33, 44, "national comity does not require any government to give effect to such assignment [for the benefit of creditors] when it shall impair the remedies or lessen the securities of its own citizens."

There being, then, no provision of positive law requiring the recognition of the right of the plaintiff in error to appropriate property in the State of Wisconsin and subject it to distribution for the benefit of foreign creditors as against the demands of local creditors, how far the public policy of the State permitted such recognition was a matter for the State to determine for itself. In determining that the policy of Wisconsin would not permit the property to be thus appropriated to the benefit of alien creditors as against the demands of the citizens of the State, the Supreme Court of Wisconsin has done no more than has been frequently done by nations and states in refusing to exercise the doctrine of comity in such wise as to impair the right of local creditors to subject local property to their just claims. We fail to perceive how this application of a well known rule can be said to deprive the plaintiff in error of its property without due process of law.

Upon the motion for rehearing the plaintiff in error called attention to two alleged treaty provisions between the United States and the Kingdom of Prussia, the first from the treaty of 1828, and the second from the treaty of 1799. As to the last mentioned treaty the following provision was referred to:

"Each party shall endeavor by all the means in their power to protect and defend all vessels and other effects belonging to the citizens or subjects of the other, which shall be within the extent of their jurisdiction by sea or by land."

The treaty of 1799 expired by its own terms on June 2, 1810, and the provision relied upon is not set forth in so much of the treaty as was revived by article 12 of the treaty of May 1, 1828. See Compilation of Treaties in Force, 1904, prepared under resolution of the Senate, pp. 638 *et seq.* If this provision of the treaty of 1799 were in force we are unable to see that it has any bearing upon the present case.

Article one of the treaty of 1828 between the Kingdom of Prussia and the United States is as follows:

"There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective states shall mutually have liberty to enter the ports, places and rivers of the territories of each party wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing."

This treaty is printed as one of the treaties in force in the compilation of 1904, p. 643, and has undoubtedly been recognized by the two governments as still in force since the formation of the German Empire. See *Terlinden* v. *Ames*, 184 U. S. 270; Foreign Relations of 1883, p. 369; Foreign Relations of 1885, pp. 404, 443, 444; Foreign Relations of 1887, p. 370; Foreign Relations of 1895, part one, 539.

Assuming, then, that this treaty is still in force between the United States and the German Empire, and conceding the rule that treaties should be liberally interpreted with a view to protecting the citizens of the respective countries in rights thereby secured, is there anything in this article which required any different decision in the Supreme Court of Wisconsin than that given? The inhabitants of the respective countries are to be at liberty to sojourn and reside in all parts whatsoever of said territories in order to attend to their affairs, and they shall enjoy, to that effect, the same security and protection as

the natives of the country wherein they reside, upon submission to the laws and ordinances there prevailing. It requires very great ingenuity to perceive anything in this treaty provision applicable to the present case. It is said to be found in the right of citizens of Prussia to attend to their affairs in this country. The treaty provides that for that purpose they are to have the same security and protection as natives in the country wherein they reside. Even between States of the American Union, as shown in the opinion of Mr. Justice Brown in *Security Trust Co.* v. *Dodd, Mead & Co.*, 173 U. S., *supra*, it has been the constant practice not to recognize assignments for the benefit of creditors outside the State, where the same came in conflict with the rights of domestic creditors seeking to recover their debts against local property. This is the doctrine in force as against natives of the country residing in other states, and it is this doctrine which has been applied by the Supreme Court of Wisconsin to foreign creditors residing in Germany. In short, there is nothing in this treaty undertaking to change the well-recognized rule between states and nations which permits a country to first protect the rights of its own citizens in local property before permitting it to be taken out of the jurisdiction for administration in favor of those residing beyond their borders.

The judgment of the Circuit Court of Milwaukee County entered upon the remittitur from the Supreme Court of Wisconsin is

Affirmed.

NORTHERN PACIFIC RAILWAY COMPANY *v.* STATE OF MINNESOTA *ex rel.* THE CITY OF DULUTH.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 92. Argued December 20, 23, 1907.—Decided February 24, 1908.

In cases arising under the contract clause of the Federal Constitution this court determines for itself, irrespective of the decision of the state court, whether a contract exists and whether its obligation has been impaired, and if plaintiff in error substantially sets up a claim of contract with allegations of its impairment by state or municipal legislation, the judgment of the state court is reviewable by this court under § 709, Rev. Stat.

Municipal legislation passed under supposed legislative authority from the State is within the prohibition of the Federal Constitution and void if it impairs the obligation of a contract.

While an ordinance merely denying liability under an existing contract does not necessarily amount to an impairment of the obligation of that contract within the meaning of the Federal Constitution, where the ordinance requires expenditure of money by one relieved therefrom by a contract, a valid contract claim is impaired and this court has jurisdiction.

The right to exercise the police power is a continuing one that cannot be limited or contracted away by the State or its municipality, nor can it be destroyed by compromise as it is immaterial upon what consideration the attempted contract is based.

The exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and uncompensated obedience to an ordinance passed in its exercise is not violative of property rights protected by the Federal Constitution; *held*, that an ordinance of a municipality of that State, valid under the law of that State as construed by its highest court, compelling a railroad to repair a viaduct constructed, after the opening of the railroad, by the city in pursuance of a contract relieving the railroad, for a substantial consideration, from making any repairs thereon for a term of years was not void under the contract, or the due process, clause of the Constitution.

98 Minnesota, 429, affirmed.

THE facts are stated in the opinion.

Mr. Charles W. Bunn for plaintiff in error:

This court has jurisdiction. The Supreme Court of Minnesota

held that there was no contract, and therefore did not come to the question whether a law of the State violated a contract. But this court has jurisdiction of the question, and will decide for itself, whether there was a contract. *Stearns* v. *Minnesota*, 179 U. S. 223, 232 and cases cited.

If the contract was valid, it was violated by a law of the State, *i. e.*, the city ordinance or resolution of July 13, 1903, which was a legislative act in that it was a legislative determination, of what repairs should be made, and that the railway company and not the city should make them.

The action of the city was not confined to a denial of the validity, or of the binding force in some particular of the contract, as in *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142.

City laws are state laws within the meaning of the Federal Constitution. *Mercantile Trust Co.* v. *Columbus*, 203 U. S. 311, and cases cited, p. 320. The jurisdiction of this court is sustained by *Waterworks Company* v. *Vicksburg*, 185 U. S. 65, 81; *Waterworks Company* v. *Louisiana*, 185 U. S. 336, 350, and *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517, 530, 531; and see *Dawson* v. *Columbia Trust Company*, 197 U. S. 178.

As to the merits: Plaintiff in error's predecessor was upon the ground at Lake avenue before the street was made, and the public and not the railway was therefore rightfully chargeable with the whole expense of providing for the street travel. *Minneapolis* v. *St. Paul, M. & M. Ry. Co.*, 35 Minnesota, 131; *Boston & Albany R. R. Co.* v. *Cambridge*, 159 Massachusetts, 283, 287; *St. Paul, M. & M. Ry. Co.* v. *District Court*, 42 Minnesota, 247; *State* v. *Ensign*, 54 Minnesota, 372; *St. Paul* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 85 Minnesota, 416.

The foundation of the conclusion below was, that in 1891 when the contract was made the law of the State imposed upon the railway the whole burden of building and repairing the bridge. For that reason the contract dividing the burden was held bad. Except for the rule of law just stated, laid down by the Minnesota court for the first time in this case, that

court would have held the contract good, for it does not differ in principle from the contract held good in the last case cited. See 85 Minnesota, 418.

As to the validity of an alleged contract, however, this court follows the law of the State as it existed when the contract was consummated and will disregard later decisions to the contrary. *Ohio Life Insurance & Trust Company* v. *Debolt*, 16 How. 416. See, also, *Taylor* v. *Ypsilanti*, 105 U. S. 60, 71; *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558, 575; *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 492; *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 517, 518.

Considering the then rights of the parties as between each other, which were in so many respects doubtful, they were certainly fair matters of compromise; and to say that a compromise honestly entered into and fully carried out is without consideration because, some fifteen years after, the Supreme Court of the State for the first time holds that the whole obligation could have been thrown upon the railway, is to violate the fundamental principle upon which compromise agreements are founded. See *Stapleton* v. *Stapleton*, 1 Atkyns, 12; 1 Chitty on Contracts (11th ed.), 47, note; *Hager* v. *Thompson*, 1 Black, 80, 93; *United States* v. *Child*, 12 Wall. 232; *Demars* v. *Musser-Sauntry Land Co.*, 37 Minnesota, 418.

Mr. Bert Fesler for defendant in error:

As to the jurisdiction: "This court does not obtain jurisdiction to review a judgment of a state court because that judgment impairs or fails to give effect to a contract. The state court must give effect to some subsequent statute or state constitution which impairs the obligation of the contract, and the judgment of that court must rest on the statute either expressly or by necessary implication." *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 350, 351. See also *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142.

The inhibitions of the Constitution upon the impairment

of the obligation of contracts, etc., by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. *New York & New England R. R. Co.* v. *Bristol*, 151 U. S. 556, 567. Nor do those constitutional provisions apply to contracts made by parties dealing with a department of government concerning the future exercise of governmental power conferred by legislative acts, where the subject matter of the contract is one which affects the safety and welfare of the public. *Board of Education* v. *Phillips*, 67 Kansas, 549.

As to the merits: The rule stated by counsel for plaintiff in error, that upon the validity of an alleged contract this court follows the law of the State as it existed when the contract was made and will disregard later decisions to the contrary, is limited to decisions of the state court as to the interpretation or validity of its own constitution and statute laws. It does not apply to the general law not found in written constitutions or statutes. *Ohio Life Insurance and Trust Company* v. *Debolt*, 16 How. 416, distinguished.

The decisions of the state court, at the time the contract of 1891 was made, were not contrary to the decision in this case.

The Minnesota court held, on the facts in the case at bar, that the viaduct is a safety device. It is not claimed that that portion of the decision is contrary to any prior decision of this court. *State ex rel. City of Minneapolis* v. *St. Paul, Minneapolis & Manitoba Railway Company*, 35 Minnesota, 131, and *State ex rel. St. Paul, Minneapolis & Manitoba Railway Company* v. *District Court*, 42 Minnesota, 247, discussed and distinguished.

Even if the contract of 1891 related to matters which were fair subjects of compromise, the law with respect to the authority or power of the city to make it is not affected by that consideration. It was an attempt on the part of the city to bind itself to keep the viaduct in repair forever. But under the decisions that duty devolved upon the railway company, and this being so, the contract of 1891 was not a valid one, be-

cause where the duty rests upon a railway corporation to restore a public way to its former condition of usefulness, a municipality cannot enter into a valid contract with such corporation whereby it surrenders its power to compel the performance of such duty. *State ex rel. St. Paul* v. *Minnesota Transfer Ry. Co.*, 80 Minnesota, 108. See also *New York & New England R. R. Co.* v. *Bristol*, 151 U. S. 556.

A municipality contracts away its police power when it contracts away the right to say who shall pay for compliance with an exercise of the police power. It is uncompensated compliance with the requirements of governmental authority to preserve the safety of crossings that the law requires. *State ex rel. Minneapolis* v. *St. Paul, M. & M. Ry. Co.*, 35 Minnesota, 131; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 571; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 254; *New Orleans Gaslight Co.* v. *Drainage Commission*, 197 U. S. 453.

Mr. Justice Day delivered the opinion of the court.

This case comes here from the Supreme Court of Minnesota, to review a judgment of that court affirming a judgment in mandamus of the St. Louis County Court in that State, which required the Northern Pacific Railway Company, plaintiff in error, to repair a certain viaduct in the city of Duluth, carrying the railway company's tracks over Lake avenue. 98 Minnesota, 429. The Northern Pacific Railway Company is the successor in title of the St. Paul and Duluth Railroad Company, which derived its title from the Lake Superior and Mississippi Railroad Company. The Lake Superior and Mississippi Railroad Company, whose rights and obligations have devolved upon the Northern Pacific Railway Company, had the following provisions in its charter:

"Sec. 6. The said company may construct the said railroad across any public or private road, highway, stream of water or watercourse if the same be necessary: *Provided*, That the same shall not interfere with navigation; but said company

shall return the same to their present state, or in a sufficient manner so as not to impair the usefulness of such road, highway, stream of water, or watercourse, to the owner or to the public."

"SEC. 17. This act is hereby declared to be a public act, and may be amended by any subsequent legislative assembly in any manner not destroying or impairing the vested rights of said corporation."

The Lake Superior and Mississippi Railroad laid its first track across what is now Lake avenue in 1869. Lake avenue was graded and improved for public traffic in the winter and spring of 1871, and since that time it has been in continuous use as a public street. In the year 1891 the amount of business on Lake avenue and the number of tracks therein had become so great that the constant passage of cars and engines endangered the safety of the public. The city of Duluth thereupon prepared plans and specifications for the construction of the viaduct over Lake avenue, and made a demand upon the railroad company to construct the same. The railroad company, after considerable negotiation, in which it denied its obligation to build the viaduct, entered into a contract with the city of Duluth, which is set up in its answer in this case as a full defense to the right of the city of Duluth to require the repair of the viaduct at the railroad company's expense. This contract was dated September 2, 1891, and provided that the city should build the bridge or viaduct upon Lake avenue to carry that street over the railroad tracks which had theretofore crossed said avenue at grade. The railroad was to contribute to the expense of the construction in the amount of $50,000, and the city undertook, for the period of fifteen years, to maintain the part of the bridge over the railroad's right of way, and to perpetually maintain the approaches. The city built the bridge at an expense of $23,000, in addition to the $50,000 which was paid by the railroad company.

In 1903, the viaduct and its appoaches having become dangerous for public use, the city of Duluth acted within the

power conferred on it by law to require railroad companies to construct bridges and viaducts at their own expense at public railroad crossings, and having investigated the subject, approved the plans prepared by the city engineer, and on the thirteenth of July, 1903, passed the following resolution:

"*Resolved,* That the repairs set forth in said specifications are necessary and proper, and are demanded by the public safety and convenience.

"*Resolved, further,* That said repairs are reasonable and practicable for the repairs of said viaduct and its approaches; and that said repairs as set forth in said specifications are hereby adopted and approved.

"*Resolved, further,* That this council does hereby demand that the Northern Pacific Railway Company immediately proceed to repair said viaduct and approaches in accordance with said specifications.

"*Resolved, further,* That a copy of this resolution be forthwith served upon the Northern Pacific Railway Company in the same manner as service may be made of summons in a civil action by the city clerk.

"*Resolved, further,* That in the event of the failure or refusal of said company to comply with such demand that the city attorney be and he is hereby instructed to institute such action or actions as to him may seem proper to compel the said railway company to make such repairs, or such portion thereof as the court may determine it is legally liable to make."

It was in pursuance of this resolution that this action in mandamus was begun and the writ issued, requiring the railroad company to make the repairs in accordance with the plans adopted and approved by the city council.

We are met at the threshold with the question of the jurisdiction of this court. It is the contention of the plaintiff in error that in requiring the railroad company to repair the viaduct at its own expense the obligation of the contract of September 2, 1891, has been impaired by legislation of the municipal corporation, in violation of the contract clause of the

Constitution of the United States. In cases arising under this clause of the Federal Constitution this court determines for itself whether there is a contract valid and binding between the parties, and whether its obligation has been impaired by the legislative action of the State. *Stearns* v. *Minnesota*, 179 U. S. 223, 233. If the plaintiff in error set up a claim of contract upon substantial grounds and with allegations showing an impairment of its obligation by state or municipal legislation, a case was presented which might be brought to this court in event such legislation was upheld. *Chicago, Burlington & Quincy R. R. Co.* v. *Nebraska*, 170 U. S. 57.

It is no longer open to question that municipal legislation passed under supposed legislative authority from the State is within the prohibition of the Federal Constitution and void if it impairs the obligation of contracts. *Mercantile Trust Company* v. *Columbus*, 203 U. S. 311–320, and cases there cited. But it is contended that the action of the city in this case amounts to no more than a denial of the validity and binding force of the contract in question and brings the case within *St. Paul Gaslight Co.* v. *St. Paul*, 181 U. S. 142, followed in *City of Dawson* v. *Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Company*, 197 U. S. 178. In the *St. Paul case* the city refused to pay certain sums claimed to be due on contract of the company and ordered the gas posts to be removed from the streets. Such a denial of liability on the part of a municipal corporation was contained in an ordinance to that effect; it was held this was not legislation impairing the obligation of the contract, and it was said in that case that the ordinance "created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. . . . When the substantial scope of this provision of the ordinance is thus clearly understood it is seen that the contention here advanced of impairment of the obligation of the contract arising from this pro-

vision of the ordinance reduces itself at once to the proposition, that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error."

And such was the effect of the ordinance in the subsequent case of *City of Dawson* v. *Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Co.*, 197 U. S. 178.

We think the municipal legislation complained of in this case amounts to more than a mere denial of liability or of the binding force of the former contract. The legislation which deprives one of the benefit of a contract or adds new duties or obligations thereto necessarily impairs the obligation of the contract, and when the state court gives effect to subsequent state or municipal legislation which has the effect to impair contract rights by depriving the parties of their benefit, and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court. *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 350, 351. And this jurisdiction has been frequently exercised in cases of municipal ordinances having this effect upon prior contract rights. *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65–81; *City of Cleveland* v. *Ry. Co.*, 194 U. S. 517. As was said in *City of Dawson* v. *Columbia Avenue Savings Fund, Safe Deposit, Title & Trust Co.*, 197 U. S. 178, it is not always easy to determine on which side of the line a given case may fall. But recurring to the resolution in this case, we are of the opinion that it is legislative action which impairs the obligation of the contract, if the contract is of binding force, which is a question to be determined upon the

merits. For the judgment of mandamus against the railroad company could not have been rendered in this case without the prior legislation by the city ascertaining the necessity for repairs upon the viaduct, the character and extent of the same, and imposing upon the railroad company the duty to enter upon the street and construct the improvement.

This municipal action is more than a mere denial of the obligation of the contract; it affirmatively requires that certain improvements shall be made upon the viaduct by the railroad company which the council deemed to be necessary. It required legislative action to determine the nature and character of these improvements. The mandamus issued by the court is but the carrying of the ordinance into effect. If the contract was of binding force and effect it would relieve the railroad company from making such improvements within the right of way for the period of fifteen years and permanently relieve it of other improvements upon the viaduct. To require that it shall make these improvements within the period named, as this legislation does, is to require the railroad to incur expenses for things which the city had expressly contracted to relieve it from during the period mentioned. Assuming for jurisdictional purposes that the company had a valid claim of contract, it was impaired by the legislation of the city in question, we therefore think there is jurisdiction in the case.

Passing to the merits, it is the contention of the railroad company that when this contract was made the Supreme Court of Minnesota had decided that, as to highways which were constructed after the railroad was built, there was no obligation upon the company to construct overhead bridges or crossings, and whatever the rule might be as to requiring a railroad company to construct such overhead bridges in the interest of public safety as to streets in existence when the railroad was built, it could not be required so to do when the highway was constructed after the railway had acquired its right of way and laid its tracks.

It is difficult to perceive how a judicial determination that

the railroad company could not be charged with the expense of such structures as this viaduct as to streets laid out *after* the railroad was built, could have induced the agreement to pay $50,000 towards the improvement in question in a street first occupied by the railroad company. And the recitals of the contract of September, 1891, are to the effect that the payment of the $50,000 was in lieu of assessments for benefits in excess of damages for the taking of property of the railroad company to be caused by said public improvement, which might be imposed upon the property of the railroad company.

But was there such settled judicial construction? In the case of *State ex rel. City of Minneapolis* v. *St. Paul, Minneapolis & Manitoba Railway Company and Another*, 98 Minnesota, 380, a case decided by that court upon the same day it handed down its decision in the case at bar, the subject was elaborately examined and a conclusion reached that the charter of a railroad, similar to the one granted the Lake Superior and Mississippi Railroad Company above set forth, imposed an obligation upon the railroad company as to highways, roads and streets, over which the railroad was constructed, to keep the same in good condition and repair, whether laid out after the building of the railroad or before, and that such requirement in the interest of public safety embraced an overhead bridge necessary for the public safety, and that a requirement that it should be built at the expense of the railroad company was an exercise of the police power of the State, and did not amount to taking property without due process of law. In that case the cases relied upon by the learned counsel for the plaintiff in error in this case as establishing a contrary doctrine, prior to the making of the contract, were reviewed. They are: *State of Minnesota ex rel. City of Minneapolis* v. *St. Paul, Minneapolis & Manitoba Railroad Co.*, 35 Minnesota, 131, and *State of Minnesota ex rel. St. Paul, Minneapolis & Manitoba Railroad Company* v. *District Court of Hennepin County*, 42 Minnesota, 247. It was there pointed out, and we think cor-

rectly, that while the learned court, in *State of Minnesota ex rel. St. Paul, Minneapolis & Manitoba Railroad Company*, limited its ruling to cases where railroads had been constructed in streets already laid out and expressly disclaimed that the doctrine there announced would necessarily apply where a new street had been laid out over the railroad after its construction, the question now made was not involved in the case, and the decision then made was limited to existing streets only. In the second case above cited (42 Minnesota, 247), while it was held that planking the tracks at crossings was a part of the construction of the highway, and not a safety device for the protection of the thoroughfare, and therefore not within the proper exercise of the police power, so that the cost thereof could be required from the company, the court did say in the most emphatic manner that safety devices might be required at new streets, and that cattle guards and gates were such safety devices, the construction of which would be required at the expense of the company. And the court said:

"When the railroad company accepted its charter it received its franchises subject to the authority and power of the State to impose such reasonable regulations concerning the use, in matters affecting the common safety, of its dangerous enginery, and not merely subject to the then existing regulations as applicable to then existing conditions; and whether the obligation now in question had been imposed at this time by direct act of the legislature, or, as is the case, arises from the laying out of a new highway, to which the previously existing law becomes applicable, can make no difference.

"The fallacy involved in the claim of the relator, and, as we think, in some decisions by which its claim is supported, arises from a failure to distinguish between rights of property, which confessedly are protected under the Constitution from being divested or appropriated to other purposes without compensation, and the very different matter concerning the manner in which the owner may use his property so as not to unnecessarily endanger the public. The claim of the relator in-

volves an assumption that when the railroad constructed its line of road, conforming to the requirements of the law as to all then existing highway crossings, it had a constitutional right, by virtue of its priority, to always afterwards operate its road unembarrassed by being required to observe like precautions with respect to highways that might be thereafter laid out across the railroad, except upon the condition that it should receive compensation, not merely for whatever of its acquired property might be taken for the other use, but also for the expense and burden of conforming its own conduct to the newly-existing conditions—of conforming to a general police regulation of the State, not before applicable. There was no such exclusive or superior right acquired by priority of charter, or of the construction of this railroad highway. It cannot be supposed that, when its franchises were granted to this relator to construct and operate this railroad, it was contemplated, either by it or by the State, that no more public highways should be laid out which should increase the number of places where the ordinary police regulations would have to be complied with by the railroad company to its inconvenience and expense. On the contrary, it must have been understood and contemplated, especially in a new State rapidly advancing in population and in the development of its resources, where new towns were springing up, and new avenues for travel and traffic were becoming necessary, that new streets and roads would be and must be laid out, and that many of these would necessarily cross existing railroad lines. We cannot resist the conclusion that, so far as concerns the matter now under consideration, the charter of the relator was taken subject to the right of the State to impose this duty whenever, by reason of the establishing of new highways, it should become necessary; and hence the relator is not entitled to compensation for obedience to this requirement. *Lake Shore &c. Ry. Co.* v. *Cincinnati &c. Ry. Co.*, 30 Ohio St. 604; *Chicago & Alton R. Co.* v. *Joliet &c. R. Co.*, 105 Illinois, 388, 400, 404; *City of Hannibal* v. *Hannibal & St. Joseph R. Co.*, 49 Missouri, 480; *City of*

Bridgeport v. *New York & New Haven R. Co.*, 36 Connecticut, 255."

As the Supreme Court of Minnesota points out in the opinion in 98 Minnesota, 380, above referred to, the state courts are not altogether agreed as to the right to compel railroads, without compensation, to construct and maintain suitable crossings at streets extended over its right of way, after the construction of the railroad. The great weight of state authority is in favor of such right. (See cases cited in 98 Minnesota, 380.)

There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. In *New York & New England Railroad Company* v. *Bristol*, 151 U. S. 556, 576, the doctrine was thus laid down by Chief Justice Fuller, speaking for the court:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury. *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Barbier* v. *Connolly*, 113 U. S. 27; *New Orleans Gas Company* v. *Louisiana Light Company*, 115 U. S. 650; *Mugler* v. *Kansas*, 123 U. S. 623; *Budd* v. *New York*, 143 U. S. 517."

The principle was recognized and enforced in *Chicago, Bur-*

lington & Quincy R. R. Co. v. *Chicago*, 166 U. S. 226, where it was held that the expenses incurred by the railroad company in erecting gates, planking at crossings, etc., and the maintenance thereof, in order that the road might be safely operated, must be deemed to have been taken into account when the company accepted its franchise from the State, and the expenses incurred by the railroad company, though upon new streets, might be required as essential to the public safety. In *Detroit Railroad Co.* v. *Osborne*, 189 U. S. 383, it was held that the State of Michigan might compel a street railroad to install safety appliances at an expense to be divided with a steam railroad company occupying the same street, notwithstanding the steam railroad was the junior occupier of the street. The subject was further under consideration in *New Orleans Gas Light Co.* v. *Drainage Commission of New Orleans*, 197 U. S. 453, where it was held, that although the gas company had permission from the city to lay its pipes under the streets, it might be required to remove the same at its own expense, in the exercise of the police power in the interest of the public, in order to make way for a system of drainage which was required, in the interest of the public health, without compensation to the gas company; and that uncompensated obedience to regulations for public safety under the police power of the State was not a taking of property without due process of law.

The same principles were recognized and the previous cases cited in *Chicago, Burlington & Quincy Ry. Co.* v. *People of the State of Illinois ex rel. Drainage Commissioners*, 200 U. S. 561, and again in *Union Bridge Co.* v. *United States*, 204 U. S. 364. The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution.

In this case the Supreme Court of Minnesota has held that

the charter of the company, as well as the common law, required the railroad, as to existing and future streets, to maintain them in safety, and to hold its charter rights subject to the exercise of the legislative power in this behalf, and that any contract which undertook to limit the exercise of this right was without consideration, against public policy and void. This doctrine is entirely consistent with the principles decided in the cases referred to in this court. But it is alleged that at the time this contract was made with the railroad company it was at least doubtful as to what the rights of the parties were, and that the contract was a legitimate compromise between the parties, which ought to be carried out. But the exercise of the police power cannot be limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the State or the municipality to abrogate this power so necessary to the public safety. *Chicago, Burlington & Quincy R. R. C.* v. *Nebraska ex rel. Omaha*, 170 U. S. 57.

We find no error in the judgment of the Supreme Court of Minnesota, holding the contract to be void and beyond the power of the city to make, and it will, therefore, be

Affirmed.

HAIRSTON *v.* DANVILLE AND WESTERN RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 6. Argued January 10, 13, 1908.—Decided February 24, 1908.

Where the condemnation of land has been held by the state court to be authorized by the constitution and laws of that State this court cannot review that aspect of the decision.

Where the state law, as is the case with the law of Virginia, permits no exercise of the right of eminent domain except for public uses, a general

judgment of condemnation by the state court will be assumed to have been held to be for a public use even if there was no specific finding of that fact.

While it is beyond the legislative power of a State to take, against his will, the property of one and give it to another for a private use, even if compensation be required, it is ultimately a judicial question whether the use is public or private; and, in deciding whether the state court has determined that question within the limits of the Fourteenth Amendment, this court will take into consideration the diversity of local conditions.

While cases may arise in which this court will not follow the decision of the state court, up to the present time it has not condemned as a violation of the Fourteenth Amendment any taking of property upheld by the state court as one for a public use in conformity with its laws.

The use for which property may be required by a railroad company for increased trackage facilities is none the less a public use because the motive which dictates its location is to reach a private industry, or because the proprietors of that industry contribute to the cost; and so held that a condemnation upheld by the highest court of Virginia as being in conformity with the law of that State did not deprive the owner of the property condemned of his property without due process of law.

THIS is a writ of error to the highest court of the State of Virginia. The defendant in error is a corporation created by the State of Virginia and operating a railroad entirely within that State. Its main line runs near the town of Martinsville, and from it a branch line runs into Martinsville and there ends. The railway company began a proceeding in a circuit court of that State for the condemnation of land belonging to Miss Hairston, the plaintiff in error, for the construction of a spur track, which was alleged to be needed for the transaction of its business, for the accommodation of the public generally, and for the purpose of reaching the factory of a large shipper, the Rucker and Witten Tobacco Company. By pleadings duly filed the land owner set up the defense (*inter alia*) that the proposed condemnation was not for a public use, and was therefore contrary to the constitution and laws of Virginia and the Fourteenth Amendment to the Constitution of the United States. Testimony was taken on this issue before the judge of the circuit court, who found against the contention, and appointed commissioners to ascertain the damage caused by the taking. The commissioners ascertained the amount of the damages.

The judge confirmed their report, and ordered that upon payment of the damages a fee simple in the land should be vested in the railway company. The land owner petitioned the Supreme Court of Appeals to grant a writ of error to review the judgment of the circuit court. The petition was denied, and a writ of error transferring the record to this court was allowed.

The uses for which the land sought to be condemned was needed are described in the testimony of the superintendent of the railroad. The material parts of it follow:

"The Danville and Western comes into Martinsville on a branch spur from the main line, running between Danville and Stewart. This spur leaves the main line about very nearly half a mile east of Martinsville. It comes into Martinsville and ends at Franklin street. The Danville and Western has in the town of Martinsville this main line referred to. The main line proper runs parallel with and about three feet from the platform of the freight and passenger station. Parallel to this track there is another track, about fifteen feet between the centers of the two tracks, running parallel with and about four or five feet from the Alliance warehouse. Both of those tracks are spur tracks, and end at Franklin street. The company also has a freight and passenger station and platform, with a portion of the platform shedded. There is also another track, designated Tabernacle track. This track is several hundred feet east of this freight and passenger station referred to, and is parallel with the main line. This track will hold seven box cars, but is quite a heavy grade—about two feet to the hundred feet. There is also parallel with the main line and also parallel with this Tabernacle track a spur track, which is designated spur track. These are all the tracks that the company has in the town of Martinsville, except a track known as Lester's siding. This, however, is a private siding and is fenced in. The gate is, as a rule, locked, and the company can use for its business only about two box car lengths on the outside of the fence. When I took charge of the road as superintendent, on the 10th day of September, 1903, I was very much impressed

with the congested condition of things in Martinsville, the danger of operating the yard, and was especially impressed with the lack of team track room; I mean by that, suitable tracks on which solid cars loaded with freight can be placed, such freight to be unloaded by consignees and teams, or *vice versa;* tracks to place empty cars on, into which shippers could load freight from their teams. I found only space for three box cars—I mean by that, proper and suitable space. That was the portion of the track described as parallel with the platform, and west of the station building, about three car lengths. Being impressed with the danger of operating this yard, soon after taking charge I gave positive instructions that the track designated as Tabernacle track must never be used for storing cars, and must be kept clear and used only to pass trains. The track was built and intended to pass trains—that is, to side-track one train on it and let the other pass. On account of the increase of the business at Martinsville, it has been necessary to change these instructions, and we have been forced to use the Tabernacle track on which to place team track cars, solid cars to be unloaded by consignees. . . . In order to get out of Franklin street I selected a lower route, and employed a competent engineer to lay off and make plans for the most feasible track, to obtain as much team track room as possible, and at the same time to reach the plant of the Rucker & Witten Tobacco Co. I was informed that this plant would be very greatly enlarged, and in fact the entire business of this concern would eventually be consolidated at Martinsville. By adopting the route proposed we would not only reach the plant of the Rucker & Witten Tobacco Co. and thereby secure for the Danville & Western a great increase in business, but we would also greatly enlarge our team track facilities. I mean by that, the portion of the track on which loaded cars would be placed to be unloaded by merchants and others in Martinsville doing business here. The map shows that about 500 feet of this proposed track is level; this would be used entirely for the public. This 500 feet would store about 16 or 18 team track cars, and will

be used entirely to place cars on for the general public. In addition to that we would reach the Rucker & Witten Tobacco Company's plant, and we would thus be enabled to place cars for that concern immediately at the factory doors, thus relieving the short team track we have in the yard, and also doing away entirely with the danger of using this Tabernacle track as a team track. We can also place empty cars at the Rucker & Witten Tobacco Company's plant, in which they can load their tobacco shipments. This will also greatly relieve us at the station. This concern has within the last thirty days made in one shipment 14 solid cars of manufactured tobacco, going to one destination, and all shipped the same day. At present we have team track room for seven cars on this Tabernacle siding, which I have explained, is on a grade of about two feet to the hundred feet, and, therefore, very dangerous to operate and to stand cars on. There is room for three cars west of the station building between the station building and Franklin street, and on this same track there is room for five cars to be placed at the platform. These last five cars, are, as a rule, merchandise cars that come here loaded for various consignees, and are unloaded by the station force into the station building. Unloaded freight is placed by shippers on the platform and is loaded into empty cars standing in the same five-car space. In order to meet the demands of the business, therefore, it is absolutely necessary to obtain more and better terminal facilities here. We wish to get away from the danger of using this Tabernacle track as a team track as early as possible. The track is on a heavy grade and cars are liable to get loose and roll down the grade. In case one of these cars should happen to get loose just as a train was approaching Martinsville a serious accident would result, the grade is so heavy. Consignees sometimes attempt to move cars a little themselves, and are not able to hold them, and they strike the others on the track, and they have invariably been derailed. We have in the last sixty days had several derailments on this track. I will say, on account of the danger, the east end of the track is protected

by a modern safety switch, derailing switch. When the cars strike this switch, they are thrown off the track on the ground. That damages the cars, and damages the track, and causes delay and expense in rerailing them again. To give some idea of the increase of business at Martinsville, I will state that the auditor of the Danville and Western Co. made me a statement for November and December, 1904, as compared to same months last year, outbound or forwarded business in November, 1904.

"Mr. STAPLES: Will you file that report with your deposition?

"The WITNESS: Yes, sir.

"ANSWER (continued). Outbound or forwarded business for November, 1904, as compared with same month 1903, shows an increase of about 16⅔ per cent. The inbound business for November, 1904, compared to same month last year, shows an increase of about 89 per cent. The outbound business for December, 1904, as compared to same month 1903, shows an increase of about 16⅔ per cent, and the inbound business for December, 1904, as compared to same month last year, shows an increase of about 100 per cent. So in order to at all handle the business with safety or convenience to patrons it is absolutely necessary to get more and better terminal facilities. In order to do that, we have located what we think to be the best and most feasible line to accomplish the two objects—get the terminal facilities, and at the same time reach the plant of the Rucker & Witten Tobacco Co.

"Q. Now, Major, will there be access along the line from Fontaine street to the depot of the Danville & Western Ry., in Martinsville, for the purpose of reaching the cars standing upon the track?

"A. These cars will be standing on this proposed track, not at the station, and parties can reach such cars with ease from Fontaine street. It is also proposed to have an entrance on the alley near the Alliance warehouse, near the proposed track.

"Q. Has the city of Martinsville grown very much in size and business within the last year or two?

"A. It has grown very much in business over our line, and I notice there is considerable building.

"Q. Well, in your opinion, is this proposed extension of your track necessary for the public convenience and for enabling the railroad to meet the business demands of the city of Martinsville?

"A. It is, sir. There is another fact of public interest which occurs to me that probably the court would like to know. The manufacturers, or parties who use steam coal, are more conveniently located to the Danville and Western station than to the Norfolk & Western station. The coal, however, comes into Martinsville over the Norfolk & Western. The manufacturers are very anxious to handle this coal on the Danville & Western tracks on account of saving which there would be in drayage and on account of convenience. We have an understanding with the Norfolk & Western traffic people that we will switch this coal to our tracks. It is not practicable now to do this, because we have no track room. It will be practicable if this proposed road is built, and that is the object of the understanding.

"Q. Then this proposed extension will be, or will it not be, for the use of the public and for the reception and delivery of consignments by your railway to the entire public?

"A. It will be for the use of the public in that cars loaded with carload shipments consigned to various consignees in Martinsville will be placed on these tracks to be unloaded, and empty cars will be placed on these tracks to be loaded by shippers.

"Q. You mean by shippers, shippers generally?

"A. Yes, sir; shippers generally, anybody who wants to ship a carload of freight will get his car on the track."

The testimony given by other witnesses did not materially add to or affect this evidence, though the other testimony and the cross-examination of the superintendent tended to show that in order to render the general public use of the spur track practicable and convenient, grading, the construction of retain-

ing walls, and the improvement and change of grade of Fontaine street, would be required. It was shown that the tobacco company agreed, in writing, to give to the railway company a part of the land over which the spur track was to be constructed and to pay the cost of the remainder. The railway company, on the other hand, agreed to continue the operation of the spur track as long as the tobacco factory was operated, but reserved the option to abandon the spur track in case the factory was abandoned for six months. In that case the land given by the tobacco company was to revert to it.

Mr. Abram P. Staples and *Mr. Waller R. Staples,* with whom *Mr. John W. Carter* was on the brief, for plaintiff in error.

Mr. George E. Hamilton, with whom *Mr. Michael J. Colbert* was on the brief, for defendant in error.

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

The condemnation of land in this case has been held by the courts of Virginia to be authorized by the constitution and laws of that State, and we have no right to review that aspect of the decision. The law of Virginia permits no exercise of the right of eminent domain except for public uses. *Fallsburg Power Company* v. *Alexander,* 101 Virginia, 98; *Dice* v. *Sherman,* 59 S. E. Rep. 388. Therefore it must be assumed that this taking was held to be for public uses, although there was no specific finding of the fact, but only a general judgment of condemnation. The plaintiff in error, however, insists that the record in this case, which includes all the evidence, shows, unmistakably, that the taking was for private uses and that the claim by the railway company, that the spur track was designed in part for public uses, is no better than a colorable pretense. We assume that, if the condemnation was for private uses, it is forbidden by the Fourteenth Amendment. *Missouri Pacific Railway* v. *Nebraska,* 164 U. S. 403; *Fallbrook Irrigation Dis-*

trict v. *Bradley*, 164 U. S. 112, 161; *Traction Company* v. *Mining Company*, 196 U. S. 239, 251, 252, 260; *Clark* v. *Nash*, 198 U. S. 361, 369; *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527.

We proceed to consider whether the uses of the spur track for which the land was taken were private, and therefore such uses for which a taking by the right of eminent domain is forbidden by the Fourteenth Amendment. The courts of the States, whenever the question has been presented to them for decision, have, without exception, held that it is beyond the legislative power to take, against his will, the property of one and give it to another for what the court deems private uses, even though full compensation for the taking be required. But, as has been shown by a discriminating writer (1 Lewis on Eminent Domain, 2d ed., sec. 157), the decisions have been rested on different grounds. Some cases proceed upon the express and some on the implied prohibitions of state constitutions, and some on the vaguer reasons derived from what seems to the judges to be the spirit of the Constitution or the fundamental principles of free government. The rule of state decision is clearly established and we have no occasion here to consider the varying reasons which have influenced its adoption. But when we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden we find no agreement, either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question. The determination of this question by the courts has been influenced in the different States by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the States and Territories of the Union that different results might well be expected. Some cases illustrative of the tendency of local conditions to affect the judgment of courts are *Hays* v. *Risher*, 32 Pa. St. 169;

Boston & Roxbury Mill Corp. v. *Newman*, 12 Pick. 467 (conf. *Lowell* v. *Boston*, 111 Massachusetts, 454); *Turner* v. *Nye*, 154 Massachusetts, 579; *Ex parte Bacot*, 36 S. C. 125; *Dayton Mining Co.* v. *Seawell*, 11 Nevada, 394; *Mining Co.* v. *Parker*, 59 Georgia, 419; *Head* v. *Amoskeag Manufacturing Company*, 113 U. S. 9; *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527; *Otis Co.* v. *Ludlow Co.*, 201 U. S. 140. The propriety of keeping in view by this court, while enforcing the Fourteenth Amendment, the diversity of local conditions and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that State, is expressed, justified, and acted upon in *Fallbrook Irrigation District* v. *Bradley*, *ub. sup.*, *Clark* v. *Wells*, *ub. sup.* and *Strickley* v. *Highland Boy Mining Co.*, *ub. sup.* What was said in these cases need not be repeated here. No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws. In *Missouri Pacific Railway* v. *Nebraska*, *ub. sup.*, it was pointed out (p. 416) that the taking in that case was not held by the state court to be for public uses. We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people. We have found nothing in the Federal Constitution which prevents the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch; of a right of way over the land of another for an aërial bucket line; or of the right to flow the land of another by the erection of a dam. It remains for the future to disclose what cases, if any, of taking for uses which the state constitution, law, and court approve will be held to be forbidden by the Fourteenth Amendment to the Constitution of the United States.

Entering upon the consideration of the case at bar in the spirit of our previous decisions, it presents no difficulties. The Virginia court has, in effect, found that the condemnation was for public uses. The evidence fully warranted that finding. We need not consider whether a condemnation by a railroad, authorized by a state law and approved by the state court, of land for the construction of a spur track to be used solely to transport commodities to the main line and thence to the place of sale and consumption throughout the country, is a violation of the Fourteenth Amendment; nor the authorities bearing upon the question whether such a use is public. Here the proposed spur track can be used, and was designed to be used, not only for access to the factory of the tobacco company but for the storage of cars to be laden or unladen by receivers and shippers of freight, and to relieve the congestion of business which, through the growth of the town, overburdened the limited trackage of the railroad. We think the court below was justified in finding that the superintendent testified accurately when he said, "In order to meet the demands of the business, therefore, it is absolutely necessary to obtain more and better terminal facilities here;" and "We have located what we think to be the best and most feasible line to accomplish two objects—get the terminal facilities, and at the same time reach the plant of the Rucker & Witten Tobacco Co.;" and "It will be for the use of the public, in that cars loaded with carload shipments . . . will be placed on these tracks to be unloaded and empty cars will be placed on those tracks to be loaded by shippers." This testimony describes a use which is clearly public. *Railroad* v. *Porter*, 43 Minnesota, 527; *Ulmer* v. *Lime Rock Co.*, 98 Maine, 579; *Railway* v. *Morehouse*, 112 Wisconsin, 1; *Railway* v. *Petty*, 57 Arkansas, 359; *Zircle* v. *Railway*, 102 Virginia, 17. The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost.

We have considered the elaborate argument of counsel that the track was not intended for the use of the public generally, and that it could not, in fact, be so used, and are not convinced by it. The judgment is

Affirmed.

WABASH RAILROAD COMPANY *v.* ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 40. Petition for rehearing and motion to modify judgment. Submitted January 31, 1908.—Decided March 9, 1908.

Petition for rehearing and motion to modify judgment in this case, *ante*, p. 38, denied and further held in this case that:

Where property is in possession and under the control of the Federal court, the declaration of a lien upon that property is a step toward the invasion of the court's possession thereof and is equally beyond the jurisdiction of the state court as an order for the sale of the property to satisfy the lien would be.

In a proceeding in the state court, the ascertainment of the amount due, whether judgment can be rendered, and the issuing of execution against a corporation, whose property is under the control of the Federal court, are questions exclusively for the state court and may be regarded as independent of the proceedings for the enforcement of the lien.

Where claims are presented for adjudication to the Circuit Court against property in its possession and there are conflicting decisions of the state and Federal courts as to the rights of the parties, the Circuit Court must first determine which decision it will follow. This court cannot pass upon that question until it is properly before it.

AFTER the decision in this case, reported 208 U. S. 38, the defendants in error petitioned for a rehearing and moved, if that were denied, that the judgment be modified. The substance of the motion was stated by counsel to be that the judgment should be modified "by specifically directing that the Supreme Court of Ohio affirm so much of the judgment of the Circuit Court of Lucas County, Ohio, as finds and adjudicates the rights of these defendants in error, and each of them,

against the property and parties in said cause, as set forth in the judgment entry, respecting the equities of the cause and right of recovery, the ownership and the lien of the equipment bonds, and the sums due thereon to the parties, respectively, with interest and costs; and by further specifically directing that said Ohio Supreme Court reverse the judgment of said Circuit Court so far as it directs a seizure and sale of the property held by the plaintiff in error in Ohio and affected by such lien, and limit the rights of the defendants in error to the recovery on such modified judgment in the Federal Circuit Court found by this court to have jurisdiction of the property."

Mr. Rush Taggart for plaintiff in error, in opposition to the petition and motion.

Mr. John W. Warrington, Mr. John C. F. Gardner, Mr. Thomas P. Paxton, Junior, and *Mr. Murray Seasongood* for defendant in error, in support of the petition and motion.

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

In the original decision of this cause we treated the proceeding in the state court as one whose sole direct purpose was to procure a sale of the railroad property in satisfaction of the lien which the holders of the equipment bonds asserted against it. We assumed that the judgment of the state court was one for the sale of the property, and that the adjudication of the amounts due the plaintiffs below, and of the existence of the lien claimed, were merely incidental and preliminary to the judgment ordering the sale. Believing, for the reasons given in the opinion, that such a judgment was beyond the jurisdiction of the state court, we reversed it. That such a conception of the proceeding and judgment was not unnatural or strained appears quite clearly from a passage in the brief of the learned counsel for the defendant in error filed in support of this motion. There it is said: "No one can read the

foregoing abstract of the petition, or the petition itself, without observing its purpose to set up the lien of the equipment bonds with all other liens, also, to have the amount found due on the equipment bonds sued on and to enforce payment through sale of the property, subject only to the liens of the two prior Ohio mortgages and two prior Indiana mortgages; also, to have an accounting and marshalling of liens and a distribution of the proceeds. Plainly then the action contemplated the ultimate seizure and sale of all the property now in question, subject only to two underlying mortgage liens."

It is, however, urged that the judgment of the court below should be directed to stand so far as it found the amount due to the several plaintiffs in respect of the equipment bonds held by them, and so far as it declared that those bonds were entitled to a lien upon the property to secure payment. But, after renewed consideration of the cause, we decline to modify our general judgment of reversal. For the purpose, however, of avoiding misunderstanding and in the hope that this prolonged litigation may be hastened to an end, we think it fitting, without extended discussion, to add a few observations to what was said in the former opinion.

1. The declaration of a lien on the property is a step toward the invasion of its possession, which we have held to be beyond the jurisdiction of the state court. It was sought, not for itself, since it would have no significance except as a basis for the order of sale of the property affected by it, but only as an essential part of the order itself. The declaration of the lien must stand or fall with the order of sale, and is, therefore, with that order, beyond the power of the state court.

2. The ascertainment of the amount due to the plaintiffs and the issue of an execution against the Toledo, Wabash and Western Railway Company may be regarded as independent of the proceedings for the enforcement of the lien. Whether such a judgment can be rendered upon a proceeding of this nature (*Giddings* v. *Barney*, 31 Ohio St. 80) is a question exclusively for the state court.

3. If the claims of the defendant in error should be presented to the Circuit Court of the United States the question would arise whether that court, in determining the rights of the bondholders against the property, should follow the decision of this court (*Wabash, St. Louis & Pacific Railway Co.* v. *Ham*, 114 U. S. 587), or the decision of the state court (*Compton* v. *Railway Company*, 45 Ohio St. 592). That question is not here, has not been argued by counsel, and we cannot now properly decide it. We do not express or intimate any opinion upon it. It must in the first instance be passed upon by the Circuit Court.

The petition for rehearing and the motion to modify the judgment are

Denied.

OPINIONS PER CURIAM, ETC., FROM JANUARY 7, TO FEBRUARY 24, 1908.

No. 7. FRITZ DUREIN, PLAINTIFF IN ERROR, *v.* THE STATE OF KANSAS; No. 8. FRED ROSS ET AL., PLAINTIFFS IN ERROR, *v.* THE STATE OF KANSAS; and No. 9. FRED. SIMMONS ET AL., PLAINTIFFS IN ERROR, *v.* THE STATE OF KANSAS. In error to the Supreme Court of the State of Kansas. Submitted January 6, 1908. Decided January 13, 1908. *Per Curiam.* Judgments affirmed with costs. *Rippey* v. *Texas*, 193 U. S. 504; case below, 70 Kansas, 1, and cases cited. *Mr. C. A. Magaw* for plaintiffs in error. *Mr. C. C. Coleman* for defendant in error.

No. 16, Original. NELSON THOMASSON, JR., ET AL., PETITIONERS, *v.* THE CHICAGO RAILWAYS COMPANY ET AL. Argued January 22, 1908. Decided January 23, 1908. Petition for appeal denied for the want of jurisdiction. *Mr. Henry Crawford, Mr. Henry S. McAuley* and *Mr. Charles H. Aldrich* for petitioners. *Mr. George W. Wickersham, Mr. William W. Gurley, Mr. William Burry* and *Mr. A. H. Van Brunt* for respondents.

No. 125. EDWARD CORCORAN ET AL., APPELLANTS, *v.* TERENCE O'BRIEN, ADMINISTRATOR, ETC., ET AL. Appeal from the Circuit Court of the United States for the Western District of Washington. Submitted January 22, 1908. Decided January 27, 1908. Decree affirmed with costs. *Mr. Samuel H. Piles, Mr. James B. Howe, Mr. George Donworth* and *Mr. Corwin S. Shank* for appellants. No appearance for appellees.

Nos. 5 and 4. UNITED LAND ASSOCIATION ET AL., PLAINTIFFS IN ERROR, *v.* LEWIS ABRAHAMS ET AL. In error to the Supreme Court of the State of California. Argued January 29, 1908. Decided February 24, 1908. *Per Curiam.* Judgments affirmed with costs. *Knight* v. *United Land Association*, 142 U. S. 161; *San Francisco City and County* v. *Le Roy*, 138 U. S. 656; case below, 139 California, 370. *Mr. Charles A. Keigwin* and *Mr. John G. Johnson* for plaintiffs in error. *Mr. W. B. Treadwell, Mr. Charles H. Lovell* and *Mr. P. F. Dunne* for defendants in error.

No. 137. ELY BERNAYS, APPELLANT, *v.* THE UNITED STATES. Appeal from the Court of Claims. Argued January 30, 1908. Decided February 24, 1908. *Per Curiam.* Judgment affirmed. *Chesebrough* v. *United States*, 192 U. S. 253; *United States* v. *New York and Cuba Mail Steamship Company*, 200 U. S. 488. *Mr. Sigmund Zeisler* and *Mr. W. H. Robeson* for appellant. *The Attorney General, Mr. Assistant Attorney General Thompson* and *Mr. A. C. Campbell* for appellee.

Decisions on Petitions for Writs of Certiorari from January 7 to February 24, 1908.

No. 524. NORFOLK & WESTERN RAILWAY COMPANY, PETITIONER, *v.* LOUELLA MAY, ADMINISTRATRIX, ETC. January 13, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Theodore W. Reath* and *Mr. Joseph I. Doran* for petitioner. *Mr. Clement Manly* for respondent.

No. 540. METROPOLITAN LIFE INSURANCE COMPANY, PETITIONER, *v.* CAMILLA B. TALBOTT, ADMINISTRATRIX, ETC. Jan-

uary 13, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Maurice E. Locke* for petitioner. *Mr. Meriwether L. Crawford* for respondent.

No. 546. SAILORS' UNION OF THE PACIFIC ET AL., PETITIONERS, *v.* HAMMOND LUMBER COMPANY. January 13, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Jackson H. Ralston* for petitioners. *Mr. S. S. Burdett* and *Mr. J. B. Thompson* for respondent.

No. 551. OWEN AHEARN, PETITIONER, *v.* THE UNITED STATES. January 13, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederick S. Tyler* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 564. JENNIE L. GRAVES ET AL., PETITIONERS, *v.* ANNA P. ASHBURN, EXECUTRIX, ETC., ET AL. January 20, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Marion Erwin* and *Mr. W. J. Wallace* for petitioners. No appearance for respondents.

No. 555. THE UNITED STATES, PETITIONER, *v.* J. T. B. HILLHOUSE. January 20, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *The Attorney General* and *The Solicitor General* for petitioner. *Mr. Howard T. Walden* for respondent.

No. 552. The Chicago, Burlington & Quincy Railway Company, Petitioner, *v.* The United States. January 27, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. O. M. Spencer* and *Mr. O. H. Dean* for petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant to the Attorney General Purdy* for respondent.

No. 557. The Chicago and Alton Railway Company, Petitioner, *v.* The United States; No. 558. John N. Faithorn, Petitioner, *v.* The United States; and No. 559. Fred A. Wann, Petitioner, *v.* The United States. January 27, 1908. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. F. S. Winston, Mr. Robert Mather, Mr. John Barton Payne, Mr. S. H. Strawn* and *Mr. Blackburn Esterline* for petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant to the Attorney General Purdy* for respondent.

No. 568. William T. Waggoner et al., Petitioners, *v.* National Bank of Commerce of Kansas City, Mo. January 27, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. O. Davis* for petitioners. No appearance for respondent.

No. 588. Henry Clay Pierce, Petitioner, *v.* Edmund P. Creecy, Chief of Police, etc. February 3, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Joseph H. Choate* and *Mr. Joseph H. Choate, Jr.*, for petitioner. *Mr. Shepard Barclay* and *Mr. Thomas T. Fauntleroy* for respondent.

No. 578. JOSEPH PAOLUCCI, PETITIONER, *v.* THE UNITED STATES. February 24, 1908. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Wilton J. Lambert* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 586. CITY OF ST. CHARLES, PETITIONER, *v.* CHARLES A. STOOKEY. February 24, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Shepard Barclay* and *Mr. Thomas T. Fauntleroy* for petitioner. *Mr. Charles Nagel* for respondent.

No. 589. FISHER BOOK TYPEWRITER COMPANY ET AL., PETITIONER, *v.* FREDERIC W. HILLARD. February 24, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William A. Redding* for petitioners. *Mr. Thomas B. Kerr* and *Mr. John C. Kerr* for respondent.

No. 592. MAX ALEXANDER, PETITIONER, *v.* MILLS B. LANE ET AL. February 24, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William Garrard, Mr. P. W. Meldrim* and *Mr. Garrard Glenn* for petitioner. *Mr. Robert M. Hitch* for respondents.

No. 594. COUNTY OF HAMILTON, ILL., PETITIONER, *v.* MONTPELIER SAVINGS BANK AND TRUST COMPANY. February 24,

1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Samuel Alschuler* and *Mr. Charles R. Holden* for petitioner. *Mr. John F. Dillon, Mr. Harry Hubbard* and *Mr. C. B. Masslich* for respondent.

No. 597. CHARLES M. SMITH, SR., ET AL., PETITIONERS, *v.* THE UNITED STATES. February 24, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. A. S. Worthington* and *Mr. R. B. Oliver* for petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Russell* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM JANUARY 7 TO FEBRUARY 24, 1908.

No. 108. JOHN H. PHILLIPS ET AL., PLAINTIFFS IN ERROR, *v.* W. E. BARRETT ET AL. In error to the Supreme Court of Appeals of the State of Virginia. January 10, 1908. Dismissed with costs, pursuant to the tenth rule. *Mr. R. M. Hudson* for plaintiffs in error. *Mr. Jno. W. Friend* for defendants in error.

No. 126. MODASTO MUNITIZ AGUIRRE, APPELLANT, *v.* SOBRINOS DE EZQUIAGA. Appeal from the Supreme Court of Porto Rico. January 15, 1908. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles Hartzell* for appellant. *Mr. John Maynard Harlan* for appellee.

No. 127. MODESTO MUNITIZ AGUIRRE, APPELLANT, *v.* SOBRINOS DE EZQUIAGA. Appeal from the Supreme Court of

Porto Rico. January 16, 1908. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles Hartzell* for appellant. *Mr. John Maynard Harlan* for appellee.

No. 278. JOSE DOLORES MARQUEZ ET AL., APPELLANTS, *v.* THE MAXWELL LAND GRANT COMPANY. Appeal from the Supreme Court of the Territory of New Mexico. January 16, 1908. Dismissed with costs on motion of counsel for appellants. *Mr. Frank W. Clancy* and *Mr. George P. Merrick* for appellants. No appearance for appellee.

No. 149. GUY LE ROY STEVICK, RECEIVER, ETC., PLAINTIFF IN ERROR, *v.* THE NATIONAL BANK OF NORTH AMERICA IN NEW YORK. In error to the Circuit Court of the United States for the District of Colorado. January 29, 1908. Dismissed with costs, pursuant to the tenth rule. *Mr. T. J. O'Donnell* for plaintiff in error. *Mr. Bronson Winthrop* for respondent.

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See BANKRUPTCY, 3.

ADMIRALTY.

Jurisdiction does not extend to claim for damages to bridge or dock concerning commerce on land.

The admiralty does not have jurisdiction of a claim for damages caused by a vessel to a bridge or dock which, although in navigable waters, is so connected with the shore that it immediately concerns commerce upon land. *The Plymouth*, 3 Wall. 20, followed, and *The Blackheath*, 195 U. S. 361, distinguished. *Cleveland Terminal R. R.* v. *Steamship Co.*, 316; *The Troy*, 321.

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1. *Application of—Combinations prohibited by.*

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2. *Who may be heard on appeal.*

An appellee, who has not himself appealed, cannot be heard in this court to assail the judgment below. *Southern Pine Co.* v. *Ward*, 126.

3. *Record; docketing of.*

Although the record was not docketed until more than thirty days after the appeal was allowed, as it was accomplished soon afterwards and meanwhile no motion was made to docket and dismiss under Rule 9, a motion subsequently made was denied. *Ib.*

4. *Record; sufficiency of incorporation of papers and documents.*

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ARMY AND NAVY.

1. *As to status of army officer as civil officer of Philippine Government.*

The fact that an officer of the United States Army, entrusted with money by the Philippine Government to be expended in connection with his military command, signs his account "Disbursing Officer" instead of by his military title, does not make him a civil officer of the Philippine Government; and *quære* whether he could become such a civil officer in view of the act of March 3, 1883, 22 Stat. 567, prohibiting the appointment of officers of the United States Army to civil offices. *Carrington* v. *United States*, 1.

2. *Criminal liability of army officer in Philippine Islands for falsification of accounts.*

A money contribution by the Philippine Government to the performance of certain military functions, and entrusting the funds to an officer of the United States Army, who is held to military responsibility therefor by court-martial, does not make that officer a civil officer of the Philippine Government and amenable to trial in the civil courts for falsification of his accounts as a public official. *Ib.*

3. *Navy—Additional pay to aids—Who is an aid within meaning of* §§ 1098, 1261, *Rev. Stat., and opening clause of Personnel Act of* 1899.

Under §§ 1098, and 1261, Rev. Stat., and the opening clause of the Navy Personnel Act of March 13, 1899, 30 Stat. 1004, a naval officer assigned to duty on the personal staff of an admiral as flag lieutenant, without any other designation, is an aid to such admiral and entitled to the additional pay of $200 allowed to an aid of a major general in the Army. *United States* v. *Miller*, 32.

4. *Navy—Longevity pay of aid to admiral; calculation of.*

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aid to an admiral is not entitled to have his longevity pay calculated upon the additional pay which he receives as aid, that being under § 1261, Rev. Stat., an allowance in addition to, and not a part of, the pay of his rank. *Ib.*

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While an adjudication in bankruptcy, refusing a discharge, finally determines for all time and in all courts, as between the parties and their privies, the facts upon which the refusal is based, it must be proved in a second proceeding brought by the bankrupt in another district, and of which the creditor has notice, in order to bar the bankrupt's discharge therefrom, if the debt is provable under the statute as amended at the time of the second proceeding although it may not have been such under the statute at the time of the first proceeding. *Bluthenthal* v. *Jones*, 64.

2. *Amendments; power of bankruptcy court as to.*

The power of the bankruptcy court over amendments is undoubted and rests in the discretion of the court. In this case that discretion was not abused in allowing amendments adding the name of the place to the jurat of the justice of the peace taking the verification, and an averment that the person proceeded against in bankruptcy did not come within the excepted classes of persons who may not be declared bankrupts. *Armstrong* v. *Fernandez*, 324.

3. *Adjudication of bankruptcy; when general finding covers particular facts.*

Where the record of a proceeding to have a person declared a bankrupt shows that detailed findings of the commission of acts of bankruptcy could have been supported by the evidence, the presumption is that such findings would have been made had appellant so requested; and, in the absence of such a request, the general finding that the party could be declared, and was adjudged, a bankrupt is sufficiently broad to cover any question involved upon the evidence as to the bankrupt's occupation and the commission of acts of bankruptcy. *Ib.*

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The requirement of the Copyright Act of June 18, 1874, c. 301, § 1, 18 Stat. 78 (Rev. Stat. § 4962), that notice shall be inserted in the several copies of every edition, does not extend to publications abroad and sold only for use there. *United Dictionary Co.* v. *Merriam Co.*, 260.

CORPORATIONS.

1. *Forfeiture of charter by state action not violative of Federal Constitution.*

The judgment of a court of competent jurisdiction of Virginia, made after a hearing that a corporation of that State had violated the liquor laws of the State, and that in pursuance of statutory provisions the charter rights and franchises of the club ceased without further proceedings, *held*, in this case not to have violated any right belonging to the club under the contract or due process clauses of the Constitution of the United States. *Cosmopolitan Club* v. *Virginia*, 378.

2. *Forfeiture of charter—Impairment of charter contract by enforcement of police regulation.*

The charter of a private corporation may be forfeited or annulled for the misuse of its corporate privileges and franchises, and its forfeiture or annulment, by appropriate judicial proceedings, for such a reason would not impair the obligation of the contract, if any, arising between the State and the corporation out of the mere granting of the charter. The charter granted to a club, *held*, in this case, not to amount to such a contract that the club could disregard the valid laws subsequently enacted by the State, regulating the sale of liquor. *Ib.*

COURTS.

1. *Federal and state—Presumption that Federal court respected decisions of state courts in determining property rights.*

It will be presumed that the Circuit Court, in determining the validity of liens affecting property in its possession, will consider the decisions of the courts of the State in which the property is situated with that respect which the decisions of this court require. *Wabash Railroad* v. *Adelbert College*, 38.

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criminated against, and were not entitled to reparation for the amounts paid by them on the barrels. *Penn Refining Co.* v. *Western New York & Pa. R. R. Co.*, 208.

2. *Rates; liability of connecting carrier for discrimination by initial carrier.* It is the duty of a connecting carrier on a joint through rate to accept the cars delivered to it by the initial carrier, and it is not thereby rendered liable for any wrongful discrimination of the initial carrier merely because of the adoption of a joint through rate, which in itself is reasonable; nor is such connecting carrier rendered liable for any such wrongful act of the initial carrier by section eight of the Interstate Commerce Act. *Ib.*

See ANTI-TRUST ACT, 1;
CONGRESS, POWERS OF, 1, 2, 3;
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JUDGMENTS AND DECREES.

Duty of courts as to judgments of other courts.

Courts are not bound to search the records of other courts and give effect to their judgments, and one who relies upon a former adjudication in another court must properly present it to the court in which he seeks to enforce it. *Bluthenthal* v. *Jones*, 64.

See ACTIONS;
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JUDICIAL NOTICE.

General knowledge; woman's physical disadvantage.

This court takes judicial cognizance of all matters of general knowledge—such as the fact that woman's physical structure and the performance of maternal functions place her at a disadvantage which justifies a difference in legislation in regard to some of the burdens which rest upon her. *Muller* v. *Oregon*, 412.

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JURISDICTION.

A. OF THIS COURT.

1. *Attachment of—Bringing in representative of deceased appellee.*

Jurisdiction of this court attaches upon allowance of the appeal and proceedings are to be taken here to bring in the representative of an appellee who dies after the acceptance of service of citation. *Southern Pine Co.* v. *Ward*, 126.

2. *Appeal or writ of error to review judgment of territorial court.*

Nat. Live Stock Bank v. *First Nat. Bank*, 203 U. S. 296, 305, followed, as to when jurisdiction of this court to review judgments of the Supreme Court of the Territory of Oklahoma is by appeal and not by writ of error. *Ib.*

3. *Appeal from Circuit Court of Appeals.*

Although diversity of citizenship is alleged in the bill, if the grounds of the suit and relief are also based on statutes of the United States, which, as in this case, are necessarily elements of the decision of the Circuit Court of Appeals, an appeal lies from the judgment of that court to this court. *Henningsen* v. *U. S. Fidelity & Guaranty Co.*, 404.

4. *Review of judgment of District or Circuit Court on jurisdictional ground after affirmance by Circuit Court of Appeals.*

Where the Circuit Court of Appeals has already affirmed the judgment of the District or Circuit Court, a writ of error from this court to the District or Circuit Court to review the judgment on the jurisdictional ground, cannot be maintained unless the proceedings in the Circuit Court of Appeals were absolutely void. *United States* v. *Larkin*, 333.

5. *Review of judgment of District or Circuit Court on jurisdictional grounds; when question sufficiently certified.*

Ordinarily a formal certificate is essential and it must be made at the same term at which the judgment is rendered; but where the record shows that the only matter tried and decided, and sought to be reviewed, was one of the jurisdiction of the court, the question of jurisdiction is sufficiently certified. *Ib.*

6. *Review of judgment of District Court on jurisdictional ground—Sufficiency of involution of jurisdictional question.*

District Courts of the United States are the proper courts to adjudicate forfeitures, and where the plea to the jurisdiction is simply whether the particular court has jurisdiction, by reason of the locality in which the goods were seized, the question involved is not the jurisdiction of

B. Of the Circuit Court of Appeals.

See Jurisdiction, A 6.

C. Of Circuit Courts.

1. *Enjoining proceedings in state court.*

Notwithstanding the prohibitive provisions of § 720, Rev. Stat., the Circuit Court of the United States may have jurisdiction of a suit brought by a citizen of one State against citizens of another State to enjoin the execution of a judgment fraudulently entered against him in a state court which had no jurisdiction by reason of non-service of the summons, and this court will not determine the merits of such a case on *habeas corpus* proceedings brought by one of the defendants committed for contempt for disobeying a preliminary injunction order issued by the Circuit Court. *Ex parte Simon*, 144.

2. *Collusion of purposes of jurisdiction—Preference of parties as to tribunal—Effect of motive for bringing suit.*

Where the averments of the bill are true, and there is no question as to the diversity of citizenship, or any evidence that a case was fraudulently created to give jurisdiction to the Federal court, the case will not be regarded as collusive merely because the parties preferred to resort to the Federal court instead of to a state court; in the absence of any improper act, the motive for bringing the suit is unimportant. *Re Metropolitan Railway Receivership*, 90.

3. *When order permitting intervention and extending receivership not of jurisdictional nature.*

After the Federal court has properly obtained jurisdiction over a corporation and has appointed receivers thereof, an order permitting other parties closely identified therewith to intervene and extending their receivership over them is not of a jurisdictional nature, and in this case the discretion was, in view of all the facts, properly exercised. *Ib.*

4. *Diversity of citizenship and not that defendants were engaged in interstate commerce determines jurisdiction in appointment of receivers.*

The mere fact that the defendant is engaged in interstate commerce does not give the Circuit Court jurisdiction; in cases in which this court has sustained the jurisdiction of the Circuit Court in the appointment of receivers, jurisdiction existed by reason of diversity of citizenship and not merely because the defendants were engaged in interstate commerce. *Ib.*

5. *Where no diversity of citizenship but constitutional question involved.*

Although all the parties to this action are citizens of the same State the Circuit Court of the United States had jurisdiction because the case arises under the Constitution of the United States, as complainant insists that the tax sought to be restrained is imposed under a state statute that impairs the obligation of a legislative contract for exemption from taxation. *Jetton* v. *University of the South*, 489.

recently decided in the lower Federal courts, this court expresses no opinion upon any other subjects involved in such cases, and does not even indirectly leave room for any implication that any opinion has been expressed as to such other issues which may hereafter come before it for decision. *Great Northern Ry. Co.* v. *United States*, 452.

ORIGINAL PACKAGES.

See STATES, 4.

PARTIES.

See APPEAL AND ERROR, 2;
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PENALTIES AND FORFEITURES.

See JURISDICTION, A 6;
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PERSONAL LIBERTY.

See CONSTITUTIONAL LAW, 6, 16.

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See ARMY AND NAVY, 1, 2.

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See CONGRESS, POWERS OF, 4;
CONSTITUTIONAL LAW, 2, 11, 18;
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See INJUNCTION, 4.

POSTMASTER GENERAL.

See INJUNCTION, 4.

POWERS OF CONGRESS.

See CONGRESS, POWERS OF;
CONSTITUTIONAL LAW, 16.

PRACTICE AND PROCEDURE.

viewing a judgment of the Supreme Court of the Territory of Oklahoma, is confined to determining whether that court erred in holding that there was evidence tending to support the findings made by the trial court in a case submitted to it by stipulation, without a jury, and whether such findings sustained the judgment. *Southern Pine Co.* v. *Ward*, 126.

14. *When Federal question raised too late.*

It is too late to raise the Federal question on motion for rehearing in the state court, unless that court entertains the motion and expressly passes on the Federal question. *Disconto Gesellschaft* v. *Umbreit*, 570.

15. *When objection to remarks of trial court to be taken.*

Objections to remarks of the trial court which counsel consider prejudicial must be taken at the time so that if the court does not then correct what is misleading its action is subject to review. *Drumm-Flato Commission Co.* v. *Edmisson*, 534.

16. *When contention embraced in ground for demurrer to indictment not considered on review of judgment.*

Although a ground for demurrer to indictment may be sufficiently broad to embrace a contention raised before this court, if it appears that such contention was disclaimed, and was not urged, in the trial court and in the Circuit Court of Appeals, and was not referred to in any of the opinions below or in the petition for certiorari or the brief in support thereof, this court will, without intimating any opinion in regard to its merits, decline to consider it. *Great Northern Ry. Co.* v. *United States*, 452.

17. *Consideration of local conditions in determining constitutionality of state court's decision in respect of exercise of eminent domain.*

While it is beyond the legislative power of a State to take, against his will, the property of one and give it to another for a private use, even if compensation be required, it is ultimately a judicial question whether the use is public or private; and, in deciding whether the state court has determined that question within the limits of the Fourteenth Amendment, this court will take into consideration the diversity of local conditions. *Hairston* v. *Danville & Western Railway*, 598.

18. *Where conflict of decisions of state and Federal courts as to rights of parties to property in possession of Circuit Court.*

Where claims are presented for adjudication to the Circuit Court against property in its possession and there are conflicting decisions of the state and Federal courts as to the rights of the parties, the Circuit Court must first determine which decision it will follow. This court cannot pass upon that question until it is properly before it. *Wabash Railroad Co.* v. *Adelbert College*, 609.

See JUDGMENTS AND DECREES;
JURISDICTION, A 7.

RATES, FREIGHT.

See INTERSTATE COMMERCE, 1, 2.

RATES OF POSTAGE

See INJUNCTION, 4.

RECEIVERS.

1. *Rights of receiver of bank.*

The receiver of a bank stands in no better position than the bank stood as a going concern. *Rankin* v. *City National Bank*, 541.

2. *Charge of liabilities incurred by.*

A receiver, as soon as he is appointed and qualifies, comes under the sole direction of the court and his engagements are those of the court, and the liabilities he incurs are chargeable upon the property and not against the parties at whose instance he was appointed and who have no authority over him and cannot control his actions. *Atlantic Trust Co.* v. *Chapman*, 360.

3. *Same.*

While cases may arise in which it may be equitable to charge the parties at whose instance a receiver is appointed with the expenses of the receivership, in the absence of special circumstances the general rule, which is applicable in this case, is that such expenses are a charge upon the property or fund without any personal liability therefor on the part of those parties; and the mere inadequacy of the fund to meet such expenses does not render a plaintiff who has not been guilty of any irregularity liable therefor. *Ib.*

4. *Termination of receivership of railroad.*

A receivership of a railroad as a going concern, although at times necessary and proper—as in this case, where the refusal to appoint a receiver would have led to sacrifice of property, confusion among the creditors, and great inconvenience to the travelling public—should not be unnecessarily prolonged, and in case of unnecessary delay the court should listen to the application of any creditor upon due notice to the receiver for the prompt termination of the trust or vacation of the order appointing receivers. *Re Metropolitan Railway Receivership*, 90.

See BILLS AND NOTES; JURISDICTION, C 3, 4;
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See TAXES AND TAXATION, 1.

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STATE AND FEDERAL COURTS.

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A. CONSTRUCTION OF.