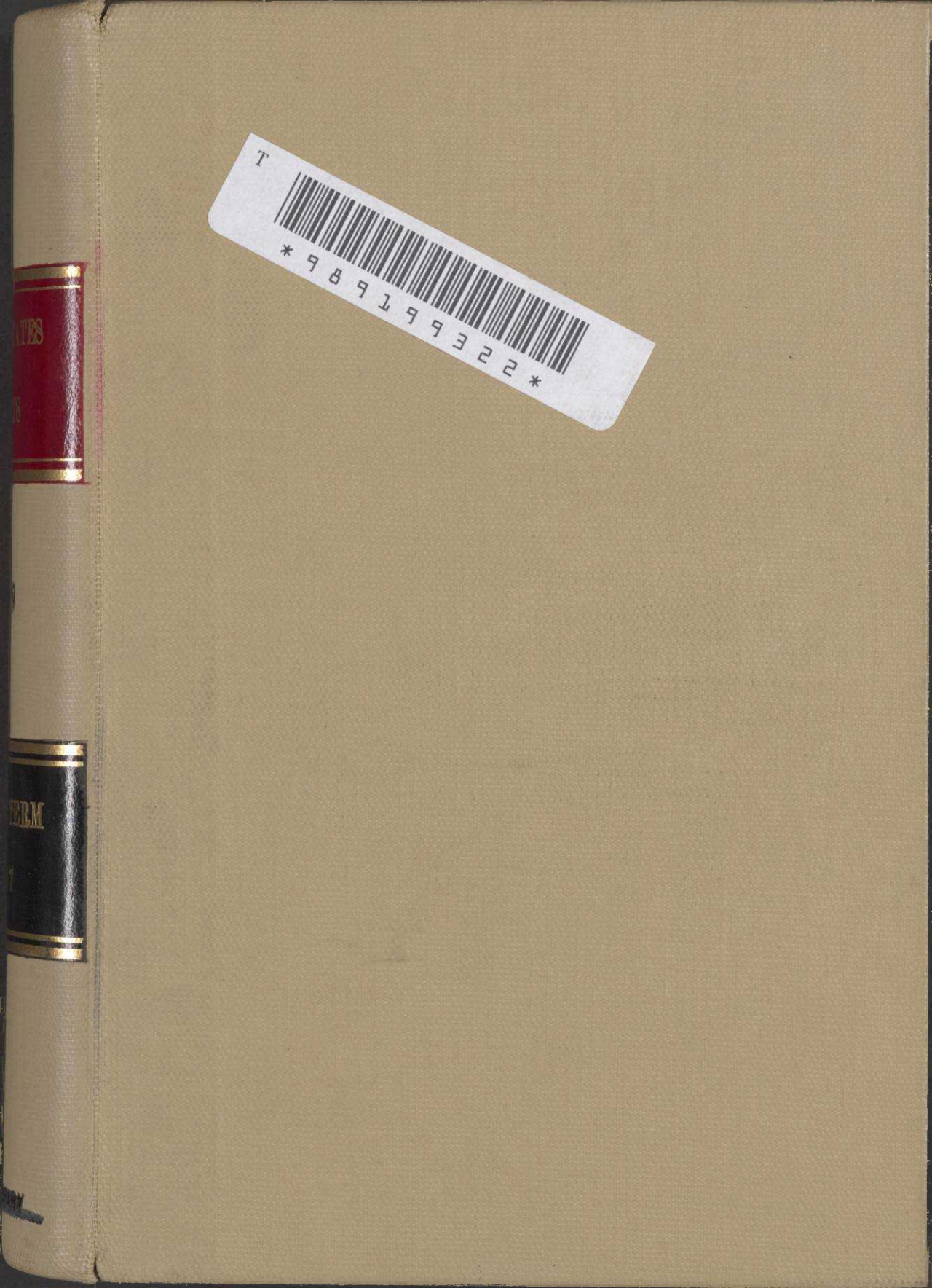

UNITED STATES REPORTS

VOLUME 209

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1907

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1908

JUSTICES

OF THE

SUPREME COURT[1]

DURING THE TIME OF THESE REPORTS.

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

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

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

SUPREME COURT OF THE UNITED STATES.

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

ORDER: There having been an Associate Justice of this court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

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

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1907.

WHITE-SMITH MUSIC PUBLISHING COMPANY *v.* APOLLO COMPANY.

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

Nos. 110, 111. Argued January 16, 17, 1908.—Decided February 24, 1908.

While this court is not bound under the doctrine of *stare decisis* by the decisions of lower Federal courts which have not been reviewed by this court, as to the construction of a Federal statute, or by the decisions of the highest courts of foreign countries construing similar statutes of those countries, where all of such decisions express the same views on the subject involved, the omission of Congress, when subsequently amending the statute, to specifically legislate concerning that subject may be regarded by this court as an acquiescence by Congress in the judicial construction so given to the statute.

While the United States is not a party to the Berne Copyright Convention of 1886, this court will hesitate to construe the copyright act as amended March 3, 1891, in such manner that foreign authors and composers can obtain advantages in this country which, according to that convention, are denied to our citizens abroad.

What is included within the protection of the copyright statute depends upon the construction of the statute itself, as the protection given to copyright in this country is wholly statutory.

The amendment of § 4966, Rev. Stat., by the act of January 6, 1897, 29 Stat. 481, providing penalties for infringements of copyrighted dramatic or musical compositions, did not enlarge the meaning of previous and unamended sections.

A "copy" of a musical composition within the meaning of the copyright

statute is a written or printed record of it in intelligible notation and this does not include perforated rolls which when duly applied and properly operated in connection with musical instruments to which they are adapted produce the same musical tones as are represented by the signs and figures on the copy in staff notation of the composition filed by the composer for copyright.

The existing copyright statute has not provided for the intellectual conception, even though meritorious, apart from the thing produced; but has provided for the making and filing of a tangible thing against the duplication whereof it has protected the composer.

Considerations of the hardships of those whose published productions are not protected by the copyright properly address themselves to Congress and not to the courts.

147 Fed. Rep. 226, affirmed.

THE facts are stated in the opinion.

Mr. Livingston Gifford for appellant:

Appellant's interpretation is in accord with the policy of the law and appellee's interpretation is not. The policy of the law is to protect the author against every form of piracy without distinction, and the piracy of a musical composition by reproducing and selling it in the form of perforated music is just as culpable as in any other form.

The Constitution purports to secure to authors "the exclusive right to their respective writings," and it is obviously not compatible with this to protect them only against the sale of their writings in a form which requires no assistance of mechanism for reading.

As this interpretation is the only one which will carry out its policy, the statute should certainly be so interpreted, unless such interpretation is inconsistent with its terms or with the terms of the Constitution.

Article I, § 8 of the Constitution, as interpreted by the decisions, is broad enough to include perforated music.

See the copyright law in which Congress has included as writings (§ 4952), books, maps, charts, dramatic or musical compositions, engravings, etc. In principle we ask for no broader interpretation here. And see also *Lithograph Co.* v. *Sarony*, 111 U. S. 53; *Holmes* v. *Hurst*, 174 U. S. 86; *Bleistein*

v. *Donaldson Co.*, 188 U. S. 239; *American Mutoscope Co.* v. *Edison Co.*, 137 Fed. Rep. 262.

The mutuality of the contract which the Constitution evidently contemplates between the Government, on the one hand, and the author or inventor on the other, also leads to the same conclusion.

If an author has among his writings a musical composition, the only possible way of "securing" to him the "exclusive right" thereto is by giving him the monopoly of this musical composition, no matter in what form it may be represented; otherwise, he gets only a partial exclusive right thereto. No composer can be truly said to have "the exclusive right" to his musical composition writings secured to him so long as others have the right to publish, and sell them without his consent, in the form of perforated music.

"Musical composition," the term of the statute under which this case comes, is broad enough to include perforated music.

As applicable to this case, the right conferred by the statute is the "sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending" the "musical composition." The undeniable policy of the law is to cover all forms of piracy.

This court has substantially decided that the subject of property in a copyrighted musical composition is the order of the notes in the author's composition, by adopting in *Holmes* v. *Hurst*, 174 U. S. 86, Mr. Justice Erle's definition of the subject of property in a book or literary composition as being "the order of the words in the author's composition." And the same thing must also be true as to the notes of a musical composition. The only thing that has to be copied to constitute a copy of the copyright property is the order in which the notes were set down.

Appellee's witnesses admit that in making the infringing perforated music they copy the order of the notes.

It is immaterial that in the year 1831, when the term "musical composition" was first placed in the copyright statute the

perforated form of musical compositions was not known. See *Edison* v. *Lubin*, 122 Fed. Rep. 240, holding that while the advance in the art of photography has resulted in a different type of photograph, yet it is none the less a photograph.

So, as to music, while the perforated notation is a different type of notation, yet it is none the less a "musical composition;" none the less a perfect record, and none the less a "writing."

Where the order of the notes or words is copied, infringement of literary or musical compositions is not avoided by variations in other respects. *Jollie* v. *Jacques*, 1 Blatch. 625; *Blume* v. *Spear*, 30 Fed. Rep. 631; *Daly* v. *Palmer*, 6 Blatch. 266; *Nicols* v. *Pitman*, 26 Ch. Div. 374; *Edison* v. *Lubin*, 122 Fed. Rep. 240; *Fishel* v. *Leuckel*, 53 Fed. Rep. 499; *Falk* v. *Howell*, 37 Fed. Rep. 202; *Falk* v. *Donaldson*, 57 Fed. Rep. 32; *Turner* v. *Robinson*, 10 Ir. Ch. 121, 510; Drone on Copyright, 385; Scrutton on Copyright, ed. 1903, 135, note.

The meaning of "musical composition" in § 4952, must be read in the light of its manifest meaning in § 4966 wherein it is the subject of protection against public performance.

The prohibition of the public performance of a copyrighted "musical composition" is the prohibition of the public reproduction of that order or succession of notes which constitutes the composition. It is the musical composition that is publicly performed, and not a sheet of music.

Public performance is prohibited, whether or not any notation or record be used. And it cannot be questioned that a performance in public of a musical composition upon an Aeolian organ or pianola, by means of perforated music, would be as much a public performance of a musical composition as if it had been played in public from a printed sheet of music in staff notation, and as such would be equally within the condemnation of the statute, provided the musical composition had been copyrighted. One who, like the appellee, sells the musical composition is a contributory infringer with the infringer under § 4952 who plays it in public.

Readability by the person without mechanical assistance is

not made a test of copyrightability or of infringement by the statute. So long as it can be read or reproduced in any way, it makes no difference what assistance the person calls in from means known in the art.

Whether a musical composition, in addition to the musical function performed by the order of its notes, does, or does not, perform also a mechanical function is not made a test of copyrightability or of infringement by the statute.

It is impossible to say that the order of the perforated notes is the mere adjunct of a valve mechanism, because the valve mechanism would work with the perforations in whatever order. It is not the machine that puts or requires the perforations in this order, but the appellee.

There is no controlling authority opposed to complainant's contention. The two decisions in this country relied upon by the appellee are neither binding upon this court nor apposite to the facts disclosed by this record. *Kennedy* v. *McTammany*, 33 Fed. Rep. 584, and *Stern* v. *Rosey*, 17 App. D. C. 562, discussed and distinguished. The English decision of *Boosey* v. *Whight*, L. R. 1900, 1 Ch. 122, was based upon the narrow wording of the English statute, and in view of the amendment of that statute in 1902, can no longer be regarded as authority, even in England.

Mr. Charles S. Burton and *Mr. John J. O'Connell* for appellee:

Copyright is strictly statutory in the United States. If a common law right ever existed it was taken away by the statute of Anne, and that statute and those amendatory of it are now in England the only source of an author's right. There never existed any common law right of copyright in the United States. Copyright in this country is the creature of statute pure and simple. *Wheaton* v. *Peters*, 8 Pet. 591, see p. 664 quotation; *Banks* v. *Manchester*, 128 U. S. 244; *Thompson* v. *Hubbard*, 131 U. S. 123.

Existing by virtue of statute only, the limitations of copyright are those which the statute fixes, or, more accurately

speaking, its extent is only that which the statute gives. *Ewer* v. *Coxe*, Fed. Cases 4,584; *S. C.*, 4 Wash. C. C. 487; *Holmes* v. *Hurst*, 174 U. S. 82; *Perris* v. *Hexamer*, 99 U. S. 674.

The statutes creating and covering copyright must be strictly construed in all respects. *Banks* v. *Manchester*, 128 U. S. 244; *Bolles* v. *Outing Co.*, 175 U. S. 268.

Departure from this rule of strict construction cannot be justified on the ground of extending the statute by analogy from things expressed, to things thought to be similar; or from rights named, and defined in respect to named subjects, to analogous rights in respect to subjects thought to be analogous.

As the legislature alone created the right and set its bounds in the first instance, so the legislature may, as civilization and art develop and the considerations governing legislative discretion change, extend or contract those bounds from year to year and from generation to generation, but as the creation of the right waited, so the extension, as much as its contraction, must wait upon the legislative act.

If the invention of automatic musical instruments and the graphophone have opened new fields and methods for the exploitation, promulgation, or what may be called "publication" of musical compositions which did not exist or were not in contemplation of the legislature when the present statutes were enacted, it is not for the courts to enter the domain of legislation to weigh the considerations either of equity or expediency which might move for or against such proposed extensions. All arguments directed to the supposed reasonableness of treating copyright as covering automatic means of audible reproduction of speech and music are utterly irrelevant and beside the question. See *Osgood* v. *Aloe Instrument Co.*, 69 Fed. Rep. 291; *Higgins* v. *Keuffel*, 140 U. S. 428; *Werckmeister* v. *American Lithograph Co.*, 117 Fed. Rep. 360; *Tompkins* v. *Rankin*, Fed. Cases, 14,090; *Thompson* v. *Hubbard*, 131 U. S. 123; *Littleton* v. *Oliver Ditson Co.*, 62 Fed. Rep. 597, affirmed, 67 Fed. Rep. 905; *Wood* v. *Abbott*, Fed. Cases, 17,938; *Hills* v. *Austrich*, 120 Fed. Rep. 862.

Musical compositions mentioned as the subject of copyright are tangible and legible embodiments of the intellectual product of the musician, and not the intangible intellectual product itself.

"Copies" which infringe a musical copyright must be tangible embodiments of the intellectual product of the composer in the same sense and for the same purpose as tangible embodiment which constitutes the copyrighted "musical composition."

The primary use and adaptation of the thing determines its copyrightability or infringement of copyright. Intention as to use is material and may be controlling.

Things intended for mechanical function—for use in themselves—will not infringe copyright, and are not copyrightable merely because of incidentally being able to perform some part of the function of things copyrightable. *Baker* v. *Selden*, 101 U. S. 99; *Amberg File Co.* v. *Shea*, 82 Fed. Rep. 314, aff'g 78 Fed. Rep. 429; *Rosenbach* v. *Dreyfuss*, 2 Fed. Rep. 217.

The protection designed to be afforded to the composer by copyright of a musical composition is only the monopoly of the multiplication and selling of copies, and this applies to musical compositions as it does to all other subjects of copyright.

As to this definition of the monopoly see *Stephens* v. *Cady*, 14 How. 529; *Stowe* v. *Thomas*, Fed. Cases, 13,514; *Lawrence* v. *Dana*, Fed. Cases, 8,136; *Perris* v. *Hexamer*, 99 U. S. 674.

That perforated sheets and other mechanical means of automatically producing music audibly are not infringements of copyrights upon the musical compositions which are thus audibly reproduced, has been the conclusion of every court of England and America before which this question has ever come for decision. *Stern* v. *Rosey*, 17 App. D. C. 562; *Kennedy* v. *McTammany*, 33 Fed. Rep. 584; *Boosey* v. *Whight*, 15 L. T. R. 322 (1899); 1 Ch. 836 (1899); 80 L. T. R. (N. S.) 561.

These prior decisions have established a rule of property and of business, and should be sustained under the doctrine of *stare decisis*, unless greater injury would result from sustaining than from reversing them. Every enactment of Congress is

properly interpreted by reference to established public policy and then known existing conditions.

The existence at the time of the enactment of the United States copyright law of 1891, of the Berne convention of 1886 compels the conclusion that said law of 1891 was not intended by Congress to subject perforated rolls to copyright.

By leave of court, the following briefs were filed in these cases on behalf of parties interested in the decision:

By *Mr. Nathan Burkan* for Victor Herbert sustaining the contentions of the appellant.

By *Mr. Albert H. Walker* for the Connorized Music Company; by *Mr. George W. Pound* for the De Kleist Musical Instrument Manufacturing Company and the Rudolph-Wurlitzer Company, sustaining the contentions of the appellee.

Mr. Justice Day delivered the opinion of the court.

These cases may be considered together. They are appeals from the judgment of the Circuit Court of Appeals for the Second Circuit (147 Fed. Rep. 226), affirming the decree of the Circuit Court of the United States for the Southern District of New York, rendered August 4, 1905 (139 Fed. Rep. 427), dismissing the bills of the complainant (now appellant) for want of equity. Motions have been made to dismiss the appeals, and a petition for writ of certiorari has been filed by appellant. In view of the nature of the cases the writ of certiorari is granted, the record on the appeals to stand as a return to the writ. *Montana Mining Co.* v. *St. Louis Mining Co.*, 204 U. S. 204.

The actions were brought to restrain infringement of the copyrights of two certain musical compositions, published in the form of sheet music, entitled, respectively, "Little Cotton Dolly" and "Kentucky Babe." The appellee, defendant below, is engaged in the sale of piano players and player pianos, known as the "Apollo," and of perforated rolls of music used

in connection therewith. The appellant, as assignee of Adam Geibel, the composer, alleged compliance with the copyright act, and that a copyright was duly obtained by it on or about March 17, 1897. The answer was general in its nature, and upon the testimony adduced a decree was rendered, as stated, in favor of the Apollo Company, defendant below, appellee here.

The action was brought under the provisions of the copyright act, § 4952 (3 U. S. Comp. Stat. Sup. 1907, p. 1021), giving to the author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same. The Circuit Courts of the United States are given jurisdiction under § 4970 (3 U. S. Comp. Stat. 3416) to grant injunctions according to the course and principles of courts of equity in copyright cases. The appellee is the manufacturer of certain musical instruments adapted to be used with perforated rolls. The testimony discloses that certain of these rolls, used in connection with such instruments, and being connected with the mechanism to which they apply, reproduce in sound the melody recorded in the two pieces of music copyrighted by the appellant.

The manufacture of such instruments and the use of such musical rolls has developed rapidly in recent years in this country and abroad. The record discloses that in the year 1902 from seventy to seventy-five thousand of such instruments were in use in the United States, and that from one million to one million and a half of such perforated musical rolls, to be more fully described hereafter, were made in this country in that year.

It is evident that the question involved in the use of such rolls is one of very considerable importance, involving large property interests, and closely touching the rights of composers and music publishers. The case was argued with force and ability, orally and upon elaborate briefs.

Without entering into a detailed discussion of the mechanical

construction of such instruments and rolls, it is enough to say that they are what has become familiar to the public in the form of mechanical attachments to pianos, such as the pianola, and the musical rolls consist of perforated sheets, which are passed over ducts connected with the operating parts of the mechanism in such manner that the same are kept sealed until, by means of perforations in the rolls, air pressure is admitted to the ducts which operate the pneumatic devices to sound the notes. This is done with the aid of an operator, upon whose skill and experience the success of the rendition largely depends. As the roll is drawn over the tracker board the notes are sounded as the perforations admit the atmospheric pressure, the perforations having been so arranged that the effect is to produce the melody or tune for which the roll has been cut.

Speaking in a general way, it may be said that these rolls are made in three ways. First. With the score or staff notation before him the arranger, with the aid of a rule or guide and a graduated schedule, marks the position and size of the perforations on a sheet of paper to correspond to the order of notes in the composition. The marked sheet is then passed into the hands of an operator who cuts the apertures, by hand, in the paper. This perforated sheet is inspected and corrected, and when corrected is called "the original." This original is used as a stencil and by passing ink rollers over it a pattern is prepared. The stenciled perforations are then cut, producing the master or templet. The master is placed in the perforating machine and reproductions thereof obtained, which are the perforated rolls in question. Expression marks are separately copied on the perforated music sheets by means of rubber stamps. Second. A perforated music roll made by another manufacturer may be used from which to make a new record. Third. By playing upon a piano to which is attached an automatic recording device producing a perforated matrix from which a perforated music roll may be produced.

It is evident, therefore, that persons skilled in the art can take such pieces of sheet music in staff notation, and by means

of the proper instruments make drawings indicating the perforations, which are afterwards outlined and cut upon the rolls in such wise as to reproduce, with the aid of the other mechanism, the music which is recorded in the copyrighted sheets.

The learned counsel for the parties to this action advance opposing theories as to the nature and extent of the copyright given by statutory laws enacted by Congress for the protection of copyright, and a determination of which is the true one will go far to decide the rights of the parties in this case. On behalf of the appellant it is insisted that it is the intention of the copyright act to protect the intellectual conception which has resulted in the compilation of notes which, when properly played, produces the melody which is the real invention of the composer. It is insisted that this is the thing which Congress intended to protect, and that the protection covers all means of expression of the order of notes which produce the air or melody which the composer has invented.

Music, it is argued, is intended for the ear as writing is for the eye, and that it is the intention of the copyright act to prevent the multiplication of every means of reproducing the music of the composer to the ear.

On the other hand, it is contended that while it is true that copyright statutes are intended to reward mental creations or conceptions, that the extent of this protection is a matter of statutory law, and that it has been extended only to the tangible results of mental conception, and that only the tangible thing is dealt with by the law, and its multiplication or reproduction is all that is protected by the statute.

Before considering the construction of the statute as an independent question the appellee invokes the doctrine of *stare decisis* in its favor, and it is its contention that in all the cases in which this question has been up for judicial consideration it has been held that such mechanical producers of musical tones as are involved in this case have not been considered to be within the protection of the copyright act; and that, if within the power of Congress to extend protection to such subjects,

the uniform holdings have been that it is not intended to include them in the statutory protection given. While it may be that the decisions have not been of that binding character that would enable the appellee to claim the protection of the doctrine of *stare decisis* to the extent of precluding further consideration of the question, it must be admitted that the decisions, so far as brought to our attention in the full discussion had at the bar and upon the briefs, have been uniformly to the effect that these perforated rolls operated in connection with mechanical devices for the production of music are not within the copyright act. It was so held in *Kennedy* v. *McTammany*, 33 Fed. Rep. 584. The decision was written by Judge Colt in the First Circuit; the case was subsequently brought to this court, where it was dismissed for failure to print the record. 145 U. S. 643. In that case the learned judge said:

"I cannot convince myself that these perforated sheets of paper are copies of sheet music within the meaning of the copyright law. They are not made to be addressed to the eye as sheet music, but they form a part of a machine. They are not designed to be used for such purposes as sheet music, nor do they in any sense occupy the same field as sheet music. They are a mechanical invention made for the sole purpose of performing tunes mechanically upon a musical instrument."

Again the matter was given careful consideration in the Court of Appeals of the District of Columbia in an opinion by Justice Shepard (*Stearn* v. *Rosey*, 17 App. D. C. 562), in which that learned justice, speaking for the court, said:

"We cannot regard the reproduction, through the agency of a phonograph, of the sounds of musical instruments playing the music composed and published by the complainants, as the copy or publication of the same within the meaning of the act. The ordinary signification of the words 'copying,' 'publishing,' etc., cannot be stretched to include it.

"It is not pretended that the marking upon waxed cylinders can be made out by the eye or that they can be utilized in any other way than as parts of the mechanism of the phonograph.

"Conveying no meaning, then, to the eye of even an expert musician and wholly incapable of use save in and as a part of a machine specially adapted to make them give up the records which they contain, these prepared waxed cylinders can neither substitute the copyrighted sheets of music nor serve any purpose which is within their scope. In these respects there would seem to be no substantial difference between them and the metal cylinder of the old and familiar music box, and this, though in use at and before the passage of the copyright act, has not been regarded as infringing upon the copyrights of authors and publishers."

The question came before the English courts in *Boosey* v. *Whight* (1899, 1 Ch. 836; 80 L. T. R. 561), and it was there held that these perforated rolls did not infringe the English copyright act protecting sheets of music. Upon appeal Lindley, Master of the Rolls, used this pertinent language (1900, 1 Ch. 122; 81 L. T. R. 265):

"The plaintiffs are entitled to copyright in three sheets of music. What does this mean? It means that they have the exclusive right of printing or otherwise multiplying copies of those sheets of music, *i. e.*, of the bars, notes, and other printed words and signs on these sheets. But the plaintiffs have no exclusive right to the production of the sounds indicated by or on those sheets of music; nor to the performance in private of the music indicated by such sheets; nor to any mechanism for the production of such sounds or music.

"The plaintiff's rights are not infringed except by an unauthorized copy of their sheets of music. We need not trouble ourselves about authority; no question turning on the meaning of that expression has to be considered in this case. The only question we have to consider is whether the defendants have copied the plaintiff's sheets of music.

"The defendants have taken those sheets of music and have prepared from them sheets of paper with perforations in them, and these perforated sheets, when put into and used with properly constructed machines or instruments, will produce or

enable the machines or instruments to produce the music indicated on the plaintiff's sheets. In this sense the defendant's perforated rolls have been copies from the plaintiff's sheets.

"But is this the kind of copying which is prohibited by the copyright act; or rather is the perforated sheet made as above mentioned a copy of the sheet of music from which it is made? Is it a copy at all? Is it a copy within the meaning of the copyright act? A sheet of music is treated in the copyright act as if it were a book or sheet of letter press. Any mode of copying such a thing, whether by printing, writing, photography, or by some other method not yet invented, would no doubt be copying. So, perhaps, might a perforated sheet of paper to be sung or played from in the same way as sheets of music are sung or played from. But to play an instrument from a sheet of music which appears to the eye is one thing; to play an instrument with a perforated sheet which itself forms part of the mechanism which produces the music is quite another thing."

Since these cases were decided Congress has repeatedly had occasion to amend the copyright law. The English cases, the decision of the District Court of Appeals, and Judge Colt's decision must have been well known to the members of Congress; and although the manufacture of mechanical musical instruments had not grown to the proportions which they have since attained they were well known, and the omission of Congress to specifically legislate concerning them might well be taken to be an acquiescence in the judicial construction given to the copyright laws.

This country was not a party to the Berne convention of 1886, concerning international copyright, in which it was specifically provided:

"It is understood that the manufacture and sale of instruments serving to reproduce mechanically the airs of music borrowed from the private domain are not considered as constituting musical infringement."

But the proceedings of this convention were doubtless well

known to Congress. After the Berne convention the act of March 3, 1891, was passed. Section 13 of that act provides (3 U. S. Comp. Stat. 3417):

"SEC. 13. That this act shall only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America the benefits of copyright on substantially the same basis as to its own citizens; and when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such agreement. The existence of either of the conditions aforesaid shall be determined by the President of the United States by proclamation made from time to time as the purposes of this act may require."

By proclamation of the President July 1, 1891, the benefit of the act was given to the citizens of Belgium, France, British possessions and Sweden, which countries permitted the citizens of the United States to have the benefit of copyright on the same basis as the citizens of those countries. On April 30, 1892, the German Empire was included. On October 31, 1892, a similar proclamation was made as to Italy. These countries were all parties to the Berne convention.

It could not have been the intention of Congress to give to foreign citizens and composers advantages in our country which according to that convention were to be denied to our citizens abroad.

In the last analysis this case turns upon the construction of a statute, for it is perfectly well settled that the protection given to copyrights in this country is wholly statutory. *Wheaton* v. *Peters*, 8 Pet. 590; *Banks* v. *Manchester*, 128 U. S. 244, 253; *Thompson* v. *Hubbard*, 131 U. S. 123, 151; *American Tobacco Company* v. *Werckmeister*, 207 U. S. 284.

Musical compositions have been the subject of copyright protection since the statute of February 3, 1831, c. , 4 Stat. 436, and laws have been passed including them since that time.

When we turn to the consideration of the act it seems evident that Congress has dealt with the tangible thing, a copy of which is required to be filed with the Librarian of Congress, and wherever the words are used (copy or copies) they seem to refer to the term in its ordinary sense of indicating reproduction or duplication of the original. Section 4956 (3 U. S. Comp. Stat. 3407) provides that two copies of a book, map, chart or musical composition, etc., shall be delivered at the office of the Librarian of Congress. Notice of copyright must be inserted in the several copies of every edition published, if a book, or if a musical composition, etc., upon some visible portion thereof. Section 4962, Copyright Act, 3 U. S. Comp. Stat. 3411. Section 4965 (3 U. S. Comp. Stat. 3414) provides in part that the infringer "shall forfeit every sheet thereof, and one dollar for every sheet of the same found in his possession," etc., evidently referring to musical compositions in sheets. Throughout the act it is apparent that Congress has dealt with the concrete and not with an abstract right of property in ideas or mental conceptions.

We cannot perceive that the amendment of § 4966 by the act of January 6, 1897, c. 4, 29 Stat. 481 (3 U. S. Comp. Stat. 3415), providing a penalty for any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, can have the effect of enlarging the meaning of the previous sections of the act which were not changed by the amendment. The purpose of the amendment evidently was to put musical compositions on the footing of dramatic compositions so as to prohibit their public performance. There is no complaint in this case of the public performance of copyrighted music; nor is the question involved whether the manufacturers of such perforated music rolls when sold for use in public performance might be held as contributing infringers. This amendment was evidently passed for the specific purpose referred to, and is entitled to little consideration in construing the meaning of the terms of the act theretofore in force.

What is meant by a copy? We have already referred to the common understanding of it as a reproduction or duplication of a thing. A definition was given by Bailey, J., in *West* v. *Francis*, 5 B. & A. 743, quoted with approval in *Boosey* v. *Whight*, *supra*. He said: "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original."

Various definitions have been given by the experts called in the case. The one which most commends itself to our judgment is perhaps as clear as can be made, and defines a copy of a musical composition to be "a written or printed record of it in intelligible notation." It may be true that in a broad sense a mechanical instrument which reproduces a tune copies it; but this is a strained and artificial meaning. When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. In no sense can musical sounds which reach us through the sense of hearing be said to be copies as that term is generally understood, and as we believe it was intended to be understood in the statutes under consideration. A musical composition is an intellectual creation which first exists in the mind of the composer; he may play it for the first time upon an instrument. It is not susceptible of being copied until it has been put in a form which others can see and read. The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer.

Also it may be noted in this connection that if the broad construction of publishing and copying contended for by the appellants is to be given to this statute it would seem equally applicable to the cylinder of a music box, with its mechanical arrangement for the reproduction of melodious sounds, or the record of the graphophone, or to the pipe organ operated by

devices similar to those in use in the pianola. All these instruments were well known when these various copyright acts were passed. Can it be that it was the intention of Congress to permit them to be held as infringements and suppressed by injunctions?

After all, what is the perforated roll? The fact is clearly established in the testimony in this case that even those skilled in the making of these rolls are unable to read them as musical compositions, as those in staff notation are read by the performer. It is true that there is some testimony to the effect that great skill and patience might enable the operator to read his record as he could a piece of music written in staff notation. But the weight of the testimony is emphatically the other way, and they are not intended to be read as an ordinary piece of sheet music, which to those skilled in the art conveys, by reading, in playing or singing, definite impressions of the melody.

These perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act.

It may be true that the use of these perforated rolls, in the absence of statutory protection, enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value. But such considerations properly address themselves to the legislative and not to the judicial branch of the Government. As the act of Congress now stands we believe it does not include these records as copies or publications of the copyrighted music involved in these cases.

The decrees of the Circuit Court of Appeals are

Affirmed.

MR. JUSTICE HOLMES, concurring specially.

In view of the facts and opinions in this country and abroad to which my brother Day has called attention I do not feel

justified in dissenting from the judgment of the court, but the result is to give to copyright less scope than its rational significance and the ground on which it is granted seem to me to demand. Therefore I desire to add a few words to what he has said.

The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is *in vacuo*, so to speak. It restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time, and therefore, I may remark in passing, it is one which hardly can be conceived except as a product of statute, as the authorities now agree.

The ground of this extraordinary right is that the person to whom it is given has invented some new collocation of visible or audible points,—of lines, colors, sounds, or words. The restraint is directed against reproducing this collocation, although but for the invention and the statute any one would be free to combine the contents of the dictionary, the elements of the spectrum, or the notes of the gamut in any way that he had the wit to devise. The restriction is confined to the specific form, to the collocation devised, of course, but one would expect that, if it was to be protected at all, that collocation would be protected according to what was its essence. One would expect the protection to be coextensive not only with the invention, which, though free to all, only one had the ability to achieve, but with the possibility of reproducing the result which gives to the invention its meaning and worth. A

musical composition is a rational collocation of sounds apart from concepts, reduced to a tangible expression from which the collocation can be reproduced either with or without continuous human intervention. On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy, or if the statute is too narrow ought to be made so by a further act, except so far as some extraneous consideration of policy may oppose. What license may be implied from a sale of the copyrighted article is a different and harder question, but I leave it untouched, as license is not relied upon as a ground for the judgment of the court.

DUN *v.* LUMBERMEN'S CREDIT ASSOCIATION.

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

No. 138. Argued January 31, 1908.—Decided February 24, 1908.

Findings of fact in a suit in equity made by both the Circuit Court and the Circuit Court of Appeals will not be reversed by this court unless shown to be clearly erroneous.

Where the lower courts have both found that the proportion of copyrighted matter issued in a later publication, in this case a trade rating journal, is insignificant compared with the volume of independently acquired information, an injunction should be refused and the owner of the copyright remitted to a court of law to recover the damages actually sustained.

144 Fed. Rep. 83, affirmed.

THE facts are stated in the opinion.

Mr. John O'Connor and *Mr. Charles K. Offield*, with whom *Mr. Thomas M. Hoyne* and *Mr. Henry S. Towle* were on the brief, for appellants.

Mr. Fred H. Atwood and *Mr. Charles O. Loucks*, with whom *Mr. Frank B. Pease* was on the brief, for appellees.

MR. JUSTICE MOODY delivered the opinion of the court.

The appellants are the proprietors of a mercantile agency which publishes at intervals a copyrighted book of reference containing lists of merchants, manufacturers and traders in the United States and the North American British possessions. The book contains information as to the business, capital and credit rating of those who are enumerated in it. The information is obtained at large expense and is useful to those who are engaged in trade and commerce, who in large number subscribe to the privilege of consulting copies of it, which are furnished but not sold to them. The appellee is a corporation engaged in preparing and publishing a similar book, limited, however, to those engaged in the lumber and kindred trades. The book is called the Reference Book of the Lumbermen's Credit Association. The appellants brought in the Circuit Court of the United States a suit in equity, alleging an infringement of their copyright by the appellee, and praying for an injunction, for an account, and for general relief. After hearing evidence, the Circuit Court entered a decree dismissing the bill for want of equity, which, with an immaterial modification, was affirmed by the Circuit Court of Appeals. An appeal to this court was then taken.

Both the courts below made findings of fact, which are in substantial agreement. Those findings best appear by quotations from the opinions which follow. The judge of the Circuit Court said:

"From the evidence it appears that defendant admits using complainants' book, but insists that it did so merely for the purpose of comparison and for information as to names, but that in every case it, at great cost, procured original and independent information as to the rating and other facts contained in defendants' book. There are in respondents' reference book more than 60,000 names. The evidence shows that there are on hand more than 1,000,000 reports, replies to inquiries, etc. It further appears that defendants receive large

numbers of newspapers, magazines, trade journals and bulletins; that they use traveling men, lumber dealers, agents, lawyers, justices of the peace, mercantile associations, railroad companies and the clippings sent out by a number of clipping bureaus. At times defendants' mail reaches approximately 2,000 pieces of mail per day. A large force of employés and large offices are required in the management of the business.

"On the other hand, a number of instances are disclosed in the evidence which have strong tendency to establish the charge that defendants have used some of complainants' copyright material in making their book. The same mistakes occur in each. In one case complainants' witness swears to an entirely fictitious item placed in complainants' book as a test, which was duly appropriated by defendants. In regard to a number of items said to be duplicated, defendants show original investigation. Still, when all the explanations are considered, it seems to be fairly established that defendants did take some of the items complained of. Generally such *indicia* is held to indicate a substantial theft of copyright property, but taking all the evidence together I am satisfied that the items selected as tests constitute the bulk of all the items taken, and that they are of small moment in comparison with the whole.

"Defendants' book gives information on 113 subjects, complainants on 19. When we consider that the matter consists of names and other data, which, when true, must be the same in any report, and that in many cases the source of information must often be the same with both the parties thereto, it would seem to be just to lay down a different rule from that which obtains in cases where syllabi and summaries of law and fact are appropriated. Here seems to be no attempt to coin money out of another's labor. It is clearly a case in which the matter taken must be substantial and such as to really work injury to complainants.

"When we take note of the character of the items alleged to be appropriated on the one hand and the consequences of

granting the injunction prayed for, it would be an unwarrantable use of the power of the court to do so."

The Circuit Court of Appeals said:

"The question is one of fact, to be solved by a study of the evidence. From our examination we concur in the conclusion of the Circuit Court. The large features are that appellees' book of about 60,000 names contain over 16,000 (and over 400 towns) that are not in Dun's; that of the names in common only about fifteen per cent have similar capital ratings, that of the names with similar capital ratings a large proportion are classified differently respecting the particular businesses; and that six times as many different classes of information are given in appellees' book as in Dun's. On every page of appellees' book the names that are not given in Dun's and the names regarding which the information does not exceed or substantially vary from that given in Dun's bear the relation of three to one. These features are ocular confirmation of appellees' testimony regarding the long-continued, elaborate and comprehensive system of obtaining independent information. It is futile to claim that such a system, producing twenty-five per cent more names than Dun, and six times as many subjects of information concerning the persons named, is kept up at great expense merely as a cloak. It may be that the evidence would require a finding that with respect to a few names an improper use of Dun's book was made by an agent or correspondent of appellees. But the proportion is so insignificant compared with the injury from stopping appellees' use of their enormous volume of independently acquired information, that an injunction would be unconscionable. In such cases the copyright owner should be remitted to his remedy at law. Drone on Copyright, 413; *Mead* v. *West Pub. Co.*, 80 Fed. Rep. 380."

We cannot, as we are asked to do by the appellants, reverse the findings of fact made by the Circuit Court and the Circuit Court of Appeals. Successively considering the same evidence, the two courts agree in the findings. In such a case in a suit

in equity the findings will not be disturbed by this court, unless they are shown to be clearly erroneous. *Towson* v. *Moore*, 173 U. S. 17; *Brainard* v. *Buck*, 184 U. S. 99; *Shappirio* v. *Goldberg*, 192 U. S. 232. An examination of the voluminous testimony shows that it tended to sustain the findings, and that, to say the least, there is no ground for saying that the conclusions drawn from the evidence were clearly erroneous.

Accepting as true the facts found, we think the discretion of the court was wisely exercised in refusing an injunction and remitting the appellants to a court of law to recover such damage as they might there prove that they had sustained. The reasons for this conclusion are tersely stated in the opinion of the Court of Appeals, which we have quoted, and we approve them.

Judgment affirmed.

VENNER *v.* GREAT NORTHERN RAILWAY COMPANY.

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

No. 485. Submitted January 20, 1908.—Decided February 24, 1908.

Where the question of jurisdiction is certified to this court under § 5 of the judiciary act of 1891, nothing but that question can be considered here. In this case the question is considered both as to parties and subject-matter.

A cause is removable to the Circuit Court if it is one of which the court is given jurisdiction.

While the court, in determining whether diverse citizenship exists, may disregard the pleader's arrangement of parties and align them according to actual interest, if the plaintiff's controversy is actually with all the parties named as defendants, all of whom are necessary parties, none of them can for jurisdictional purposes be regarded otherwise than as defendants; and so *held*, in an action against a corporation and others by one of the stockholders, that where the complaint alleges joint fraudulent conduct on the part of the corporation and the other defendants with whom it jointly resists that charge, the corporation cannot be realigned as a party plaintiff even if it might be to its financial interest to have the plaintiff prevail. *Doctor* v. *Harrington*, 196 U. S. 579.

The right to bring a suit is distinguishable from the right to prosecute the particular bill; and, where the other jurisdictional essentials exist, the Circuit Court has jurisdiction of an action against a corporation by one of its stockholders although the bill does not comply with Equity Rule 94 and for that reason must be dismissed.

The jurisdiction of the Circuit Court is prescribed by laws enacted by Congress in pursuance of the Constitution and while this court may, by rules not inconsistent with law, regulate the manner in which that jurisdiction shall be exercised, that jurisdiction cannot by such rules be enlarged or diminished.

THE facts are stated in the opinion.

Mr. Abram J. Rose, Mr. George H. Yeaman, Mr. Alfred C. Petlé and *Mr. Stephen M. Yeaman* for appellant:

The Circuit Court should have aligned the Great Northern Railway with the plaintiff which would defeat jurisdiction.

The question of jurisdiction is directly raised in and appears by the record.

The action is the common one in equity by a stockholder of a corporation suing on behalf of himself and of other stockholders to recover for a wrong alleged to have been done to the corporation by its officers dealing on its behalf to their own personal profit and advantage and to the waste and injury of the corporation, its funds and estate.

The original complaint in the state court stated a good cause of action as was conceded by the circuit judge in the opinion sustaining the demurrers which cited *Young* v. *Drake*, 8 Hun, 61, 64; *Frothingham* v. *Broadway &c. Ry. Co.*, 9 Civ. Pro. 304, 314; *O'Connor* v. *Va. P. P. Co.*, 46 Misc. 530, 535; *Frickett* v. *Murphy*, 46 App. Div. 180, 186; *Sayles* v. *Central Bank of Rome*, 18 Misc. 155, 158; *Hanna* v. *Lyon*, 179 N. Y. 107. See also *Stewart* v. *Erie &c.*, 17 Minnesota, 372, 400, 401; Cook on Corporations (5th ed.) 1882; *Elkins* v. *Camden & At. R. R. Co.*, 36 N. J. Eq. 514; *Parsons* v. *Joseph*, 92 Alabama, 403, 405; *Montgomery Light Co.* v. *Lahey*, 121 Alabama, 131, 136.

Such being the nature of the action, the only possible ground of Federal jurisdiction would be the diverse citizenship of the parties, and unless the required diversity of citizenship is

shown to exist, the Circuit Court was wholly without jurisdiction.

The facts necessary to confer jurisdiction on a United States court to entertain an action of the nature of the one at bar when the diverse citizenship of the parties is the sole ground of jurisdiction have been expressly laid down and defined in Equity Rule 94.

The reasons which gave rise to the promulgation of this rule and the abuses which it was intended to prevent are well known.

The direct object and purpose of that rule was to prevent the courts of the United States from being overburdened with actions brought by stockholders of corporations, which, except for the diverse citizenship of the stockholder appearing as complainant, would have to be brought in a state court, of competent jurisdiction. *Hawes* v. *Oakland*, 104 U. S. 450; *Detroit* v. *Dean*, 106 U. S. 537; *City of Quincy* v. *Steele*, 120 U. S. 241.

If the necessary jurisdictional facts required by Rule 94 do not appear, the corporation will be aligned as the party plaintiff, and the question of jurisdiction determined as if the suit had been originally brought by it and not by a stockholder in its behalf. *Elkins* v. *City of Chicago*, 119 Fed. Rep. 957; *Kemmerer* v. *Haggerty*, 139 Fed. Rep. 693; *Dickinson* v. *Consolidated Traction Co.*, 114 Fed. Rep. 232; *Waller* v. *Coler*, 125 Fed. Rep. 821; *Groel* v. *United Electric Co.*, 132 Fed. Rep. 252.

The allegations of the bill clearly do not meet the requirements of Rule 94; either as to the plaintiff being a stockholder at the time the cause of action arose, that he thereafter became a stockholder by devolution of law, or as to the suit not being a collusive one to confer on a court of the United States jurisdiction of a cause of which it would not otherwise have cognizance. In these respects, therefore, there is no compliance with the rule and the case cannot be taken out of the application of the wholesome rule that for the purpose of determining jurisdiction on the ground of diverse citizenship, the real

party in interest will be aligned on the part of the complainant. *Brown* v. *Strode,* 15 Cranch, 303; *McNutt* v. *Bland,* 2 How. 9; *Maryland, use of Markley* v. *Baldwin,* 112 U. S. 490; *Stewart* v. *Baltimore & Ohio R. R. Co.,* 168 U. S. 445.

Rule 94 does not apply to actions removed from a state court to a Federal court. *Earle* v. *Seattle &c. R. R. Co.,* 56 Fed. Rep. 909; *Evans* v. *Un. Pac. Ry. Co.,* 58 Fed. Rep. 497. See also *City of Chicago* v. *Camerson,* 22 Ill. App. 91, 102.

The Circuit Court had no original jurisdiction of the case and could not acquire jurisdiction by removal.

Since the acts of 1887 and 1888, it is very clear that the intent is to confine the right of removal to cases originally cognizable in the Circuit Courts of the United States. See *Mexican National Ry. Co.* v. *Davidson,* 157 U. S. 201, and this differentiates this case from those cited in the opinion below, in which were involved §§ 11 and 12 of the act of 1789.

The Circuit Court being wholly without jurisdiction should have remanded the case to the state court. *Detroit* v. *Dean,* 106 U. S. 537.

Mr. Julius F. Workum for appellees:

Inasmuch as this appeal is taken direct from the Circuit Court to this court, and the question of the former court's jurisdiction is certified up, this court can consider only whether the Circuit Court as a Federal court had jurisdiction, and not whether as a court of equity it should have sustained or overruled the demurrers. *Chicago* v. *Mills,* 204 U. S. 321, 326; *Louisville Trust Co.* v. *Knott,* 191 U. S. 225, 233, 234; *Hennessy* v. *Richardson Drug Co.,* 189 U. S. 25, 33; *Mexican Central R. R. Co.* v. *Eckman,* 187 U. S. 429, 432; *Blythe* v. *Hinckley,* 173 U. S. 501; *United States* v. *Rider,* 163 U. S. 132, 139; *Smith* v. *McKay,* 161 U. S. 355; *United States* v. *Jahn,* 155 U. S. 109, 113; *Schunk* v. *Moline,* 147 U. S. 500, 507; *McLish* v. *Roff,* 141 U. S. 661; *Rosenbaum* v. *Bauer,* 120 U. S. 459.

The only question that is open for discussion, therefore, is whether the case involves a controversy between citizens of

different States. As the parties are arranged the citizenship of plaintiff is different from that of the defendants. The mere fact that the defendant corporation might be benefited by such a suit does not force its alignment with complainant, unless there is really no controversy between the complainant and the railroad company. See *Detroit* v. *Dean*, 106 U. S. 537, and cases cited; and *Dodge* v. *Woolsey*, 18 How. 331; *Davenport* v. *Dows*, 18 Wall. 626; *Memphis* v. *Dean*, 8 Wall. 64; *Greenwood* v. *Freight Company*, 105 U. S. 13; *Quincy* v. *Steel*, 120 U. S. 241.

Doctor v. *Harrington*, 196 U. S. 579, is conclusive of the case at bar, for in that case, as in this, the complainant based his right to maintain the action on the ground that the defendant corporation is controlled by its co-defendant, who, it is alleged, used the corporation for his own advantage. *New Jersey Central R. R. Co.* v. *Mills*, 113 U. S. 249. See also *East Tenn. &c. R. R. Co.* v. *Grayson*, 119 U. S. 240; *Chicago* v. *Mills*, 204 U. S. 321; *Hawes* v. *Oakland*, 104 U. S. 450, 452.

Complainant cannot, under Equity Rule 94, maintain the action; as a matter of fact he purchased his stock just before bringing suit, long after the alleged acts of which he complained, and he could not, and did not, allege that he was a stockholder at the time of their occurrence. This defect of title did not, as appellant argues, create any Federal jurisdictional question. *Corbus* v. *Gold Mining Co.*, 187 U. S. 455; *Illinois Central R. R. Co.* v. *Adams*, 180 U. S. 28, 34, 35.

Mr. Justice Moody delivered the opinion of the court.

The plaintiff in error, a citizen of New York, brought this suit in equity in the Supreme Court of New York against the defendant railroad, a citizen of Minnesota, and the other defendant, its president, also a citizen of Minnesota. The complaint set forth in substance the following facts upon which the right to relief was claimed: The plaintiff was a stockholder in the defendant railroad at the time of the beginning of the

suit in 1906. Whether or not he was a stockholder at the time when the alleged wrongful acts were committed by the defendants does not appear by any allegation in the complaint. The defendant James J. Hill was a director and the president of the other defendant, the Great Northern Railway Company, and that railroad and its board of directors were under his absolute control. While holding these offices and exercising this control, in 1900 and 1901, Hill purchased, or caused to be purchased for his use, stock of the Chicago, Burlington and Quincy Railroad Company of the par value of $25,000,000, at an average price of one hundred and fifty dollars a share. This purchase was made with the design of selling the stock at a higher price to the company of which he was a director and president. Subsequently, in 1901, while still holding his offices in the Great Northern Railway and exercising the same control over that corporation, he sold to it a large amount of the stock of the Chicago, Burlington and Quincy Railroad Company owned by him, and made an unlawful profit of $10,000,000 on the transaction. Before bringing this suit the plaintiff demanded of the Great Northern Railway Company that it bring suit against Hill to compel him to account for and pay over to it the wrongful profit which he had obtained. The railroad refused to comply with this demand, and thereupon the plaintiff brought this suit as a stockholder in his own behalf, and in the behalf and for the benefit of other stockholders similarly situated. The prayer was that Hill should account for his profit and pay it to the Great Northern Railway Company with interest, and for general relief. On the defendants' petition the case was removed to the United States Circuit Court for the Southern District of New York, on the ground of diversity of citizenship of the plaintiff and the defendants. In that court the plaintiff was ordered to "replead the complaint herein according to the forms and practice prevailing in equity." This was done on November 9, 1906. The new complaint set forth the facts in greater detail and with some variations, but its substance and effect was

similar to that of the first complaint. The complaint did not conform to the requirements of Equity Rule 94, relating to suits of this nature, in that it failed to allege that the plaintiff was a shareholder at the time of the transactions of which he complains, or that his shares had devolved on him since by operation of law, or that the suit was not collusive, or the particulars of his efforts to procure action by the corporation defendant. The defendants then demurred separately to the bill and the defendant Hill subjoined to his demurrer an affidavit denying every allegation in it tending to show wrongful conduct on his part. Thereafter the plaintiff moved to remand the cause to the state court on the ground that the Circuit Court was without jurisdiction over it. This motion was denied. The demurrer was sustained and the bill dismissed. The correctness of the ruling on the demurrer and the dismissal is not before us. The case comes here on direct appeal from the Circuit Court on the question of jurisdiction alone, certified in the following terms: "Now, therefore, the court hereby certifies to the Supreme Court of the United States the question of jurisdiction which has arisen upon the aforesaid motion to remand and the demurrers to the complaint, to wit: Whether or not the complainant's amended bill of complaint showed that there was such diversity of citizenship between the party complainant and the parties defendant in this cause as would be sufficient, under the provisions of the United States Revised Statutes to confer jurisdiction upon the United States Circuit Court for the Southern District of New York of this cause, and whether this cause, as brought in the Supreme Court of the State of New York, was one over which this court would have had original jurisdiction, and was therefore removable into this court."

We consider nothing but the question of jurisdiction, and express no opinion upon the decision upon the demurrer which is not properly here. *Schunk* v. *Moline, Milburn & Stoddart Co.*, 147 U. S. 500; *Smith* v. *McKay*, 161 U. S. 355; *Mexican Central Railway Co.* v. *Eckman*, 187 U. S. 429; *Hennessy* v.

Richardson Drug Co., 189 U. S. 25; *Chicago* v. *Mills*, 204 U. S. 321.

The cause was removable to the Circuit Court by the defendants if it was one of which that court was given jurisdiction. 25 Stat. 434; *Mexican National Railroad Company* v. *Davidson*, 157 U. S. 201; *Traction Company* v. *Mining Company*, 196 U. S. 239. The only ground of original jurisdiction or of removal was that the suit was a controversy between citizens of different States. In that case Congress has given the Circuit Court jurisdiction over it, with certain limitations not material here. 25 Stat. 434. The plaintiff contends that the Circuit Court was without jurisdiction of the cause, and should therefore have remanded it to the state court, for two reasons. First, because upon a proper alignment of the parties there was not a controversy between citizens of different States. Second, because the cause of action as disclosed by the pleadings showed that the Circuit Court had no jurisdiction over the subject matter. These reasons are entirely independent of each other and require separate consideration. First, was there a controversy between citizens of different States? As the parties were arranged by the plaintiff himself on the face of the record, there was a diversity of citizenship. The plaintiff was a citizen of New York and the two defendants were citizens of Minnesota. But the plaintiff insists that by looking through the superficial aspects of the controversy to its real substance it is seen that the railway company's interest is adverse to that of the other defendant, and the same as that of the plaintiff, and that therefore, for the purpose of determining the jurisdiction, the defendant railroad should be regarded as a plaintiff. If this should be done there would be a citizen of Minnesota a plaintiff and another citizen of Minnesota a defendant, and the diversity of citizenship which is indispensable to the jurisdiction of the Circuit Court would no longer exist. Let it be assumed for the purposes of this decision that the court may disregard the arrangement of parties made by the pleader, and align them upon the side where their interest in and attitude to the controversy

really places them, and then may determine the jurisdictional question in view of this alignment. *Removal Cases*, 100 U. S. 457; *Pacific Railroad* v. *Ketchum*, 101 U. S. 289; *Harter* v. *Kernochan*, 103 U. S. 562, 566; *Wilson* v. *Oswego Township*, 151 U. S. 56, 63; *Merchants' Cotton Press Co.* v. *Insurance Company of North America*, 151 U. S. 368, 385; *Evers* v. *Watson*, 156 U. S. 527, 532. If this rule should be applied it would leave the parties here where the pleader has arranged them. It would doubtless be for the financial interests of the defendant railroad that the plaintiff should prevail. But that is not enough. Both defendants unite, as sufficiently appears by the petition and other proceedings, in resisting the plaintiff's claim of illegality and fraud. They are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action. The plaintiff's controversy is with both, and both are rightfully and necessarily made defendants, and neither can, for jurisdictional purposes, be regarded otherwise than as a defendant. *Davenport* v. *Dows*, 18 Wall. 626; *The Central Railroad Company* v. *Mills*, 113 U. S. 249; *Railroad* v. *Grayson*, 119 U. S. 240; *Doctor* v. *Harrington*, 196 U. S. 579; *Groel* v. *United Electric Co.*, 132 Fed. Rep. 252, and see *Chicago* v. *Mills*, 204 U. S. 321. The case of *Doctor* v. *Harrington* is precisely in point on this branch of the case, and is conclusive. In that case the plaintiffs, stockholders in a corporation, brought an action in the Circuit Court against the corporation and Harrington, another stockholder, "who directed the management of the affairs of the corporation, dictated its policy, and selected its directors." It was alleged that Harrington fraudulently caused the corporation to make its promissory note without consideration, obtained a judgment on the note, and sold, on execution, for much less than their real value, the assets of the corporation to persons acting for his benefit. On the face of the pleadings there was the necessary diversity of citizenship, but it was insisted that the corporation, because its interest was the same as that of the plaintiff, should be regarded as a plaintiff.

The court below so aligned the corporation defendant, and, as that destroyed the diversity of citizenship, dismissed the suit for want of jurisdiction. This court reversed the decree, saying, p. 587: "The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic, and made to act in a way detrimental to his rights. In other words, his interests, and the interests of the corporation, may be made subservient to some illegal purpose. If a controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal court." There was therefore in the case at bar the diversity of citizenship which confers jurisdiction.

Second. Did the Circuit Court have jurisdiction of the subject matter of the litigation? It has already been shown that the plaintiff in his petition did not bring this case within the terms of Equity Rule 94, which is printed in the margin.[1] It may be noted that the plaintiff in *Doctor* v. *Harrington*, *supra* complied with the requirements of the rule. It is argued that a compliance with that rule is essential to the jurisdiction, and that a controversy of the general nature contemplated by the rule is beyond the jurisdiction of the Circuit Court, unless the plaintiff shows the existence of all the facts which the rule makes indispensable to his success in the suit. But this argument overlooks the purpose and nature of the rule. The rule simply expresses the principles which this court, after a review of the authorities, had declared in *Hawes* v. *Oakland*, 104 U. S.

[1] Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may be properly asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

450, to be applicable in the decision of a stockholder's suit of the kind now under consideration. Neither the rule nor the decision from which it was derived deals with the question of the jurisdiction of the courts, but only prescribes the manner in which the jurisdiction shall be exercised. If a controversy of this general nature is brought in the Circuit Court and the necessary diversity of citizenship exists, but upon the pleadings or the proof it appears that the plaintiff has not shown a case within the decision in *Hawes* v. *Oakland*, or the rule of court declaratory of that decision, the bill should be dismissed for want of equity and not for want of jurisdiction. The dismissal of the bill would not be the denial but the assertion and exercise of jurisdiction. So it was that in *Hawes* v. *Oakland* the demurrer was sustained and the bill dismissed, not for want of jurisdiction, but, in the words of the court (p. 462), "because the appellant shows no standing in a court of equity—no right in himself to prosecute this suit." The same order was made in *Huntington* v. *Palmer*, 104 U. S. 482, and *Quincy* v. *Steel*, 120 U. S. 241. This very question was considered by the court in *Illinois Central Railroad Company* v. *Adams*, 180 U. S. 28, where it said, p. 34: "Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists in the Circuit Courts of the United States under the express terms of the act of August 13, 1888, if the plaintiff be a citizen of one State, the defendant a citizen of another, if the amount in controversy exceed $2,000, and the defendant be properly served with process within the district. Excepting certain *quasi*-jurisdictional facts, necessary to be averred in particular cases and immaterial here, these are the only facts required to vest jurisdiction of the controversy in the Circuit Courts. It may undoubtedly be shown in defense that plaintiff has no right under the allegations of this bill or the facts of the case to bring suit, but that is no defect of jurisdiction, but of title. It is as much so as if it were sought to dismiss an action of ejectment for want of jurisdiction, by showing that the plaintiff

had no title to the land in controversy. At common law neither an infant, an insane person, married woman, alien enemy, nor person having no interest in the cause of action, can maintain a suit in his or her own name; but it never would be contended that the court would not have jurisdiction to inquire whether such disability in fact existed, nor that the case could be dismissed on motion for want of jurisdiction. The right to bring a suit is entirely distinguishable from the right to prosecute the particular bill. One goes to the maintenance of any action; the other to the maintenance of the particular action. Thus it was held in the case of *Smith* v. *McKay*, 161 U. S. 355, and *Blythe* v. *Hinckley*, 173 U. S. 501, that it was not a question of the jurisdiction of the Circuit Court that the action should have been brought at law instead of in equity. The question in each case is whether the plaintiff has brought himself within the language of the jurisdictional act, whatever be the form of his action or whether it be in law or in equity. The objection that plaintiff has failed to comply with Equity Rule 94 may be raised by demurrer, but the admitted power to decide this question is also an admission that the court has jurisdiction of the case." These observations may not have been strictly necessary to the disposition of the case, but they declare the true purpose and effect of the rule. The jurisdiction of the Circuit Court is prescribed by laws enacted by Congress in pursuance of the Constitution and this court by its rules has no power to increase or diminish the jurisdiction thus created, though it may regulate its exercise in any manner not inconsistent with the laws of the United States. Congress has given to the Circuit Courts jurisdiction of all suits of a civil nature (in which the matter in dispute is of a certain value) where "there shall be a controversy between citizens of different States," language taken from that part of the Constitution which defines the judicial power. There was such a controversy in the case at bar, and the Circuit Court had cognizance of it.

The judgment of the Circuit Court is

Affirmed.

BATTLE *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 438. Submitted January 28, 1908.—Decided March 2, 1908.

Under Article I, § 8, cl. 17, of the Federal Constitution, Congress has power to purchase land within a State for post offices and courts by consent of the legislature of the State and to exercise exclusive legislation over the same.

Under §§ 711 and 5339, Rev. Stat., the United States courts have exclusive jurisdiction of all offenses enumerated in § 5339, committed in a post office owned by the United States over which the State has ceded jurisdiction.

The language of the Constitution, being wide enough to authorize the purchase of land for post offices and the acceptance of a grant of jurisdiction, the language of the statute based thereon will not be taken in any narrower sense as excluding post offices.

Even if the burden of proof be on the Government to prove the fact of a prisoner's sanity, until evidence is given on the other side, the burden is satisfied by the presumption arising from the fact that most men are sane, and the trial judge is not bound to go further than to instruct the jury that the Government is bound to prove the fact beyond reasonable doubt, and that the jury consider all the evidence including the bearing of the prisoner, and the manner of his own testimony.

An interruption of the court asking defendant's counsel to make a proper argument held in this case to be justified and not a ground for exception.

THE facts are stated in the opinion.

Mr. John Randolph Cooper for plaintiff in error.

Mr. Assistant Attorney General Cooley for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes up on a writ of error to the United States Circuit Court, after a conviction of the plaintiff in error of murder without capital punishment. The chief error assigned is that the court proceeded without jurisdiction—an objection

taken by demurrer and renewed in other forms. The crime was committed upon land bought by the United States in the city of Macon, on which it was building a post office and court-house, and over which the State of Georgia had ceded jurisdiction; but it is said that murder in a post office of the United States has not been made an offense against the United States, whatever might be the power of Congress if it saw fit to put it forth.

There can be no doubt of the power of Congress to purchase land within a State for post offices or courts, by consent of the legislature of the State, and to exercise exclusive legislation over the same. Post offices are among the "other needful buildings" for the erection of which, as well as of "forts, magazines, arsenals, dock-yards," it is assumed that land will be bought, and for which land has been bought by the Government all over the United States. Const., Art. I, § 8, cl. 17. Indeed, this is not denied. The power to establish post offices is given by Art. I, § 8, cl. 7, in terms. See *Kohl* v. *United States*, 91 U. S. 367, 372; *Burt* v. *Merchants' Insurance Co.*, 106 Massachusetts, 356; *Trombley* v. *Humphrey*, 23 Michigan, 471, 475; *Sinks* v. *Reese*, 19 Ohio St. 306. The exclusive legislative power and jurisdiction of the United States is equally clear. *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525; *Benson* v. *United States*, 146 U. S. 325. So that the question is only whether the statutes of the United States extend to this case, which was the question intended to be raised.

By Rev. Stat. § 5339, "Every person who commits murder— First. Within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States; . . . shall suffer death"; and by the act of January 15, 1897, c. 29, § 1, 29 Stat. 487, in such cases "the jury may qualify their verdict by adding thereto 'without capital punishment,'" whereupon the sentence is imprisonment at hard labor for life. The jurisdiction of the United States courts under these sections is exclusive. Rev. Stat. § 711. If the language of the Constitution is wide enough to

authorize the purchase of land for a post office and court-house and the acceptance of a grant of jurisdiction, there is no reason for taking the language of the statute in any narrower sense. The argument, although ostensibly directed against the statute, must embrace the Constitution, and, as we have implied, such an argument comes many years too late.

There was an exception to a refusal of the court to instruct the jury on the law of justifiable homicide. Sufficient instructions were given. The evidence, however, would not have warranted such a verdict. According to the defendant's own testimony the death was due to an accident. According to all the other evidence, even the most favorable, the defendant was upon a platform above Berry, and Berry either was below standing on a beam in a very insecure place, or else was climbing up to or upon the platform, when the defendant struck him over the head, according to several witnesses, with an iron bolt, until he dropped fifty or sixty feet. So as to involuntary homicide. There was no evidence of such a case, and the jury under the charge must have found that the defendant made an intentional and unjustified assault of such a kind that the probable consequences were obvious, an assault with a deadly weapon, that either directly caused Berry's death or brought it about by his inevitable fall.

It also is urged that the court erred in declining to give a somewhat confused instruction concerning sanity, that was asked. The judge instructed the jury that the burden of proof was on the Government to prove that fact beyond a reasonable doubt, and he was not called upon to go further. Until evidence is given on the other side the burden of proof is satisfied by a presumption arising from the fact that most men are sane. In this case there was the merest shadow of evidence that the defendant was not of sound mind. The jury were told to consider all the evidence, including the bearing of the prisoner and the manner of his own testimony, and the evidence relied upon by him was stated. In the circumstances he could ask no more.

Finally an exception was taken to an interruption of the judge, asking the defendant's counsel to make an argument that did not tend to degrade the administration of justice. The reference was to an appeal to race prejudice and to such language as this: "You will believe a white man not on his oath before you will a negro who is sworn. You can swallow those niggers if you want to, but John Randolph Cooper will never swallow them." The interruption was fully justified.—The foregoing are the exceptions argued. In our opinion there is nothing in them or in any that were taken. The judgment of the Circuit Court must stand.

Judgment affirmed.

UNITED STATES *v.* THAYER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

No. 390. Argued February 25, 1908.—Decided March 9, 1908.

A man may sometimes be punished in person where he has brought consequences to pass, although he was not there in person. *In re Palliser*, 136 U. S. 257.

A solicitation of funds for campaign purposes made by letter in violation of § 12 of the Civil Service Act of January 16, 1883, c. 27, 22 Stat. 403, is not complete until the letter is delivered to the person from whom the contribution is solicited, and if the letter is received by one within a building or room described in § 12 of the act the solicitation is in that place and the sender of the letter commits the prohibited offense in the prohibited place.

154 Fed. Rep. 508, reversed.

THE facts are stated in the opinion.

The Attorney General and *Mr. Assistant Attorney General Cooley* for plaintiff in error:

The act of mailing the letter soliciting a contribution for

political purposes, was, under the circumstances of this case, one which Congress intended to prohibit, and the court will place such reasonable construction on the statute of Congress as tends to give effect to that intention. *United States* v. *Lacher*, 134 U. S. 624, 628; *Johnson* v. *United States*, 196 U. S. 1.

The act of mailing the letter is also within the letter of the statute. There is nothing in § 12 making the physical presence of the person soliciting within the Federal building an essential element of the offense. The act of soliciting was completed when the letter was received and read by the person to whom it was addressed and to whose mind the demand for money therein contained was addressed. Wharton, Conflict of Laws, §§ 825, 826; Hobart's Rep. (1st Am. ed.) p. 152; *Clutterbuck* v. *Chaffers*, 1 Starkie, 471; *The King* v. *Burdett*, 4 B. & A. 95; *The King* v. *Johnston*, 7 East, 65, 68; *In re Palliser*, 136 U. S. 257, and cases cited; *Horner* v. *United States*, 143 U. S. 207, 214; *Burton* v. *United States*, 202 U. S. 344; *People* v. *Rathbun*, 21 Wend. 509, 529; *Simpson* v. *State*, 92 Georgia, 41, 43; *People* v. *Adams*, 3 Denio, 190, 207; *State* v. *Grady*, 34 Connecticut, 118, 130.

The general effect of these numerous decisions is that the offense is committed at the place where the unlawful act takes effect. If, as seems clear, Congress intended to prohibit the demand of political assessments in Federal buildings, it is a matter of no consequence whether the defendant in making his demands for contributions to the Republican campaign fund was actually in the building or not. He willfully and knowingly set in motion an agency which resulted in a demand on a Government officer in a Government building, and on well-settled principles it must be held that he committed the offense on forbidden ground.

Mr. J. M. McCormick, with whom *Mr. F. M. Etheridge* was on the brief, for defendant in error:

The legislative history of the act of Congress in question

herein, shows that it was not the intention to prohibit the writing by a private citizen of a letter soliciting a political contribution, which is by him enveloped, stamped, addressed and deposited in the United States mail with an intent that the addressee shall read the same in a public building. Cong. Rec., vol. 14, 650, 866.

The intent of Congress in enacting § 12 is the law. And before a violation thereof can arise, there must be acts contravening this intent, which are so clearly forbidden by it as to charge notice to the citizen that they are unlawful. The section under discussion creates a crime theretofore unknown to the law. Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. *United States* v. *Sharp,* Pet. C. C. 118; *United States* v. *Brewer,* 139 U. S. 288. See also *United States* v. *Wiltberger,* 5 Wheat. 76; *United States* v. *Morris,* 14 Pet. 464; *American Fur. Co.* v. *United States,* 2 Pet. 358, 367; *United States* v. *Winn,* 3 Sumner, 209, 211.

The words of § 12, taken in connection with the other sections of the law and the statutes *in pari materia* are not so precise and clear as to compel the construction contended for by the Government which would lead to an absurd consequence. *Commonwealth* v. *Kimball,* 24 Pick. 371.

If the physical presence of the defendant, or his agent or servant in the building at the time the letters containing the solicitations respectively were read, was necessary, then the Government's case falls for the reason that the postal employés are in law deemed the agents of the addressee, and not of the sender of a letter. *Commonwealth* v. *Wood,* 142 Massachusetts, 462, and see also *Regina* v. *Jones,* 4 Cox C. C. 198.

Mr. Justice Holmes delivered the opinion of the court.

This is an indictment for soliciting a contribution of money for political purposes from an employé of the United States in a post office building of the United States occupied by the

employé in the discharge of his duties. By the Civil Service Act of January 16, 1883, c. 27, § 12, 22 Stat. 403, 407, "No person shall, in any room or building occupied in the discharge of official duties by any officer or employé of the United States mentioned in this act, or in any navy-yard, fort, or arsenal, solicit in any manner whatever, or receive any contribution of money or any other thing of any value for any political purpose whatever." By § 15 a penalty is imposed of fine, imprisonment, or both. The indictment is in eleven counts, and charges the sending of letters to employés, which were intended to be received and read by them in the building and were so received and read by them in fact. It is admitted that the defendant was not in the building. There was a demurrer, which was sustained by the District Court on the ground that the case was not within the act. 154 Fed. Rep. 508. The only question argued or intended to be raised is whether the defendant's physical presence in the building was necessary to create the offense.

Of course it is possible to solicit by letter as well as in person. It is equally clear that the person who writes the letter and intentionally puts it in the way of delivery solicits, whether the delivery is accomplished by agents of the writer, by agents of the person addressed, or by independent middlemen, if it takes place in the intended way. It appears to us no more open to doubt that the statute prohibits solicitation by written as well as by spoken words. It forbids all persons to solicit "in any manner whatever." The purpose is wider than that of a notice prohibiting book peddling in a building. It is not, even primarily, to save employés from interruption or annoyance in their business. It is to check a political abuse, which is not different in kind, whether practiced by letter or by word of mouth. The limits of the act, presumably, were due to what was considered the reasonable and possibly the constitutional freedom of citizens, whether officeholders or not, when in private life, and it may be conjectured that it was upon this ground that an amendment of broader scope was

rejected. If the writer of the letter in person had handed it to the man addressed, in the building without a word, and the latter had read it then and there, we suppose that no one would deny that the writer fell within the statute. We can see no distinction between personally delivering the letter and sending it by a servant of the writer. If the solicitation is in the building the statute does not require personal presence, so that the question is narrowed to whether the solicitation alleged took place in the building or outside.

The solicitation was made at some time, somewhere. The time determines the place. It was not complete when the letter was dropped into the post. If the letter had miscarried or had been burned, the defendant would not have accomplished a solicitation. The court below was misled by cases in which, upon an indictment for obtaining money by false pretenses, the crime was held to have been committed at the place where drafts were put into the post by the defrauded person. *Commonwealth* v. *Wood*, 142 Massachusetts, 459, 462; *Regina* v. *Jones*, 4 Cox C. C. 198. But these stand on the analogy of the acceptance by mail of an offer and throw no light. A relation already existed between the parties, and it is because of that relation that posting the letter made the transaction complete. See *Brauer* v. *Shaw*, 168 Massachusetts, 198, 200. Here a relation was to be established, just as there is at the first stage of a contract when an offer is to be made. Whether or not, as Mr. Langdell thinks, nothing less than bringing the offer to the actual consciousness of the person addressed would do, Contr. § 151, certainly putting a letter into a post office is neither an offer nor a solicitation. "An offer is nothing until it is communicated to the party to whom it is made." *Thomson* v. *James*, 18 Ct. of Sess. Cas. (2d Series), 1, 10, 15. Therefore, we repeat, until after the letter had entered the building the offense was not complete, but, when it had been read, the case was not affected by the nature of the intended means by which it was put into the hands of the person addressed. Neither can the case be affected by specu-

lations as to what the position would have been if the receiver had put the letter in his pocket and had read it later at home. Offenses usually depend for their completion upon events that are not wholly within the offender's control and that may turn out in different ways.

No difficulty is raised by the coupling of solicitation and receipt in the statute. If receipt required personal presence, it still would be obvious that "solicit in any manner whatever" was a broader term. But the cases that have been relied upon to establish that the solicitation did not happen in the building, although inadequate for that, do sufficiently show that the money might be received there without the personal presence of the defendant. If, in answer to the defendant's letter, the parties addressed had posted money to him in the building where they were employed, the money undoubtedly would have been received there. To sum up, the defendant solicited money for campaign purposes, he did not solicit until his letter actually was received in the building, he did solicit when it was received and read there, and the solicitation was in the place where the letter was received. We observe that this is the opinion expressed by the Civil Service Commission in a note upon this section, and the principle of our decision is similar to that recognized in several cases in this court. *In re Palliser*, 136 U. S. 257, 266; *Horner* v. *United States*, 143 U. S. 207, 214; *Burton* v. *United States*, 202 U. S. 344, 387, *et seq.* We do not cite them more at length, as the only dispute possible is on the meaning of the particular words that Congress has used.

We may add that this case does not raise the questions presented by an act done in one jurisdiction and producing effects in another which threatens the actor with punishment if it can catch him. Decisions in that class of cases, however, illustrate the indisputable general proposition that a man sometimes may be punished where he has brought consequences to pass, although he was not there in person. They are cited in *In re Palliser, supra.* Here the defendant was

within and subject to the jurisdiction of the United States to the extent of its constitutional power, and the power is not in dispute. *Ex parte Curtis*, 106 U. S. 371; *United States* v. *Newton*, 9 Mackey (D. C.), 226.

Judgment reversed.

MARIA FRANCISCA O'REILLY DE CAMARA, COUNTESS OF BUENA VISTA, *v.* BROOKE, MAJOR GENERAL, U. S. A.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 104. Argued February 28, March 2, 1908.—Decided March 16, 1908.

A tort can be ratified so as to make an act done in the course of the principal's business and purporting to be done in his name, his tort; and the rule of exonerating the servant when the master assumes liability is still applicable to a greater or less extent when the master is the sovereign. *The Paquette Habana*, 189 U. S. 453, 469.

By virtue of an order of the Secretary of War and also by the Platt amendment of the act of March 2, 1901, c. 803, 31 Stat. 897, and the treaty with Cuba of May 22, 1903, 33 Stat. 2249, the acts of the officers of the United States, during the military occupation of Cuba, complained of in this action, were ratified by the United States, and those officers relieved of liability therefor.

The courts will not declare an act to be a tort in violation of the law of nations or of a treaty of the United States when the Executive, Congress and the treaty-making power have all adopted it.

The holder of a heritable office in Cuba which had been abolished prior to the extinction of Spanish sovereignty, but who, pending compensation for its condemnation, was receiving the emoluments of one of the grants of the office, *held* in this case to have no property rights that survived the extinction of such sovereignty.

142 Fed. Rep. 858, affirmed.

THE facts are stated in the opinion.

Mr. Frederic R. Coudert, with whom *Mr. Paul Fuller*, *Mr.*

Crammond Kennedy and *Mr. Howard Thayer Kingsbury* were on the brief, for plaintiff in error:

Neither the order of the Secretary of War, nor the "Platt Amendment" was a ratification by the United States of the tortious act of General Brooke.

Neither does the Secretary of War possess any such inherent and plenary powers as to make his order equivalent to a ratification by the United States of a tortious conversion of private property, committed by an army officer in time of peace. The United States Government has expressly recognized that "executive action by the War Department . . . is not due process of law." 22 Ops. Atty. Gen. 518.

General Brooke's order was not, even in terms, included in the ratification of the Platt Amendment. By the express limitation of that statute to "lawful rights" acquired under the acts of the American administration of Cuban affairs, it clearly recognized that rights might be claimed thereunder which would not be lawful, and these it did not attempt to ratify. It did not purport to deal with a particular act of a military officer transferring something belonging to *A.* over to *B.*

In any event, General Brooke is individually liable for his tortious act, irrespective of governmental direction or ratification. *Little* v. *Bareme*, 2 Cranch, 170. And see *The Charming Betsy*, 2 Cranch, 64; *Shattuck* v. *Maley*, 3 Cranch, 458; *Mitchell* v. *Harmony*, 13 How. 115; *Grisar* v. *McDowell*, 6 Wall. 363; *Cammeyer* v. *Newton*, 94 U. S. 225; *Bates* v. *Clark*, 95 U. S. 204; *Kilbourne* v. *Thompson*, 103 U. S. 168; *United States* v. *Lee*, 106 U. S. 196; *Virginia Coupon Cases*, 114 U. S. 269; *In re Ayers*, 123 U. S. 443; *Magahey* v. *Virginia*, 135 U. S. 662; *Belknap* v. *Schild*, 161 U. S. 10.

General Brooke's act was a trespass upon plaintiff's property rights and she was entitled to judgment.

The case having been tried by the court without a jury, by waiver, the decision of the trial judge is conclusive and equivalent to the verdict of a jury. *Oleomargarine Cases*, 195 U. S. 30,

65, 159. It is therefore not open to dispute in this court that under the law of Spain, which continued in force in Cuba during the American occupation, plaintiff's franchise was a property right which survived the withdrawal of the Spanish sovereignty, that she performed her duty to keep the slaughter-house clean and wholesome; that any nuisance resulting from the discharge of offal from the slaughter-house into slaughter-house creek had been abated prior to General Brooke's order, and that his order was not a valid exercise of the police power. It must have been, therefore, an arbitrary confiscation, and the fact that his motives may have been subjectively meritorious does not justify the trespass. Upon these facts the District Court should have held—and upon the demurrer necessarily and properly did hold—that defendant was liable.

It is immaterial that the plaintiff may have an additional right of action on contract against the United States or any other party.

Where officers of the Government tortiously take property for Government uses, the Government may, by recognizing the property taken as private property, become liable on an implied contract to pay for it, but the plaintiff could only avail herself of such right of action by waiving the individual tort. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645. This she is under no obligation to do.

Mr. Assistant Attorney General Russell for defendant in error:

Whether a public office is an alienable office or periodically elective or appointive, it is everywhere and in all cases a part of the sovereign authority or a vehicle for such authority and cannot survive when the sovereignty departs or is extinguished, and the termination of Spain's sovereignty as a result of war put an end to this office long before General Ludlow or General Brooke issued any order about it.

That termination took place prior to or at the ratification of the treaty of peace.

Upon the face of the laws and decrees found by the judge as

facts and notwithstanding his interpretation of them, we say that "the emoluments" of the office, if the office had been pared down to "the emoluments," did not cease to be "emoluments" of an "office,"—emoluments to be collected by virtue of the sovereign authority of which the whole office was a part or a vehicle. No part of the office and no fee or tax collected by virtue of holding it or having held it could survive the sovereignty which had created and maintained the office and lent the sovereign power to support the tax or fee.

Such an office or privilege was not such "property" as was to be protected under the terms of the treaty with Spain.

Supervision of slaughter-houses and prescribing regulations for their conduct and the disposition of their refuse is a police power inherent in all governments. *Slaughter-house Cases*, 16 Wall. 61, 62, and 63 and see *L'Hote* v. *New Orleans*, 177 U. S. 598; *Stone* v. *Mississippi*, 101 U. S. 816; *Mugler* v. *Kansas*, 123 U. S. 669; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 668; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 238.

The rule stated in *Dobbins* v. *Los Angeles*, 195 U. S. 223, 235, relative to municipal action applies to the action of General Brooke in this case.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error to review a judgment of the District Court dismissing a complaint purporting to be brought under Rev. Stat. § 563, the sixteenth clause of which gives the District Courts jurisdiction "of all suits brought by any alien for a tort 'only' in violation of the law of nations, or of a treaty of the United States." 142 Fed. Rep. 858. See 135 Fed. Rep. 384. The plaintiff is a Spanish subject and alleges a title by descent to the right to carry on the slaughter of cattle in the city of Havana and to receive compensation for the same. (She does not allege title to the slaughter-house where the slaughtering was done. That belonged to the city.) According to the complaint the right was incident to an inheritable and alienable

office; that of Alguacil Mayor or High Sheriff of Havana. The office was abolished in 1878, subject to provisions that continued the emoluments until the incumbent should be paid. The plaintiff has not been paid, and in 1895 one-half of the emoluments was sold on execution by consent, the other half remaining to the plaintiff or those whom she represents. On May 20, 1899, the Island of Cuba being under the military jurisdiction of the United States, Brigadier General Ludlow, then governor of Havana, issued an order that the grant in connection with the service of the city slaughter-house, of which the O'Reilly family and its grantees were the beneficiaries, was ended and declared void, and that thenceforth the city should make provision for such services. The owners were referred to the courts and it was decreed that the order should go into effect on the first of June. In pursuance of the same, it is alleged, the plaintiff was deprived of her property. She appealed to the defendant, then military governor of Cuba. On August 10 he issued an order, reciting the appeal, and stating that, it being considered prejudicial to the general welfare of Havana, etc., and in view of the cessation of Spanish sovereignty, the office of Alguacil Mayor de la Habana, together with all rights pertaining thereto or derived therefrom, was thereby abolished, and the right of claimants to the office or emoluments was denied. The city thereafter was to perform the services. It is alleged that by this action the plaintiff was prevented, and to this day has been prevented, from carrying out the duties and receiving the emoluments mentioned above. The complaint ends by alleging violation of the Treaty of December 10, 1898, 30 Stat. 1754, and of General Orders No. 101, of July 18, 1898, issued by the President through the Secretary of War. It also sets up the Constitution of the United States and the Spanish law in force before the Island was ceded by Spain.

The answer denies the plaintiff's right, but admits the passage of the order, and sets up a ratification by the United States in the so-called Platt Amendment of the act of March 2, 1901, c.

803, 31 Stat. 897, to the effect that "all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected," afterwards embodied in the Treaty with Cuba of May 22, 1903. 33 Stat. 2249. The district judge made a finding of facts, substantially supporting the allegations of the bill, which it is not necessary to set forth in detail, but stating one further public fact that should be mentioned. The plaintiff appealed to the Secretary of War to have General Brooke's order revoked. In answer, Mr. Secretary Root denied that the rights attached to the office of Sheriff of Havana survived the sovereignty of Spain, observed that the services in question were in substance an exercise of the police power of the State, that the right to exercise that power under Spanish authority ended when Spanish sovereignty in Cuba ended, and that the petitioner had been deprived of no property whatever. In December, 1900, the United States ratified and adopted the action of General Brooke through an order of the Secretary of War, and again by the act of Congress just mentioned and the Treaty of 1903. The judge was of opinion that, although there was a public nuisance in the slaughter-house creek, General Brooke's order was not justified under the police power, but that by the ratification of the United States the plaintiff lost any claim against him. The judge intimated, however, that she had a just one against the United States under the Treaty with Spain.

We are so clearly of opinion that the complaint must be dismissed that we shall not do more than mention some technical difficulties that would have to be discussed before the plaintiff could succeed. In assuming that General Brooke's order permanently deprived the plaintiff of her rights, although they were attached to no tangible thing, and although General Brooke long since has ceased to be Governor of Cuba or to have any power in the premises, the plaintiff necessarily assumes that her rights follow the ancient conception of an office and are an incorporeal hereditament, susceptible of disseisin. 3

Kent, 454; Stat. Westm. II, c. 25; 2 Co. Inst. 412; U. S. Rev. Stat. § 563, cl. 13. If we are to apply that conception to the case, we are led to ask why the disseisin was not complete, upon the allegations of the complaint, before General Brooke had anything to do with the matter, or why the brief period during which his authority intervened should make him answerable not only for what had happened before, but also for the continued exclusion of the plaintiff by the United States and by the government of Cuba. But it is very hard to admit that the notion of a disseisin can be applied for the present purpose to such disembodied rights any more than to copyrights or patents; and, if not, then all that General Brooke could be held for, if for anything, would be damages for the disturbances of the plaintiff while he was in power, which are not the object of this suit. It becomes impossible to go further than that when it is remembered that the United States asserted no permanent sovereignty over Cuba, and that, as General Brooke could not carry the office with him, his interference must have lost all legal effect in a very short time.

Again, if the plaintiff lost her rights once for all by General Brooke's order, and so was disseised, it would be a question to be considered whether a disseisin was a tort within the meaning of Rev. Stat. § 563 (16). In any event, the question hardly can be avoided whether the supposed tort is "a tort only in violation of the law of nations" or of the Treaty with Spain. In this court the plaintiff seems to place more reliance upon the suggestion that her rights were of so fundamental a nature that they could not be displaced, even if Congress and the Executive should unite in the effort. It is not necessary to say more about that contention than that it is not the ground on which the jurisdiction of the District Court was invoked.

Coming one step further down, we are met by an argument on the part of the defendant that the only things that we can consider are the pleadings and the judgment dismissing the complaint. It is urged with great force that the decision denying the power of a circuit judge to find and report facts for the

consideration of this court upon a writ of error, *Campbell* v. *Boyreau*, 21 How. 223, although met as to the Circuit Court by Rev. Stat. §§ 649, 700, still applies to the District Courts. *Rogers* v. *United States*, 141 U. S. 548. However, if we assume this argument to be correct, there still perhaps may be gathered from the pleadings, coupled with matters of general knowledge, enough to present the questions which the plaintiff was entitled to present below, and therefore we proceed to dispose of the case upon the merits.

It is said that neither the Executive nor Congress could have taken the plaintiff's property, and that therefore they could not ratify the act of General Brooke so as to make his act that of the United States and to exonerate him. But it has been held that a tort could be ratified so far as to make an act done in the course of the principal's business, and purporting to be done in his name, his tort, *Dempsey* v. *Chambers*, 154 Massachusetts, 330; and it may be assumed that this is the law as to the wrongful appropriation of property which the principal retains, *ibid.* 332, and cases cited. The old law, which sometimes at least was thought to hold the servant exonerated when the master assumed liability [1 Roll. Abr. 2, pl. 7; 95 (T.); *Cremer* v. *Tookley's Case*, Godbolt, 385, 389; *Laicock's Case*, Latch, 187; *Anon.*, 1 Mod. 209], still is applied to a greater or less extent when the master is the sovereign. *The Paquete Habana*, 189 U. S. 453, 465. It is not necessary to consider what limits there may be to the doctrine, for we think it plain that where, as here, the jurisdiction of the case depends upon the establishment of a "tort only in violation of the law of nations, or of a treaty of the United States," it is impossible for the courts to declare an act a tort of that kind when the Executive, Congress and the treaty-making power all have adopted the act. We see no reason to doubt that the ratification extended to the conduct of General Brooke.

But we do not dwell longer upon the ratification of what was done during the military occupation of Cuba, or consider the question whether the ratification was needed, because we agree

with the opinion of the Secretary of War that the plaintiff had no property that survived the extinction of the sovereignty of Spain. The emoluments to which she claims a right were merely the incident of an office, and were left in her hands only until the proceedings for condemnation of the office should be completed and she should be paid. The right to the office was the foundation of the right to the emoluments. Whether the office was or was not extinguished in the sense that it no longer could be exercised, the right remained so far that it was to be paid for, and if it had been paid for the right to the emoluments would have ceased. If the right to the office or to compensation for the loss of it was extinguished, all the plaintiff's rights were at an end. No ground is disclosed in the bill for treating the right to slaughter cattle as having become a hereditament independent of its source. But of course the right to the office or to be paid for it did not exist as against the United States Government, and unless it did the plaintiff's case is at an end.

Judgment affirmed.

SMITH *v.* RAINEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 144. Argued March 3, 4, 1908.—Decided March 16, 1908.

A partner has a lien on the firm's assets for the repayment of his advances to the firm, and in this case *held*, that the articles of copartnership, construed as a whole, provided that the partner in a land venture advancing the amount needed for the venture should have a lien on the land regarded as assets.

THE facts are stated in the opinion.

Mr. Lewis M. Ogden, with whom *Mr. James G. Flanders* was on the brief, for appellant.

Mr. Walter Bennett, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a judgment on demurrer dismissing the appellant's complaint. The prayer of the complaint is to have declared and foreclosed a mortgage lien on certain land as against the defendants, who also claim liens upon the same, and is based upon a written agreement set forth. This instrument recites that the appellant and William J. Rainey have bought the land for $18,000, in the proportions of two-thirds and one-third respectively, for the purpose of improving and selling it; that the whole consideration was paid in cash by the appellant, and that Rainey has agreed to repay the one-third with interest. It agrees that the improvements as specified shall be carried on with reasonable diligence and dispatch, and that the appellant will make necessary advances, and then goes on: "Fourth. That all money advanced by said Jesse Hoyt Smith in said purchase, as well as all such as shall be hereafter advanced by him for any of the purposes aforesaid, shall be considered and treated as a loan or loans by him, and shall be paid to him as rapidly as possible from the receipts from the sale or sales or other income of said property until the same shall be fully paid at six per cent. per annum and before any division of profits shall be made or paid."

The argument for the appellant and the decision below turned mainly on the sufficiency of this clause to create a lien. Standing by itself, and still more if taken only in connection with the next clause, which provides that if all the loans have not been repaid with interest in five years Rainey shall repay his one-third on demand, it well might be held not to be enough. It might be held not to go beyond a personal undertaking, with an indication of a fund as the limit and only source of repayment until five years should have elapsed. But it is necessary to consider the whole document.

The sixth clause gives Rainey the general management,

limiting his contracts "on account of said property" to $5,000 without Smith's written consent, requiring agreement of the parties as to prices and terms, and providing that Rainey shall give Smith true accounts "of all the transactions relating to the business" and full information, etc. The seventh clause provides more specifically for Rainey's keeping books of account, to be always open to Smith, and for his sending to Smith monthly "an account in full of all transactions during the preceding month, including all contracts made and all disbursements and receipts, and showing all the assets and liabilities of the partnership." By the eighth clause Rainey accepts the management without other remuneration than his one-third of the net profits of the business.

The ninth clause reads as follows: "That after the repayment to the said Jesse Hoyt Smith of the said sum of eighteen thousand dollars ($18,000) so advanced by him for the purchase of said tract and his repayment of all advances which shall be hereafter made by him on account of said property or said business, together with interest on all such sums at six (6) per cent. per annum, the net profits of said land and said business shall be divided between the parties hereto as follows: Said Jesse Hoyt Smith shall be entitled to the two-thirds (⅔) thereof, and said William J. Rainey the one-third (⅓) thereof; and the losses if any, shall be shared between the parties in ratio aforesaid.—It is further agreed and understood between the parties hereto that this Memorandum of Agreement is made for the purpose of stating explicitly the terms of copartnership on which the said Jesse Hoyt Smith and William J. Rainey have joined in the purchase, improvement and sale of said tract."

The result of the whole agreement then is that it forms a partnership, and that when it comes to the division of assets the appellant is to be repaid, not merely his share of the capital, but the whole eighteen thousand dollars and his advances before any profits are declared. This means, of course, that he is to be repaid them out of the land or its proceeds. The

advance of one-third of the purchase price, which appears in the beginning as a loan to Rainey, is regarded at the end, with manifest justice, as standing on the same footing as the later advances made more specifically to the business. The whole land is treated as firm capital, and the whole sum paid for is treated as having been contributed, as in fact it was, by Smith, and as contributed to the firm.

A partner has a lien on the firm's assets for the repayment of his advances to the firm, and the ninth article, providing for the repayment of the whole sum advanced by Smith for the venture, means that he shall be repaid out of the land regarded as assets. Taking the instrument as a whole, we are of opinion that it gives the appellant a lien. Whether the defendants nevertheless may not be entitled to priority, is not before us now. The only ground on which the demurrer was or could have been sustained was that the plaintiff had no lien at all.

Judgment reversed.
Demurrer overruled.

ARMOUR PACKING COMPANY *v.* UNITED STATES.
SWIFT AND COMPANY *v.* SAME.
MORRIS AND COMPANY *v.* SAME.
CUDAHY PACKING COMPANY *v.* SAME.

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

Nos. 467, 468, 469, 470. Argued January 20, 21, 22, 1908.—Decided March 16, 1908.

A device to obtain rebates to be within the prohibition of the Interstate Commerce Act of March 2, 1889, 25 Stat. 857, and the Elkins Act of February 19, 1903, 32 Stat. 847, need not necessarily be fraudulent. The term "device" as used in those statutes includes any plan or contrivance whereby merchandise is transported for less than the published rate, or any other advantage is given to, or discrimination practiced in favor of, the shipper.

In construing the Elkins Act it will be read not only in the light of the previous legislation on the same subject, but also of the purpose which Congress had in mind in enacting it—to require all shippers to be treated alike and to pay one rate as established, published and posted. *New Haven Railroad Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 391.

The requirements of § 2 of Art. III of, and of the Sixth Amendment to, the Federal Constitution relate to the locality of the offense and not to the personal presence of the offender.

Transportation of merchandise by a carrier for less than the published rate is, under the Elkins Act, a single continuing offense, continuously committed in each district through which the transportation is conducted at the prohibited rate, and is not a series of separate offenses, and the provision in the law making such an offense triable in any of those districts, confers jurisdiction on the court therein, and does not violate § 2 of Art. III of, or the Sixth Amendment to, the Federal Constitution, providing that the accused shall be tried in the State and district where the crime was committed.

The Interstate Commerce Act embraces the whole field of interstate commerce; it does not exempt such foreign commerce as is carried on a through bill of lading, but in terms applies to the transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of transhipment.

The export and preference clause of the Constitution prohibits burdens only by way of actual taxation and duty, or legislation intending to give, and actually giving, the prohibited preference, and does not prohibit the merely incidental effect of regulations of interstate commerce wholly within the power of Congress; and the fact that such regulations in the Interstate Commerce Act may affect the ports of one State having natural advantages more than those of another State not possessing such advantages does not render the act unconstitutional as violating that provision.

There is no provision in the Elkins Act exempting special contracts from its operation, nor is there any provision for filing and publishing such contracts, and the fact that a contract was at the published rate when made does not legalize it after the carrier has advanced the published rate. The provisions as to rates, being in force in a constitutional act of Congress when the contract is made, are read into the contract and become a part thereof, and the shipper, who is a party to such a contract, takes it subject to any change thereafter made in the rate to which he must conform or suffer the penalty fixed by law.

An indictment which clearly and distinctly charges each and every element of the offense intended to be charged, and which distinctly advises the defendant of what he is to meet at the trial is sufficient; and so *held* in this case as to an indictment for accepting rebates prohibited by the Elkins Act, although the details of the device by which the rebates were received were not set out.

While intent is to some extent essential in the commission of crime, and

without determining whether a shipper honestly paying a reduced rate in the belief that it is the published rate is liable under the statute, *held* that shippers who pay such a rate with full knowledge of the published rates, and contend that they have a right so to do, commit the offense prohibited by the Elkins Act, and are subject to the penalties provided therein, even though their contention be a mistake of law.
153 Fed. Rep. 1, affirmed.

THE facts are stated in the opinion.

Mr. Frank Hagerman and *Mr. J. C. Cowin*, with whom *Mr. A. R. Urion*, *Mr. Henry Veeder* and *Mr. M. W. Borders* were on the brief, for petitioners:

A shipper can be guilty of an offense under the Elkins Act only if and when he is guilty of some bad faith or fraudulent conduct in using some kind of device intentionally dishonest or some underhand method of obtaining a rebate, concession or discrimination. It was never intended that he should be held guilty if he honestly believed he was entitled to the rate at which he openly shipped.

The purpose of the Elkins Act was to enlarge the character of devices specified in the act of 1889, and it should have read into it the language of the act of 1889 by making willfulness and knowledge essential elements. Otherwise the statute is incomplete and to be sustained at all must be read in the light of the common law, leaving the court to infer that the legislative intent was only to create guilt on the part of the shipper if he knew of the published tariff and then by some device obtained a concession thereunder. See *United States* v. *Carll*, 105 U. S. 611; *United States* v. *Milwaukee Refrigerator Transit Co.*, 142 Fed. Rep. 247, 251, 252.

The word "device" cannot be taken from the statute, for it is a word of well-defined legal meaning, the trial judge having adopted that given by Webster. See A. & E. Enc. Law (2d ed.), 448; 1 Bouvier's Law Dictionary (Rawle's Revision); Black's Law Dictionary; *Potter* v. *State*, 27 Arkansas, 362; *State* v. *Blackstone*, 115 Missouri, 427.

Not only was it necessary for the shipper to use some device,

but he must have known what the tariff was and used the device to evade it. An innocent shipper paying a rate called for is guiltless, even though the tariff is not charged. *Pond-Decker Lumber Co.* v. *Spencer*, 30 C. C. A. 430; *S. C.*, 86 Fed. Rep. 846, 848; *United States* v. *Milwaukee Ref. Transit Co.*, 142 Fed. Rep. 247, 252.

There was no jurisdiction, because the alleged crime was not committed within the district, nor any concession made as to any portion of the route therein.

The indictment only charged, and the proof conclusively showed, that the alleged concession was obtained in Kansas upon that portion of the transportation which was conducted east of the Mississippi River. So far as concerned the Western District of Missouri, the shipment was merely carried through it by the railway company.

If the Elkins Act is to be construed to authorize a prosecution of the shipper outside of the district in which the concession was obtained, it is unconstitutional under § 2, Art. III and the Sixth Amendment of the Federal Constitution. *Tinsley* v. *Treat*, 205 U. S. 20. So it was decided as to the act of 1889, 32 Stat. 847, prohibiting shippers from obtaining concessions, *In re Belknap*, 96 Fed. Rep. 614, 616; *Davis* v. *United States*, 104 Fed. Rep. 136, 138; as to the act of 1887, 24 Stat. 379, 382, prohibiting the giving of rebates, *United States* v. *Fowkes*, 53 Fed. Rep. 13, 16; and as to the anti-lottery act, § 3894, Rev. Stat., as amended, 26 Stat. 465, in so far as it attempted to authorize a prosecution in a district to which the matter was mailed, where the offense charged was depositing the matter in the mail, see *United States* v. *Conrad*, 59 Fed. Rep. 458, 465.

The Elkins Act, so far as it attempts to authorize a prosecution in any district through which the transportation is conducted, should not in any event be held to apply, as against a shipper who committed no act within the district, especially when the alleged concession was not upon any part of the route therein.

The offense, if any was committed by the shipper, was com-

plete in Kansas. See *Dealy* v. *United States*, 152 U. S. 539; *In re Belknap*, 96 Fed. Rep. 614, 616, 617; *Davis* v. *United States*, 43 C. C. A. 448; *S. C.*, 104 Fed. Rep. 136, 138, 139; *United States* v. *Fowkes*, 3 C. C. A. 394; *S. C.*, 53 Fed. Rep. 13, 16, 17.

The purpose of § 2, Art. III, of the Constitution, and the Sixth Amendment, was to give to defendant the benefit of an indictment by, and a trial before, a jury of his neighbors, or of the community in which the offense was committed, and to protect him against a trial "as a stranger in a strange land" where he had never been and in which he had committed no act. *Tinsley* v. *Treat*, 205 U. S. 20; *Beavers* v. *Henkel*, 194 U. S. 73, 83; *Thompson* v. *Utah*, 170 U. S. 343, 349, 350; *West* v. *Gammon*, 39 C. C. A. 271; *Burton* v. *United States*, 196 U. S. 283, 304.

The shipment being a through export shipment, was not within the Elkins Act, which is limited to "the interstate or foreign commerce" provided for in the original Interstate Commerce Act, 24 Stat. 379, and amendments thereto, 25 Stat. 855. Its terms have no application to a through export shipment and as such shipments are excluded from the scope of the act, § 6, requiring the publication of schedules, can have no application thereto.

The act covers only rail carriers, or those with a combined rail and water (inland) route. Independent inland water carriers are not included, nor water carriers under a common arrangement with each other for continuous shipment. With broadest interpretation of phrase, "common control," etc., it is only water (inland) carriers that make joint rates with a rail carrier that come within the act. All other carriers are excluded, wagon, express, telegraph, etc. Ocean carriers, whether acting independently or making common arrangement with rail carriers, are outside the act; because they do not carry the kind of commerce that is regulated by the act, that is, foreign commerce while it is outside port of transhipment or entry; nor do they come under description of carriers regulated.

The act as construed by the Circuit Court of Appeals is in

conflict with Art. I, § 9, par. 5 of the Constitution, which prohibits the laying of any tax or duty on articles exported from any State or the giving of any preference by any regulation of commerce or revenue to the ports of one State over those of another. This prohibition upon exported articles is a guaranty against any form of legislation which burdens exportation. *Fairbank* v. *United States*, 181 U. S. 283.

The act as construed also violates that portion of the section which prohibits any preference to the ports of one State over those of another, as it gives a distinct preference to those ports which are reached by water as against those which are reached only by land. See *Passenger Cases*, 7 How. 284, 420; *Ward* v. *Maryland*, 12 Wall. 418; *Fairbank* v. *United States*, 181 U. S. 283, 294.

The contract of the shippers with the Burlington Company was a valid one. A carrier can make a contract to carry for a fixed period at the then published rates, and such a contract is not subject to the right of the carrier, voluntarily and without the shipper's consent, to change it at any time, upon giving the statutory notice, by an amendment of the tariff. The right to make a change in the tariff is a privilege given to the carrier which it can waive. While it can make no contract that is not subject to a change in the rate by Congress or by finding of the Interstate Commerce Commission, it can for itself agree to carry for a given time at an existing published rate. See packing house contract case (*Interstate Commerce Commission* v. *C. G. W. Ry. Co.*, 141 Fed. Rep. 1003); special milk shipper's contract (*D., L. & W. R. Co.*, 147 Fed. Rep. 51, 61; certiorari denied, 203 U. S. 588). The statute does not in terms interfere with the contractual right of the carrier.

Without prohibition by a statute, such a contract is undoubtedly valid. *Cin. &c. R. R. Co.* v. *Interstate Com. Commission*, 162 U. S. 184; *Pond-Decker Lumber Co.* v. *Spencer*, 30 C. C. A. 430; *S. C.*, 86 Fed. Rep. 846, 848; 4 Elliott on Railroads, § 1560; *Memphis & C. Packet Co.* v. *Abell*, 17 Ky. Law Rep. 191; *S. C.*, 30 S. W. Rep. 658, 659; *Baldwin* v. *Liverpool & G. W.*

Ry. Co., 48 Hun, 496, 500; *Chicago &c. R. Co.* v. *Chicago &c. Coal Co.*, 79 Illinois, 121, 126; *Atlanta, K. & N. R. Co.* v. *Horne*, 106 Tennessee, 73; *S. C.*, 59 S. W. Rep. 134, 135.

Having made the contract in accordance with the schedule, it was the duty of the carrier to keep such schedule in force and to carry for all others at the same rate. Hence, there was no right to change the tariff during the life of the contract. Such was the effect of the contract. *Laurel Cotton Mills* v. *Gulf &c. R. Co.*, 84 Mississippi, 339.

The indictment was insufficient. The indictment omitted the statutory words, "whereby . . . property . . . *by any device* . . . be transported at a less rate. . . ." Not only this, but it wholly failed to state how, in what manner, or by what means the concession was obtained, or of what it consisted. In a statutory offense, there cannot be any omission of any element of the offense as defined; and, the indictment must show the means by or the manner in which the offense was committed. Even in statutory offenses of the character in question, there is an exception to the general rule that it is sufficient to charge the offense in the language of the statute. *United States* v. *Cook*, 17 Wall. 168; *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Mann*, 95 U. S. 583; *United States* v. *Hess*, 124 U. S. 483; *Evans* v. *United States*, 153 U. S. 584; *United States* v. *Brazean*, 78 Fed. Rep. 464, 465, and cases cited; *Evans* v. *United States*, 153 U. S. 584; *Keck* v. *United States*, 172 U. S. 434; *United States* v. *Britton*, 107 U. S. 655, 669.

The facts did not warrant a finding of any criminal guilt. Nothing in the record warrants any imputation of bad faith.

It can well be contended that the element of willfulness in the former law must be extended to the Elkins Act. Another principle leads to exactly the same result. In the Federal courts even if a statute does not use the words "willfully or intentionally" or make *scienter* necessary, still the statute will be construed to mean that there must have been knowledge of wrongdoing and actual guilty intent, unless, possibly,

in cases where a specific act is unconditionally made an offense. So where the offense is uttering forged paper, *United States* v. *Carll*, 105 U. S. 611; obstructing justice, *Pettibone* v. *United States*, 148 U. S. 197; mailing obscene matter, *United States* v. *Slenker*, 32 Fed. Rep. 691, 694; obstructing Federal election officers, *United States* v. *Taylor*, 57 Fed. Rep. 391; adopting device prohibited by the Elkins Act, *United States* v. *Milwaukee Transit Co.*, 142 Fed. Rep. 247, 252. This is a recognition of the general rule that criminality will not be imputed unless an act is done in bad faith, or with an intention of violating the law.

The Attorney General, *Mr. Milton D. Purdy*, Assistant to the Attorney General, and *Mr. A. S. Van Valkenburgh*, United States Attorney, for the United States:

The acts of the shippers in these cases in accepting and receiving a special rate or discrimination, whereby their goods were carried at a less rate than that charged others for the same service, constitutes a crime under the Elkins Act without regard to whether there was any secret device employed by them to obtain from the railroad company the concession of such rebate, special rate or discrimination. The history of the prior acts *in pari materia*, as well as of the Elkins Act itself, shows this to be so. *United States* v. *Tozer*, 37 Fed. Rep. 635; *United States* v. *Standard Oil Co.*, 148 Fed. Rep. 719; *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361; *Harris* v. *Rosenberger*, 145 Fed. Rep. 449; *Durland* v. *United States*, 161 U. S. 306.

The court had jurisdiction of the alleged crime for the reason that the transportation was conducted through the district, and the transportation of the property is an essential element of the offense. The offense of giving or receiving rebates is susceptible of prosecution whenever the transportation has started by the delivery of the property to the carrier, and continues and is ever present until that transportation is completed. *Rhodes* v. *Iowa*, 170 U. S. 412; *Heyman* v. *Southern*

Ry. Co., 203 U. S. 270; *United States* v. *Fowkes*, 53 Fed. Rep. 13; *In re Belknap*, 96 Fed. Rep. 614; *State* v. *Smith*, 66 Missouri, 61; *State* v. *McGraw*, 87 Missouri, 161; *State* v. *Hatch*, 91 Missouri, 568; *Commonwealth* v. *Parker*, 165 Massachusetts, 526; *State* v. *Bailey*, 50 Ohio St. 636; *Commonwealth* v. *Macloon*, 101 Massachusetts, 1, 6.

In export shipments, the Elkins Act applies to interstate inland carriage from the point of origin within the United States to the port of transhipment. The Interstate Commerce Act (§ 1) plainly applies to commerce with a country *not* adjacent. It places that commerce entirely within the operation of the act, whether the same is between the point of origin and the port of transhipment or between the port of entry and the point of destination. *Texas & Pacific R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197.

This act was designed primarily in the case of export shipments for the protection of the shipper; no one shipper, but shippers in the aggregate. Take away the necessity of published rates and of adherence to published rates, and there is little to prevent the carrier, by a complex and devious system of rate-making, from discriminating between various shippers similarly situated from the point of origin to the port of transhipment, and of so skillfully concealing or excusing the same that punishment in any given case would be well-nigh impossible. This, Congress foresaw, and in order to prevent this greater evil it passed a law, which may possibly, as is the case with all laws conferring general benefits, work some temporary inconvenience in isolated cases.

In any event, the discretion was with Congress, and with Congress alone, and the courts cannot do otherwise than enforce the plain provisions of the legislative act. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 477 *et seq.; Interstate Commerce Commission* v. *Baltimore &c. R. Co.*, 145 U. S. 263.

The act in question here is not unconstitutional as burdening export traffic nor as giving preference to the ports of one State over those of another. If it at all affects the traffic of any port

injuriously it is purely incidental and does not come within the constitutional prohibition. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 434; *South Carolina* v. *Georgia*, 93 U. S. 13; *Cooley* v. *Board of Port Wardens*, 12 How. 299; *Norris* v. *Boston*, 7 How. 414; *United States* v. *Wood*, 145 Fed. Rep. 412;

The contract between the Burlington company and the packers, even if valid as between carrier and shipper after August 7, 1905, cannot avail either carrier or shipper as a defense to a departure from the filed and published rate in force after that date.

Since the passage of the Elkins amendment the shipper is liable equally with the carrier for a departure from the filed and published rate, and the mere soliciting, accepting, or receiving of a concession or rebate is an offense. No intent is necessary to the completion of that offense. Where the intent is not essential, a mistake or ignorance of fact is quite as immaterial as mistake or ignorance of law. *United States* v. *Leathers*, 6 Sawyer, 17; *State* v. *Griffith*, 67 Missouri, 287; *Beckham* v. *Nacke*, 56 Missouri, 546; *People* v. *Roby*, 52 Michigan, 577; *Church* v. *Minneapolis & St. L. Ry. Co.*, 14 S. Dak. 443.

The law stood upon the statute books when this contract was made. Both parties contracted with reference to it, and what subsequently might be done under it, even to the extent, as has been held, that the law itself might be changed, because the power to regulate and legislate respecting such commerce is reserved in Congress. *Fitzgerald* v. *Grand Trunk Ry. Co.*, 63 Vermont, 173; *McGowan* v. *Wilmington*, 95 N. Car. 417; *Clarendon* v. *Rutland &c. Ry. Co.*, 75 Vermont, 6; *St. Anthony* v. *St. Paul Water Co.*, 168 U. S. 372.

The indictments in these cases are sufficient. The employment of a device is not an essential element of the offense, and with respect to the concession charged, the indictment fully and sufficiently described it, what it was and of what it consisted. *United States* v. *Britton*, 107 U. S. 655 (cited by petitioners), discussed and distinguished. The charge in the in-

dictment fully meets all legal requirements. *United States* v. *Simmons*, 96 U. S. 360, 362. And see *Connors* v. *United States*, 158 U. S. 408, 411; *Ledbetter* v. *United States*, 170 U. S. 606, 611.

The facts fully warrant the finding of criminal guilt. The packers are conclusively presumed to have intended to do what they did and are bound by the legal consequences of their acts. *New Haven R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 396–398.

MR. JUSTICE DAY delivered the opinion of the court.

These cases are here upon writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. By stipulation there was a single petition for certiorari and the cases in the Circuit Court of Appeals were considered together on the record in the *Armour Packing Company case*, and, as it is conceded in the brief of the learned counsel for the petitioners that the differences in the cases are unsubstantial, the same course may be followed here.

Each of the petitioners was convicted in the District Court of the United States, Western District of Missouri, for violation of the so-called Elkins Act of February 19, 1903, chap. 708, 32 Stat. 847, in obtaining from the Chicago, Burlington and Quincy Railway Company an unlawful concession of 12 cents per 100 pounds from the published and filed rate on that portion of the route between the Mississippi River and New York for transportation upon a shipment made August 17, 1905, for carriage by rail of certain packing house products from Kansas City, Kansas, to New York for export. Upon writs of error from the Circuit Court of Appeals of the Eighth Circuit the sentences of conviction were affirmed. 153 Fed. Rep. 1.

The facts in the *Armour case* are briefly these: From May 9 to August 6, 1905, the Chicago, Burlington and Quincy Railway Company, with its connecting railroads east of the Mississippi River, under joint traffic arrangements, had filed, published and posted in accordance with the acts of Congress the

rates of shipment of the character in question, and showing that the proportionate part thereof from points on the Mississippi River to New York was 23 cents per 100 pounds. Upon June 16, 1905, the packing company contracted with the Wilson Steamship line for space upon boats sailing in August for certain shipments, and notified the Burlington Company thereof, giving it a copy of the contract. On June 17, 1905, the Burlington Company contracted with the packing company to carry export shipments from Kansas City, Kansas, of products named, until December 31, 1905, at a rate the proportionate part of which from the Mississippi River to New York city was 23 cents per 100 pounds as aforesaid. Upon August 6, 1905, the tariff was amended and duly published and filed, showing that the proportionate part from the Mississippi River to New York city was 35 cents instead of 23 cents per 100 pounds. One of the connecting railroads then objected to the carrying of the freight at the contract rate hereinbefore stated, and a controversy arose between it and the Burlington Company as to whether such contract should apply, the Burlington Company claiming that it should, the connecting carrier denying this contention. Upon August 17, 1905, the packing company delivered at Kansas City, Kansas, to the Burlington Company sixty-seven tierces of oleo oil, property of the character covered by the contract, for export to Christiania, Norway, and upon receipt thereof at Kansas City, Kansas, the Burlington Company issued and delivered a bill of lading agreeing to carry the same to the point of destination for a through rate, which included the carriage by, and the rate of the steamship line, which bill of lading was, according to the ordinary course of business, delivered to the Traders Despatch, one of the connecting carriers, which took the same up and issued a through bill of lading for the goods at the through rate. The bill was in triplicate, one copy thereof being delivered to and accepted by the steamship company. The packing company paid to the Burlington Company, as the initial carrier, the full through rate for the

carriage over the line of the Burlington Company and its connecting carriers and that of the steamship line, and from the time of the delivery of the freight to the railway company at Kansas City, Kansas, until it was delivered at the export destination, it was exclusively handled by the carriers, rail and steamship, the shipper having nothing to do with it. The Burlington Company did, with connecting lines, transport the property from Kansas City, Kansas, through the Western District of Missouri and other States and districts to New York city, where the same was delivered to the steamship line. The full rate for the through carriage thus paid was made up so that the proportional part of the railroad carriage east of the Mississippi River was 23 cents per 100 pounds, instead of 35 cents per 100 pounds, fixed by the amended and published rate. The packing company at the time of making the shipment and paying the freight knew of the filing and publishing of the amended tariff of August 5, 1905, but did not know how the rate was apportioned or divided, or made up among the respective carriers or points, except that it knew the steamship rate as named in the contract with the steamship owners.

At the time aforesaid the Burlington Company was a common carrier, engaged in the transportation of property by railway under contract agreements and traffic arrangements with certain other lines, extending from Kansas City, Kansas, east to the city of New York and other seaboard points. There were no fixed contract, agreements or traffic arrangements with the steamship lines, which were conducted as hereinafter set forth. The ocean rate is variable, depending upon the season, weather and other matters. The steamship must sail at a given date and has a certain amount of space to be filled, so that space may be at one time quoted to one person at one price and at another time to another person at a different price. The question of such rates vary from hour to hour, as well as from day to day. For these, among other reasons, there was no contract agreement or traffic arrangements between the railroads and export steamship lines. The reservation of

space upon an ocean steamer in advance is an important thing, so that the packing company can be certain that its shipment can go on the boats sailing at specified times. The packing company has houses in different parts of the United States, so that it cannot always at the time of the contract for space know from what particular point and over what road the shipments will go.

Before August 6, 1905, shipments were made according to the terms of the contract aforesaid, which were carried under the terms thereof. The Armour Company contended and insisted that the amendment increasing the tariff rate did not and could not abrogate or impair the term of its contract.

These prosecutions were under the Elkins Act (32 Stat. 847), and the first question argued concerns the construction of that act, as to what constitutes a crime on the part of the shippers so far as obtaining a shipment by some manner of device is concerned, it being the contention of the petitioners that in order to work conviction the shipper must be guilty of some bad faith or fraudulent conduct in the use of the device or obtain the rebate by some intentionally dishonest or underhanded method, concession or discrimination denounced by the act. The history of the act in this feature may be of service in interpreting the meaning of Congress. The act of February 4, 1887, made no provision for criminal offenses against the shippers, but it was provided (§ 2, ch. 104, 24 Stat. 379) that if the common carrier should directly or indirectly, by any special rate, rebate, or other device, demand, collect or receive, through any person or persons, a greater or less compensation for any service rendered or to be rendered in the transportation of property subject to the provisions of the act, than it charges, demands, collects or receives, etc., from any other person or persons for doing for him or them a like service in the transportation of a like kind of traffic under substantially the same circumstances, such common carrier shall be deemed guilty of unjust discrimination, which by the

act was prohibited and made unlawful. And it was made unlawful for a common carrier to deviate from the published schedule of rates, fares and charges. 24 Stat, § 6, p. 381, ch. 104, February 4, 1887.

By the act of March 2, 1889 (25 Stat. 857, § 10), the shipper was brought within certain criminal provisions of the law, and one who should knowingly and willfully, by false billing, false classifying, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, with or without the consent or connivance of the carrier, obtain or dispose of property at less than the regular rate established and in force, should be deemed guilty of fraud.

It will be noticed that in these statutes the term device is associated with other words indicative of its meaning, and in the act of March 2, 1889, the shipper, for falsely acting as to weighing, billing, classifying or obtaining the transportation of property at less than the regular rate, or by any other device, was deemed guilty of fraud. In this act the term device, as one of the means of consummating a fraud, shows the sense in which the term is used by Congress. It was only fraudulent conduct in obtaining transportation at less rates than others, which was denounced by the act, and the imposition aimed at was principally such as might be practiced by the shippers upon the carriers in order to procure the preference.

When we come to the Elkins Act we find the following provisions (32 Stat. 847):

"The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons or corporation to offer, grant or give or to solicit, accept or receive any rebate, concession or

discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concessions, or discriminations shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

In this act we find punishment by imprisonment abolished, and the shipper and carrier are placed upon the like footing, and it is made unlawful for any person or corporation to offer, grant, solicit, give, or to accept or receive, any rebate, concession or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported for a less rate than that published and filed by such carriers, or whereby any other advantage is given or discrimination practiced. And we find the word device disassociated from any such words as fraudulent conduct, scheme or contrivance, but the act seeks to reach all means and methods by which the unlawful preference of rebate, concession or discrimination is offered, granted, given or received. Had it been the intention of Congress to limit the obtaining of such preferences to fraudulent schemes or devices, or to those operating only by dishonest, underhanded methods, it would have been easy to have so provided in words that would be unmistakable in their meaning. A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance. Webster defines it to be "that which is devised or formed by design; a contrivance; an invention; a project," etc.

This act is not only to be read in the light of the previous legislation, but the purpose which Congress evidently had in mind in the passage of the law is also to be considered.

The views of this court, speaking through Mr. Justice White, in *N. Y., New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 391, are apposite here:

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. . . . The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."

The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

It is next contended that there is no jurisdiction to prosecute

the offense named, because the alleged offense, if any, was not committed in the Western District of Missouri, where the prosecution was had, but the same was complete in Kansas City in the State of Kansas; and it is contended in this connection that if the act can be construed to include prosecutions in other districts it is unconstitutional within the provisions of the Sixth Amendment of the Constitution of the United States, which provides that the accused shall have the right to be tried by an impartial jury of the State and district wherein the crime shall have been committed. Art. III, § 2, and Amendment VI.

As to the construction of the act, in addition to the section of the act above quoted, it is further provided in the Elkins law (32 Stat. 847) as to jurisdiction:

(Prosecution—Jurisdiction) "Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein."

In this case the indictment charges the actual transportation of the property from Kansas City, Kansas, to New York city, the course of transportation being through the Western District of Missouri, in which the prosecution was had.

We are not now concerned with the construction of the act in making provision for punishing the carrier or shipper for offering, granting or giving, or soliciting, accepting or receiving, rebates, concessions, or discriminations, irrespective of actual transportation, for it is specifically made an offense to receive any rebate or concession *whereby any such property is by any device whatever transported* at a less rate than that named, published and filed by the carrier; and jurisdiction is given to prosecute in any criminal court of the United States

in the district *through which the transportation may have been conducted.*

Having in view the offense charged in this case, we think it is clearly within the terms of the act making it penal to procure the actual transportation, by any of the means denounced in the act, of goods at a less rate than that named in the tariffs. It is the purpose of the act to punish those who give or receive transportation, in the sense of actual carriage, at a concession from the published rates. Wherever such transportation is received, there the offense is to be deemed to have been committed. Why may this not be so? In this feature of the statute, the transportation being of the essence of the offense, when it takes place, whether in one district or another, whether at the beginning, at the end, or in the middle of the journey, it is equally and at all times committed.

Congress also embraced in § 1 of the Elkins Act offenses not depending upon actual transportation through districts; and as to the trial of such, it also made provisions in the venue section.

For the penal section is not only aimed at offenses whereby property is transported in interstate commerce at less than published rates, but in terms covers the offering, granting, giving, soliciting, accepting or receiving of rebates, concessions or discriminations, "whereby any other advantage is given or discrimination is practiced" in respect of interstate transportation.

Congress doubtless had in mind that some of these offenses might be complete in a single district; some might be begun in one and completed in another; and those wherein transportation—actual carriage—was made an essential element might continue through several districts, and hence undertook to provide places for trial of any offense which might be committed against the provisions of the act. It is at least certain that these sections, construed together, make an offense of obtaining transportation at a concession from the published rate, which shall be triable in any district through which it

is had. That is the offense of which the accused is charged in this case, and such is the district in which it was tried.

It is contended that the contrary was held in the case of *Davis* v. *United States*, 104 Fed. Rep. 136, decided in the Circuit Court of Appeals for the Sixth Circuit. In that case the prosecution was for false billing by the shipper, under § 10 of the act of 1889, wherein the statute provided punishment for the offense in a single district, and it was there held that the crime was complete in the district in which the false billing was made and the goods delivered to the carrier for transportation, and that its actual carriage was not an essential element of the offense; and that a prosecution in Texas for goods falsely billed and delivered to the carrier in Ohio could not be maintained.

Under the amended act, transportation, with a rebate, or at a concession from the established rates, is made an offense as to the shipper as well as the carrier, thereby differentiating the Elkins Act from § 10 of the act of 1889 as construed in the *Davis case*. In the *Davis case* it was specifically said:

"Such transportation may be through a number of districts, but Congress has given jurisdiction for punishment of the crime in the district in which the offense is committed. It must have been in the contemplation of Congress that the fraudulent representations may be made in one place, and the transportation, in the sense of actual carriage, obtained as a result thereof, may be to a State or district remote from the place of delivery, and through a number of districts of the United States. If it was contemplated that the crime could only be committed when the carriage contracted for was concluded, quite a different provision would have been inserted than the one requiring punishment in the district where committed. Congress, in passing this act, and providing for the place of trial and punishment in a single district, evidently contemplated the consummation of the offense at the place where the goods are billed by the shipper and the delivery for transportation takes place."

But it is said this construction of the act is in violation of the Sixth Amendment of the Constitution of the United States, which requires crimes to be prosecuted and punished in the State or district where the same are committed, and that as the transportation was had, at least, in part in Kansas, the offense was there completed and could not be prosecuted elsewhere. But the constitutional provision does not require the prosecution of the defendant in the district wherein he may reside at the time of the commission of the offense, or where he may happen to be at that time, provided he is prosecuted where the offense is committed. The constitutional requirement is as to the locality of the offense and not the personal presence of the offender. *In re Palliser*, 136 U. S. 257, 265; *Burton* v. *United States*, 202 U. S. 344, 387. This doctrine finds illustration in *Palliser's case, supra*, in which a person was prosecuted in Connecticut for mailing a letter in New York, addressed to the postmaster in the former State, to induce him to violate his official duty, and it was therein argued that the offense was complete in New York when the letter was mailed, and that only in the New York district could the prosecution be constitutionally had; but this court, speaking through Mr. Justice Gray, said: "There can be no doubt at all, if any offense was committed in New York, the offense was continuing to be committed when the letter reached the postmaster in Connecticut."

In that case the offender had done no act out of New York and the acts performed by him were complete when the letter was delivered at the post office in that State, but this court held the crime to be a continuing one. We think the doctrine for stronger reason applies in the present case, for transportation is an essential element of the offense, and, as we have said, transportation equally takes place over any and all of the traveled route, and during transportation the crime is being constantly committed. It does not follow from this view of the character of the offense that a single transportation of goods can be made the basis of repeated separate

criminal charges in each of the districts through which the transportation at an illegal rate is had. Take the present case. The charge is of a single, continuous carriage from Kansas City to New York at a concession from the legal rate for the part of the carriage between the Mississippi River and New York of 12 cents for each 100 pounds so transported. This is a single, continuing offense, not a series of offenses, although it is continuously committed in each district through which the transportation is received at the prohibited rate.

To say that this construction may work serious hardship in permitting prosecutions in places distant from the home and remote from the vicinage of the accused is to state an objection to the policy of the law, not to the power of Congress to pass it. *Hyde* v. *Shine*, 199 U. S. 62, 78. But this is a large country, and the offense under consideration is one which may be constantly committed through its length and breadth. This situation arises from modern facilities for transportation and intercommunication in interstate transportation, and considerations of convenience and hardship, while they may appeal to the legislative branch of the Government, will not prevent Congress from exercising its constitutional power in the management and control of interstate commerce. We think there was jurisdiction to prosecute for the offense charged within the Western District of Missouri.

It is further contended by petitioners that the statutes have no application to a shipment on a through bill of lading from an interior point in the United States to a foreign port. It is alleged that the Elkins law refers to the original Interstate Commerce Act, and that its terms do not include such shipments. Analyzing the first section of the act (24 Stat. 379), it is said that it applies to the following kinds of commerce: (*a*) interstate commerce; (*b*) commerce between the United States and an *adjacent* foreign country; (*c*) commerce between places in the United States passing through a foreign country; (*d*) commerce from the United States to a foreign country, only while being transported to a point of transhipment;

(*e*) commerce from a foreign country to points in the United States, but only while being carried from port of entry either in the United States or an adjacent foreign country. And, it is contended, that § 6, as amended (25 Stat. 855), does not require the filing of through export tariffs.

The purpose of Congress to embrace the whole field of interstate commerce is made apparent by the exclusion only of wholly domestic commerce in the last clause of section one of the original act of 1887, and in the declaration of the scope and purpose of the act declared in its title. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 211. There is no attempt in the language of the act to exempt such foreign commerce as is carried on a through bill of lading; on the contrary, the act in terms applies to the transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of transhipment.

What reasonable ground is there for supposing that Congress intended to exercise no control over such commerce if it happens to be billed through to the foreign port? Such construction would place such important commerce shipped in the United States to a port for transhipment abroad wholly outside the restrictions of the law, and enable shippers to withdraw such commerce from the regulations enforced against other interstate commerce by the expedient of a through bill of lading. Take the present case. The through rate is obtained by adding the ocean rate to the inland rate. There is no contractual relation between the railroad carrier and the ocean carrier. The ocean rate is uncertain and variable, depending upon time of sailing and available space. The accommodation for ocean shipment was obtained by the shipper and by it made known to the inland carrier. We think the language of the statute, read in the light of the manifest purpose of its passage, shows the intent of Congress to bring interstate commerce within the control of the provisions of the law up to the time of ocean shipment. This construction

is reinforced by the broad provisions of § 6 of the act as to publishing schedules, showing rates, fares and charges, and filing the same with the Interstate Commerce Commission. That such rates, notwithstanding through bills of lading, were subject to the provisions of the act, was held, upon full consideration, and rightfully, as we think, by the Interstate Commerce Commission. *Re Tariffs* v. *Export and Import Traffic*, 10 I. C. C. Rep. 55.

It is contended that the act, as construed by the Circuit Court of Appeals, makes it conflict with Art. I, § 9, par. 5, of the Constitution, which provides: "No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another."

The petitioner contends that to permit a statute to have such application to articles intended for foreign export is to place a burden on the exercise of this right, because before the shipper can lawfully send his goods abroad and before the carrier can lawfully accept them there must be a compliance with the established rate on file with the Interstate Commerce Commission. This rate is subject only to be changed as provided by law; and this can be done without notice to the exporter and regardless of his power to comply with the legal rate and meet the competition at the seaport and the conditions of foreign markets. These things, it is said place a distinct burden upon export trade, and therefore come within the constitutional prohibition. But it is to be observed that the Constitution provides for a burden only by the way of taxation or duty, and unless the alleged interference amounts to such taxation or duty it does not come within the constitutional prohibition. *Cornell* v. *Coyne*, 192 U. S. 418.

The regulations of interstate commerce provided by the statute now under consideration are within the acknowledged power of Congress under the interstate commerce clause of

the Constitution. There is no attempt to levy duties on goods to be exported, and the mere incidental effect in the legal regulation of interstate commerce upon such exportations does not come within this constitutional prohibition.

Nor do we think there is any more force in the contention that this legislation amounts to a preference of ports of one State over those of another within the meaning of the constitutional provision under consideration. This provision was intended to prevent legislation intended to give and having the effect of giving preference to the ports of one State over those of another State. It may be true that the regulation of interstate commerce by rail has the effect to give an advantage to commerce wholly by water and to ports which can be reached by means of inland navigation, but these are natural advantages and are not created by statutory law. The fact that regulation, within the acknowledged power of Congress to enact, may affect the ports of one State more than those of another cannot be construed as a violation of this constitutional provision. *South Carolina* v. *Georgia*, 93 U. S. 4, 13; *Pennsylvania* v. *Wheeling & Belmont Bridge Company*, 18 How. 421, 433.

It is strongly urged that there is nothing in the acts of Congress regulating interstate commerce which can render illegal the contract between the shipper and the railroad company covering the period from June to December, 1905. The contract, it is insisted, was at the legal, published and filed rate, and there is nothing in the law destroying the right of contract so essential to carrying on business such as the petitioner was engaged in. But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper.

In the Elkins Act, Congress has made it a penal offense to give or receive transportation at less than the published rate. This rate can only be raised by ten days' or lowered by three

days' notice. Sec. 6, 25 Stat. 855. There is no provision excepting special contracts from the operation of the law. One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

It is said that if the carrier saw fit to change the published rate by contract the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

Nor do we find anything in the provisions of the statute inconsistent with this conclusion in the fact that the statute makes the rate as published or filed conclusive on the carrier. The carrier files and publishes the rate. It may well be concluded by its own action. But neither shipper nor carrier may vary from the duly filed and published rate without incurring the penalty of the law.

It may be, as urged by petitioner, that this construction renders impossible the making of contracts for the future delivery of such merchandise as the petitioner deals in, and that the instability of the rate introduces a factor of uncertainty, destructive of contract rights heretofore enjoyed in such property. This feature of the law, it is insisted, puts the shipper in many kinds of trade at the mercy of the carrier, who may arbitrarily change a rate, upon the faith of which

contracts have been entered into. But the right to make such regulations is inherent in the power of Congress to legislate respecting interstate commerce, and such considerations of inconvenience or hardship address themselves to the law-making branch of the Government. *New Haven Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 399. It may be that such contracts should be recognized, giving stability to rates for limited periods; that the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done. But, as we have said, such considerations address themselves to Congress, not to the courts. It is the province of the judiciary to enforce laws constitutionally enacted, not to make them to suit their own views of propriety or justice.

The statute being within the constitutional power of Congress, and being in force when the contract was made, is read into the contract and becomes a part of it.

If the shipper sees fit to make a contract covering a definite period for a rate in force at the time he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law.

The right to charge other than the published rate because of a contract alleged to have provided for the rate in force at the time, but, owing to changed conditions, subsequently becoming inadequate to provide for the payment of the published rate, was dealt with by this court in *New Haven Railroad Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, where a contract for the purchase and carriage of coal at its inception produced the established rate to the carrier, which it subsequently failed to do. This court, speaking through Mr. Justice White, said:

"Further, as the prohibition of the interstate commerce act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff

rates would have been realized by the Chesapeake and Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever for any cause, such as the enhanced cost of coal at the mines, an increase in the cost of the ocean carriage, etc., the gross sum realized was not sufficient to net the Chesapeake and Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the interstate commerce act against the acceptance at any time by a carrier of less than its published rates. We say this because we think it obvious that such prohibitions would be rendered wholly ineffective by deciding that a carrier may avoid those prohibitions by making a contract for the sale of a commodity stipulating for the payment of a fixed price in the future and thereby acquiring the power during the life of the contract to continue to execute it, although a violation of the act to regulate commerce might arise from doing so."

It is alleged that the indictment is insufficient, in that it fails to set out the kind of device by which traffic was obtained, and of what the concession consisted, and how it was granted. Authorities are cited to the proposition that in statutory offenses every element must be distinctly charged and alleged. This court has frequently had occasion to hold that the accused is entitled to know the nature and cause of the accusation against him, and that a charge must be sufficiently definite to enable him to make his defense and avail himself of the record of conviction or acquittal for his protection against further prosecutions and to inform the court of the facts charged, so that it may decide as to their sufficiency in law to support a conviction, if one be had, and the elements of the offense must be set forth in the indictment with reasonable particularity of time, place and circumstances. And it is true it is not always sufficient to charge statutory offenses in the language of the statutes, and where the offense includes generic terms it is not sufficient that the indictment charge the offense in the same generic terms, but it must state the particulars.

United States v. *Hess*, 124 U. S. 483; *Evans* v. *United States*, 153 U. S. 584. But an indictment which distinctly and clearly charges each and every element of the offense intended to be charged, and distinctly advises the defendant of what he is to meet at the trial, is sufficient.

And in *Ledbetter* v. *United States*, 170 U. S. 606, 612, Mr. Justice Brown, speaking for the court, said:

"Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense."

In the present case no objection was made to the indictment until after verdict by motion in arrest of judgment.

Had it been made by demurrer or motion and overruled it would not avail the defendant, in error proceedings, unless it appeared that the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the particular mode in which the offense charged was committed. See Rev. Stat. U. S. § 1025; *Connors* v. *United States*, 158 U. S. 408, 411.

There can be no doubt that the accused was fully advised of and understood the precise facts which were alleged to be a violation of the statute.

As we interpret this law, it is intended, among other things, to prohibit and punish the receiving of a concession for the transportation of goods from the duly filed and published rate. Each and all of the elements of the offense, with allegations of time, place, kind of goods and name of carrier, are distinctly charged in the indictment, and include the fixing of the published rate at 23 cents per 100 pounds; the changing of the rate and the new publication at 35 cents per 100 pounds; the knowledge of this change on the part of the shipper, and the carriage of the goods over a described route at a concession of the difference between the published and the contract rate—all these

facts being stated, the indictment is clearly sufficient. Whether it was necessary to charge actual knowledge of the change of rate on the shipper's part is a question not involved in this case, as the indictment charges such knowledge, and the facts stipulated show that the shipper knew of the establishing of the new rate when the goods described in the indictment were shipped.

It is again contended that the submission in the trial court of the question of whether there was a device to avoid the operation of the act and to obtain the transportation at the less rate, was prejudicial to the petitioners, as such issue was not within the agreed facts upon which the case was tried.

It is true, as we have held in another part of this opinion, that no device or contrivance, secret or fraudulent in its nature, is requisite to the commission of the offense outlined in the statute, and that any means by which transportation by a concession from the established rate was had is sufficient to work a conviction. Hence this charge was not prejudicial to the petitioner.

It is contended by the petitioner that there is nothing in the facts found in this case to show any intentional violation of the law; that on the contrary the petitioner believed itself to be within its legal rights in insisting upon the performance of its contract, and maintained in good faith that the Interstate Commerce Act did not and could not interfere with it, and that the statute had no application to a shipment of goods for exportation in the manner shown in this case. While intent is in a certain sense essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases within which we think the one under consideration falls, where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong. In this case the statutes provide it shall be penal to receive transportation of goods at less than the published rate. Whether shippers who pay a rate under the honest belief that it is the lawfully established rate, when in fact it is not, are

liable under the statute because of a duty resting on them to inform themselves as to the existence of the elements essential to establish a rate as required by law, is a question not decided because not arising on this record. The stipulated facts show that the shippers had knowledge of the rates published and shipped the goods under a contention of their legal right so to do. This was all the knowledge or guilty intent that the act required. 1 Bish. Cr. Law (5th ed.), § 343. A mistake of law as to the right to ship under the contract after the change of rate is unavailing upon well-settled principles. *Reynolds* v. *United States*, 98 U. S. 145.

Finding no error in the judgments of the Circuit Court of Appeals, the same are

Affirmed.

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

MR. JUSTICE BREWER dissenting: I dissent from the opinion and judgment in this case, and, without noticing other objections, I rest that dissent upon this single ground: On June 17, 1905, the Burlington Railway Company made a contract with the petitioner, the Armour Packing Company, for the transportation of certain products from Kansas City, Kansas, to New York, this contract to remain in force until December 31, 1905. No objection is made to the reasonableness of this contract or the rates named. The time during which it was to run was brief, less than seven months, and but for the legislation of Congress there would be no question of its validity, or that it could be enforced without subjecting either party thereto to any liability, civil or criminal. On August 6 the Burlington Company and its connecting carriers filed with the Interstate Commerce Commission an amendment to their tariffs, which was duly posted and published, and by which the rate from Kansas City, Kansas, to New York was increased.

On August 17, 1905, the Armour Packing Company delivered

to the Burlington Company, under its contract, sixty-seven tierces of oleo oil for transportation to New York. The railway company accepted the shipment, issued a through bill of lading and received pay upon the basis of the rates fixed by the contract of June 17. Now, because the packing company insisted upon compliance by the railway company with its contract of transportation—and the railway company (recognizing the binding force of the contract) accepted the transportation and received payment at the rates named therein—the packing company is adjudged a criminal and fined the sum of $15,000.

I want to emphasize this matter. The railway company and the packing company entered into a fair and reasonable contract for transportation. Independently of the statute, it was valid in all respects, and could have been enforced by the packing company against the railway company, but according to the ruling of the court the railway company was authorized arbitrarily to break the contract, raise the amount to be paid for transportation—thus unsettling the business of the shipper, even it may be to the extent of wholly destroying it. Sustaining under those circumstances the power of the carrier and punishing the shipper shocks my sense of justice, and I cannot impute to Congress an intent by its legislation to make possible such a result.

It has been one of the boasts of our jurisprudence that it upholds the sacredness of contracts. By constitutional provision a State is estopped from passing a law impairing the obligation of a contract, and again and again has this court stricken down legislation having such effect. While there is no such restriction upon the power of Congress, yet Congress has in this case broken no contract. It has simply, as held by the court, given permission to a carrier, arbitrarily and without inquiry or decision by any tribunal, to repudiate its contract.

Again, we have held that in "enacting the statutes establishing the Interstate Commerce Commission the purpose of Congress was to facilitate and promote commerce." *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S.

197, 198. But to deny to parties the power of agreeing upon rates of transportation for a reasonable time tends to destroy and not promote commerce. One of the conditions of successful business—one of the things which induces new industries—is the ability to provide in advance for certainty of expenditures, including among them the cost of transportation. Who will engage in any new enterprise or invest money in a manufacturing industry when he knows that he cannot make a definite contract for rates of transportation to and from his factory, but is advised that whatever contract he makes may, at the whim of the carrier, upon ten days' notice, be set aside and a higher rate imposed?

Further, it seems to be implied that Congress has given express authority to the carrier to raise its rates, but this is not so. The single provision is that it shall not raise its rates without giving ten days' notice. It is a limitation upon power instead of a grant of authority.

It may be said that the remedy of the shipper is to pay the increased rates and then sue the carrier for the excess. But upon what ground can such an action be maintained? If the contract is no longer valid, if it has been destroyed by the mere action of the carrier in publishing a new tariff, and the rates of the latter are in themselves reasonable, although in excess of the contract provisions, how can a shipper recover damages? The contract is gone, has ceased to be valid, the new rates are reasonable, and the shipper must abide by the consequences of the arbitrary act of the carrier.

But, it may be said, that prescribing the limitation of ten days' notice of an increase in rates is an implied authority to the carrier to make such a raise, providing the new rates are reasonable. To my mind it seems more in accordance with the spirit and purpose of the Interstate Commerce Act to hold that, there being no express authority given to raise rates, the fact that the railway company has made a contract to operate for a reasonable time should be construed as an inhibition upon its right to make such a raise, and that the rates as fixed by its

contract should continue for all shippers until the termination of the period named therein.

Obviously, from the tone of the opinion of the court the wrong done to the shipper is recognized, and the argument is only that the responsibility for the wrong rests upon Congress. In other words, the court has unloaded upon Congress the injustice which the construction placed by it upon the statute accomplishes. To my mind a better way would be to enforce the contract and thus secure justice in this case, leaving to Congress the enactment of additional legislation, if deemed necessary, to prevent the possibilities of secret arrangements between carrier and shipper.

I am authorized to say that the Chief Justice and Mr. Justice Peckham concur in this dissent. They are also of the opinion that the trial court, the District Court of the Western District of Missouri, had no jurisdiction of the alleged offense, but that such jurisdiction was vested in the District Court of Kansas, holding that when goods are delivered to the carrier, and the shipper has solicited, accepted or received any rebate, concession or discrimination from such carrier, "in respect to the transportation" of the goods, the crime is then complete, at least so far as regards the shipper, and it cannot be made a continuing crime in each district through which the goods pass in their transportation. The Constitution has made provision for the venue of criminal actions or prosecutions, and their nature cannot be altered by legislative enactment, so as to embrace the whole country in one vast district. A provision in a statute of this nature by which it is possible to find an indictment and to have a trial at the most remote point from the actual commission of the offense, ought not to be approved as a compliance with the Constitution.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, PETITIONER, *v.* UNITED STATES.

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

No. 552. Submitted January 22, 1908.—Decided March 16, 1908.

Decided on the authority of *Armour Packing Company* v. *United States*, *ante*, p. 56.

THE facts are stated in the opinion.

Mr. Frank Hagerman, *Mr. J. C. Cowin*, *Mr. A. R. Urion*, *Mr. Henry Veeder* and *Mr. M. W. Borders* for petitioners.

The Attorney General, *Mr. Milton D. Purdy*, Assistant to the Attorney General, and *Mr. A. S. Van Valkenburgh*, United States Attorney, for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

The counsel for the petitioner and the Solicitor General for the United States having filed a stipulation in writing in this cause, agreeing to abide the result of the Packing Company cases just decided (Nos. 467, 468, 469 and 470), it is hereby ordered that the judgment of the Circuit Court of Appeals in this case be

Affirmed.

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

MR. JUSTICE BREWER'S dissent in *Armour Packing Co.* v. *United States*, *ante*, p. 56, applied also to this case.

BOSQUE *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 147. Submitted January 29, 1908.—Decided March 23, 1908.

Under the Treaty of Paris of 1898, between the United States and Spain, a Spanish resident of the Philippine Islands, who left there in May, 1899, without making any declaration of intention to preserve his allegiance to Spain and remained away until after the expiration of eighteen months after the ratification of the treaty continued to be a Spaniard, and did not, even though he intended to return, become a citizen of the islands under the new sovereignty, and therefore is not eligible to admission to practice at the bar under the rules established by the military and civil authorities of the Philippine Islands.

The laws applicable to other foreigners referred to in Article XIX of the treaty referred not to Spanish laws but to the laws to be enacted by the new sovereignty. Spaniards only became foreigners after the cession.

The right to practice law is not property within the protection of Article VII of the treaty.

1 Philippine Rep. 88, affirmed.

PLAINTIFF in error applied to the Supreme Court of the Philippine Islands in February, 1901, to be admitted to practice law in the Philippine courts. His petition was supported by various certificates as to professional qualifications and good character, and set forth that petitioner was a graduate of the University of Manila; and practiced law in the Philippine Islands from 1892 until the cessation of the Spanish courts; "that he is of good character, and has not been inscribed in the record of Spanish nationality, in consequence whereof I have lost this, in accordance with the provisions of the Treaty of Paris, and therefore I am neither a subject nor citizen of any foreign government, and consequently, in my opinion, have the condition required by General Order No. 29, July 19, 1899, of the United States Military Government in these islands for continuing the practice of my profession."

July 27, 1901, the petition was denied by the Supreme Court, without opinion, on the ground that the applicant "does not

possess the political qualifications required by law for the practice of his profession in the Philippine Archipelago."

Plaintiff subsequently filed a petition for rehearing, accompanied by additional certificates and affidavits as to his professional and personal reputation. In this petition he claimed to be entitled to practice his profession under Article IX of the Treaty of Paris and under § 13 of the Code of Civil Procedure, which had been enacted since the date of his first petition.

The petition for rehearing was denied by the court in an opinion rendered by the Chief Justice, 1 Philippine Rep. 88, which held that petitioner had not lost his Spanish nationality, but was a Spanish subject upon an equal footing with other foreign residents who were not entitled to practice the legal profession under the law, either prior or subsequent to the Treaty of Paris.

In January, 1906, plaintiff in error presented to the court the following motion:

"Appears Juan Garcia Bosque and asks that the Honorable Supreme Court be pleased to declare that the petitioner has a right to practice as an attorney at law in the Philippines before all courts. This motion is founded upon the accompanying affidavit."

The affidavit referred to stated that the affiant, on April 10, 1899, and for eight years immediately prior thereto, had practiced law continuously before the courts of the islands. The Supreme Court overruled the motion, and thereupon plaintiff sued out this writ of error.

Mr. Edgar W. Camp for plaintiff in error:

The qualifying clause, in the Treaty of Paris, "being subject in respect thereof to such laws as are applicable to other foreigners," is not conclusive against the right to continue the practice of his profession as claimed by plaintiff in error, because, first, there is nothing in the context of the article quoted nor elsewhere in the treaty to warrant such a construction; secondly, because no such intention is to be imputed to

the framers of the treaty, for it were wholly unnecessary to specify rights which any and all foreigners enjoy, and wholly unjust to reduce to naught by the mere stroke of a pen all the rights incident to citizenship created under the flag of the former sovereign; and, lastly, even though such a construction be admissible there existed at the time of the ratification of the treaty no law disqualifying foreigners from becoming members of the bar in the Philippine Islands. Plan of Studies (Plan de Estudios) of 1836; Royal Decree of July 26, 1853; Vol. 5, Diccionario de Alcubilla, p. 423; Same, Vol. 6, p. 798; Vol. 1, Diccionario de Berriz (1888), p. 1341; Diccionario de Alcubilla, p. 873, (Vol. 6); Vol. 3, p. 348; Vol. 5, p. 428; Vol. 3, p. 357; Vol. 2, p. 566.

The Supreme Court of the Philippines has neither power, jurisdiction nor authority to render in any proceeding had in this matter, a decision the effect of which would be to deprive plaintiff in error of the right to practice his profession. Sections 21 to 25 of the Code specify the only grounds upon and the only manner in which a lawyer may be deprived of the right to practice his profession. As well might the Philippine Supreme Court have declared that plaintiff in error was disqualified to practice because he professed a certain religious belief as to have assigned the reasons it did for such alleged disqualification. There can, therefore, be no question of *res adjudicata* herein.

The right of plaintiff in error to practice his profession is a vested right of which he may be deprived only by due process of law. For the proper exercise and enjoyment of this right the recognition by the Insular Supreme Court, in the manner and form herein prayed, is essential. *Cummings* v. *State of Missouri*, 4 Wall. 356; *Ex parte Garland*, 4 Wall. 366; *Ely's Administrator* v. *United States*, 171 U. S. 220–223; *Smith* v. *United States*, 10 Peters, 330; *Soulard* v. *United States*, 4 Peters, 511; *Strother* v. *Lucas*, 12 Peters, 411; *Bryan* v. *Mennett*, 113 U. S. 179.

And in Article VIII (2nd par.) of the Treaty of Paris is

found an express declaration that the relinquishment or cession of sovereignty "cannot in any respect impair the property or rights which by laws belong to the peaceful possession of property of all kinds . . . of private individuals of whatsoever nationality such individuals may be."

The Solicitor General for United States:

Plaintiff in error did not become a citizen of the Philippine Islands under the new sovereignty, but continued to remain a Spaniard. His Spanish nationality could only be lost by continuous residence in the islands and failure to declare his intention of retaining it within the time specified (Art. IX, Treaty of Paris, 30 Stat. 1754). He was absent from the islands during the whole of the period allowed for making such declarations, and remained away for more than a year and a half. It makes no difference that he intended to return; it was not necessary in order to retain his Spanish nationality that he should remain away permanently.

As a Spaniard, he is not entitled to practice law in the Philippines. Under the Spanish law foreigners were not allowed to practice the legal profession in Spain and her colonies. Royal Order of July 26, 1853; Diccionario de Alcubilla, Vol. 5, p. 423; Law of Public Instruction, Art. 96, *id.*, Vol. 6, p. 798; decree of February 6, 1869, Alcubilla, Vol. 6, p. 873; Art. 25, Constitution of 1869; Art. 27, Civil Code of Spain; Royal Orders of October 10, 11, 1879, Alcubilla, Vol. 6, pp. 1135–1136. That point is immaterial, however, because the provision in Article IX of the Treaty of Paris that Spanish subjects in the Philippines shall have the right to carry on their professions, etc., subject to "such laws as are applicable to other foreigners" refers to the laws enacted by the new sovereignty. Spaniards were not "foreigners" at the time of the treaty, but only became so after the cession of the islands, and it is evident that the words meant such laws as *shall be* applicable to other foreigners.

Under the laws and regulations on the subject, put in force

in the Philippines first by the military and then by the civil authorities, plaintiff is not entitled to the privilege which he seeks. General Orders, No. 29, series of 1899, §§ 2–6; Philippine Code of Civ. Pro., §§ 13, 15, 19; 1 Pub. Laws, p. 378. The explicit reservation as to aliens runs through all the laws and regulations, making it clear that the intention was and had been from the first to require all members of the bar to be either citizens of the United States or those enjoying the status of natives of the Philippines, and to exclude all foreigners from the legal profession in the islands.

The effect of the decision of the Philippine court was not to deprive plaintiff of the right to practice his profession. The privilege ceased by virtue of the stipulations of the treaty of Paris and the subsequent laws and regulations of the new sovereignty. Those sections of the Code which prescribe the grounds upon which a lawyer may be deprived of the right to practice relate to the removal or suspension from the bar of attorneys already practicing, and have no application to the case of one who has been denied admission to practice at all.

The right claimed by plaintiff is not a vested or property right. *Ex parte Garland,* 4 Wall. 333; *Bradwell* v. *United States,* 16 Wall. 130; *Languille* v. *State,* 4 Tex. App. 312; *State* v. *Gazley,* 5 Ohio, 14; *Cohen* v. *Wright,* 22 California, 293; *Sprayberry* v. *Atlanta,* 13 S. E. Rep. 197. The property rights intended to be protected by the stipulation in the eighth article of the Treaty of Paris do not relate to the rights connected with trades and professions. As to definition of *propiedad,* used in the Spanish text of the treaty; see 4 Escriche, 736.

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

Plaintiff in error contends: (1) That his right to practice law in the Philippine Islands was expressly guaranteed by Article IX of the Treaty of Paris and recognized by § 13

of the Philippine Code of Civil Procedure; (2) That the Supreme Court of the Philippine Islands had no power, jurisdiction or authority to deny or deprive a lawyer of his right to practice his profession, except for the reasons and in the manner provided in the Civil Code; (3) That plaintiff in error's right so to practice was a vested right, of which he could be deprived only by due process of law.

Article IX of the Treaty of Paris, 30 Stat. 1754, provided:

"Spanish subjects, natives of the peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

The record shows that plaintiff in error left the Philippines for Europe on May 30, 1899, and remained away until January 11, 1901. In the affidavit accompanying his petition for rehearing he states that the reasons for his departure from the islands were the unsettled conditions prevailing there and the state of his health; that while abroad he lived in France and Spain, residing for the most part in Barcelona; that he did not return sooner to the Philippines because of newspaper reports as to personal unsafety in Manilla. In his first petition he

claims to have lost his Spanish nationality because he had not made the necessary declaration of intention to preserve his allegiance to Spain, but that requirement was meant only for those who remained in the territory, and was not necessary in his case, since he removed from the islands.

In the opinion of the Philippine Supreme Court he carried his Spanish nationality with him on his departure, and it could only be lost by continuous residence in the islands and failure to declare his intention of retaining it within the time specified. But plaintiff was absent from the Philippines during the whole of the period allowed for making such declaration, and remained away several months after its expiration. It follows that he did not become a citizen of the islands under the new sovereignty, but that he continued to remain a Spaniard. The fact that he intended to return does not affect this conclusion. It was not necessary in order to retain his Spanish nationality that he should remain away permanently, and he was absent for more than a year and a half.

The question whether aliens were permitted to practice law in Spain and her colonies is elaborately argued, but it is quite unnecessary to pass upon it, since it is manifest that the words in Article IX of the treaty, "such laws as are applicable to other foreigners," referred not to the Spanish law, but to the laws enacted by the new sovereignty. Spaniards only became "foreigners" after the cession of the islands, and it is obvious that the words meant such laws as shall be applicable to other foreigners.

We think it evident that plaintiff under the laws and regulations on the subject put in force in the Philippines, first by the military and then by the civil authorities, was not entitled to the privilege which he sought.

On July 19, 1899, the military governor promulgated, in respect to the admission of lawyers, certain regulations, known as "General Orders, No. 29, Series of 1899," § 2 of which provides as follows:

"Any resident of the Philippine Islands, *not a subject or*

citizen of any foreign government, of the age of 23 years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all of the courts of these islands."

By § 3 every applicant is required to produce satisfactory testimonials of good moral character and to undergo a strict examination in open court by the justices of the Supreme Court. If upon examination he is found qualified he shall be admitted to practice in all the courts of the Philippine Islands, and a certificate of the record of the court's order to that effect shall be given him, which certificate shall be his license. (Sec. 4.) Section 5 is as follows:

"Every resident of these islands, *not a citizen or subject of any foreign government*, who has been admitted to practice law in the Supreme Court of the United States, or in any Circuit Court of Appeals, Circuit Court or District Court thereof, or in the highest court of any State or Territory of the United States, may be admitted to practice in the courts of these islands upon the production of his license. Likewise all persons duly accredited as lawyers in the Philippine Islands on the 31st day of January, 1899, who are residents of said islands, *and not subjects or citizens of another government*, may be admitted as attorneys and counselors in all the courts of the islands: *Provided*, that all applicants under this section shall furnish satisfactory evidence of good moral character and professional standing and take the prescribed oath: *And provided further*, That the court may, if it deems advisable, examine the applicant as to his qualifications."

Every person upon admission must take an oath of allegiance to the United States. (Sec. 6.)

It is conceded that plaintiff did not become a member of the bar under the provisions of this law.

General Orders, No. 29, was followed by Act No. 190 of the Philippine Commission, being the Code of Civil Procedure for the Philippine Islands (1 Pub. Laws, p. 378), § 13 of which is as follows:

"The following persons, *if not specially declared ineligible,* are entitled to practice law in the courts of the Philippine Islands:

"1. Those who have been duly licensed under the laws and orders of the islands under the sovereignty of Spain or of the United States and are in good and regular standing as members of the bar of the Philippine Islands at the time of the adoption of this code.

"2. Those who are hereafter licensed in the manner herein prescribed."

It will be perceived that the applicants must be "in good and regular standing as members of the bar of the Philippine Islands *at the time of the adoption of this code.*" This description does not apply to plaintiff in error. The Civil Code was enacted August 7, 1901, to take effect September 1, 1901. He had been denied permission to practice law by the Supreme Court of the Philippines on July 27, 1901, upon the ground that he did not possess the political qualifications required by law. He was not, therefore, at the date of the adoption of the code in good and regular standing as a member of the bar.

It is true § 13 declares "those who have been duly licensed under the laws and orders of the islands, under the sovereignty of Spain," etc., are entitled to practice law, but that applies only to persons "not specially declared ineligible," and plaintiff in error was declared ineligible because a citizen or subject of a foreign government.

Reference may well be made in this connection to § 14 of the act, which reads:

"Any resident of the Philippine Islands, *not a subject or citizen of any foreign government,* of the age of twenty-three years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as a member of the bar of the islands and to practice as such in all their courts."

Section 19 provides for the admission without examination of any resident, *not a citizen or subject of any foreign government,*

who has been admitted to practice in any of the courts of the United States.

It seems clear from the provisions of General Orders, No. 29, and of the code, that the intention was, and has been from the first, to require all members of the bar to be either citizens of the United States or those enjoying the status of natives of the Philippines, and to exclude all foreigners from the legal profession in the islands.

If it be conceded that plaintiff in error possessed the privilege of practicing his profession in the islands at the time Spain surrendered her sovereignty over them, the enjoyment of that privilege ceased by virtue of the stipulations of the Treaty of Paris and the subsequent laws and regulations of the new sovereignty inconsistent therewith; and the effect of the decision in the present instance was not to deprive plaintiff in error of that privilege. Counsel for plaintiff in error cite various sections of the code which prescribe the grounds upon which a lawyer may be deprived of the right to practice, but they relate to the removal or suspension from the bar of attorneys already practicing, and have no application to the case of one who has been denied admission to practice at all.

The eighth article of the Treaty of Paris declares that the cession of sovereignty "cannot in any respect impair the property rights which by law belong to the peaceful possession of property of all kinds," etc., but that stipulation does not relate to the rights connected with trades and professions. The word "propiedad" used in the Spanish text is defined by Escriche as the right to enjoy and dispose freely of one's things in so far as the laws do not prohibit it. 4 Escriche, 736. The same word appears in Article IX, providing that Spanish subjects may retain, whether they remain or remove from the territory, "all their rights of property, including the right to sell or dispose of such property or of its proceeds." Clearly the right to practice law was not referred to as "property" there, and they are followed by the words "and they shall also have the right to carry on their industry, commerce and professions,

being subject in respect thereof to such laws as are applicable to other foreigners."

We concur with the conclusions of the Supreme Court of the Philippines, and its judgment is

Affirmed.

HALLOWELL *v.* UNITED STATES.

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

No. 175. Argued March 12, 1908.—Decided March 23, 1908.

The authority given by § 6 of the Judiciary Act of March 3, 1891, 26 Stat. 826, to the Circuit Court of Appeals, to certify propositions of law to this court, cannot be used for the purpose of sending to this court the whole case for its consideration and decision. A certificate which does not set forth the propositions of law, clearly stated, which may be answered without reference to all the facts, but which sets forth mixed questions of law and fact requiring this court to construe acts of Congress, and, in the light of all the testimony, to determine what should be the judgment of the lower court, is defective and must be dismissed. *C., B. & Q. Ry. Co.* v. *Williams,* 205 U. S. 444, 454.

THIS case is here upon certified questions by the judges of the Circuit Court of Appeals.

The certified questions and the statement of the case which precedes them are as follows:

"The indictment was returned November 16, 1905, and charged that the defendant, on August 1, 1905, in the District of Nebraska, introduced whiskey and other intoxicating liquors into the Indian country, 'to wit, into and upon the Omaha Indian Reservation, a reservation set apart for the exclusive use and benefit of certain tribes of the Omaha Indians.' The defendant entered a plea of not guilty and the case was submitted to a jury upon the following agreed statement:

" 'That the defendant, Simeon Hallowell, an Omaha Indian, is and was on the first day of August, 1905, an allottee of land granted to him on the Omaha Indian Reservation, in Thurston County, Nebraska; that the allotment so made to him was made under the provisions of the act of Congress of August 7, 1882 (22 Stat. 341); that the first or trust patent was issued to him in the year 1884, and that the twenty-five year period of the trust limitation has not yet expired; and that the fee title of the allotment so made to him is still held by the United States.

" 'That the defendant, Simeon Hallowell, on the first of August, 1905, procured at a point outside the said reservation one-half gallon of whiskey which he took to his home, which was within the limits of the Omaha Indian Reservation, and upon an allotment which he had inherited and which allotment was made under the provisions of the act of Congress, of August 7, 1882, and the title of which is held by the Government as the twenty-five year trust period has not expired. That he took the said whiskey into and upon this allotment for the purpose of drinking and using the same himself, and that he did drink said whiskey and did give some of it to his friends or visitors to drink.

" 'That the said Omaha Indian Reservation has been allotted practically in whole and that many of the allotments of deceased Omaha Indians have been sold to white people, under the provisions of the act of Congress of May 27, 1902 (32 Stat. 245, 275); that within the original boundary limits of the Omaha Indian Reservation there are many tracts of land that have been sold, under the provisions of said act, to white persons who are the sole owners thereof, and that the full title to such lands has passed to the purchaser, the same as if a final patent without restriction upon alienation had been issued to the allottee.

" 'That all of the Omaha Indians who were living in the year 1884, and by law entitled to allotments, received them.

" 'That the Omaha Indian Reservation is within and a

physical part of the organized territory of the State of Nebraska, as are also the allotments herein referred to, into and upon which the said defendant took said whiskey. That the Omaha Indians exercise the rights of citizenship, and participate in the County and State government extending over the said Omaha Indian Reservation, and over and upon the allotments herein referred to. That the defendant, Simeon Hallowell, has been on frequent occasions a Judge and Clerk of election, a Justice of the Peace, an Assessor, and a Director of the public school district in which he lives. That Omaha Indians have taken part in the State and County government, extending over the reservation, and have held the following offices in said County of Thurston, State of Nebraska: County Coroner, County Attorney, County Judge, Justice of the Peace, Constable, Road Overseer, Election officers, and have also served as jurors in the county and district courts. Defendant is self-supporting as are most of said Indians. Some of them are engaged in business and most of them engaged in farming.'

"Over the defendant's objection that the matters recited in the agreed statement did not constitute or show an offense against laws of the United States, the court instructed the jury that, if the matters so recited were true, the defendant was guilty of the offense charged. The defendant reserved an exception to this ruling. The jury found him guilty.

"And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law are presented to it in said cause; that their decision is indispensable to a decision of the cause, and that to the end that such court may properly decide the issues of law so presented, it desires the instruction of the Supreme Court of the United States upon such question, to wit:

"1. After the allotment in severalty to the Omaha Indians of practically all of the lands in the Omaha Indian Reservation in the State of Nebraska and the issuance to the several allottees of the first or trust patents, under the act of August 7,

1882 (22 Stat. 341), and after the provisions of § 7 of that act and of § 6 of the act of February 8, 1887 (24 Stat. 388), had become effective as to such allottees, did Congress retain or possess the power to regulate or prohibit the introduction of intoxicating liquors upon such allotments, while the title to the same should be held in trust by the United States, or while the same should remain inalienable by the allottee without the consent of the United States?

"2. Do the facts that the tribal relation of these Indians is still maintained and that part of the lands in said reservation are unallotted and are held by the United States for the use and benefit of the said tribe, as provided in § 8 of the said act of August 7, 1882, enable Congress, consistently with the provisions and effect of § 7 of that act and of § 6 of the said act of February 8, 1887, to regulate or prohibit the introduction of intoxicating liquors upon such allotments, while the same shall be held in trust by the United States, or while the same shall remain inalienable by the allottee without the consent of the United States?

"3. As applied to allotments in severalty to Indians of lands in a State, when the land is to be held in trust for the allottee for a stated period and is then to be conveyed to him or his heirs in fee and is to remain inalienable by him during such trust period without the consent of the United States, and when the effect of the allotment is to give to the allottee the benefit of and to subject him to the laws, both civil and criminal, of the State, and to make him a citizen of the United States and to entitle him to all the rights, privileges and immunities of such citizens, is that portion of the act of January 30, 1897 (29 Stat. 506), which purports to regulate the introduction of intoxicating liquors upon such allotments, while the title to the same shall be held by the United States or while the same shall remain inalienable by the allottee without the consent of the United States, a valid exercise of the power of Congress to legislate in respect of Indians or Indian lands?

"4. Where, as shown by the stipulated facts, the defendant, Simeon Hallowell, an Omaha Indian, is an allottee of lands granted to him on the Omaha Indian Reservation, in Thurston County, State of Nebraska, which allotment was made to him under the provisions of the act of Congress of August 7, 1882 (22 Stat. 351), and the first patent was issued to him in the year 1884, and the twenty-five years' period of the trust limitation fixed by said act has not expired, and the fee title of the allotment so made to him is still held by the United States; and where 'the said Omaha Indian Reservation has been allotted practically in whole, and many of the allotments of deceased Omaha Indians have been sold to white people under the provisions of the act of Congress of May 27, 1902 (32 Stat. 245, 275);' and within the original boundary limits of the Omaha Indian Reservation many tracts of land were hitherto sold under the provisions of said act to white persons, who are the sole owners thereof, and to whom the full title to such lands has passed to the purchaser, the same as if the final patent without restriction upon alienation had been issued to the allottee; and where all of the Omaha Indians, living in the year 1884, entitled to such allotments, have received the same; and where said Omaha Indian Reservation is within and a physical part of the organized territory of the State of Nebraska, as also the allotment hereinbefore referred to; and the said Omaha Indians, including the defendant, are citizens of the United States, and exercise the rights of citizenship, participating in the County and State governments extending over said Omaha Indian Reservation, and over the allotments aforesaid, the said defendant, Simeon Hallowell, having, on frequent occasions prior to 1905, held and exercised the office of Judge, and Justice of the Peace, and Assessor in said county, where said Omaha Indians have taken part in the State and the County government extending over the Reservation, and where the defendant is self-supporting; is he liable to indictment and punishment under the act of Congress of January 30, 1897 (29 Stat. 506), for intro-

ducing intoxicating liquor, as into an Indian country, where he procured one-half gallon of whiskey at a point outside of said reservation, on the first day of August, 1905, which he took into and upon his allotment, within the limits of the Omaha Indian Reservation, which allotment he inherited and which was made under the provisions of said act of August 7, 1882, the fee title to which is held by the Government, as the twenty-five years' trust period has not expired, the said whiskey having been so taken upon his allotment for the purpose of drinking and using the same himself, which he drank, giving some of it to his friends and visitors to drink?"

Mr. Thomas L. Sloan for Hallowell.

The Solicitor General for The United States.

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

In *Chicago, Burlington & Quincy Railway Co.* v. *Williams*, 205 U. S. 444, 454, we had occasion to consider the scope and meaning of the sixth section of the Judiciary Act of March 3, 1891, authorizing a Circuit Court of Appeals, in every case within its jurisdiction, to certify questions or propositions of law concerning which it desires instruction for the proper decision of the case. The court there reaffirmed the rule, announced in previous cases, that the authority to certify such questions could not be used for the purpose of sending to this court the whole case, with all its circumstances, for consideration and decision. *Jewell* v. *McKnight*, 123 U. S. 426; *Waterville* v. *Van Slyke*, 116 U. S. 699; *United States* v. *Rider*, 163 U. S. 132; *United States* v. *Union Pacific Railway*, 168 U. S. 505. Upon a review of the adjudged cases we used this language in reference to the certificate of questions in that case: "The present certificate brings to us a question of mixed law and fact and, substantially, all the circumstances connected

with the issue to be determined. It does not present a distinct point of law, clearly stated, which can be decided without passing upon the weight or effect of all the evidence out of which the question arises. The question certified is rather a condensed, argumentative narrative of the facts upon which, in the opinion of the judges of the Circuit Court of Appeals, depends the validity of the live-stock contract in suit. Thus, practically, the whole case is brought here by the certified question, and we are, in effect, asked to indicate what, under all the facts stated, should be the final judgment. It is, obviously, as if the court had been asked, generally, upon a statement of all the facts, to determine what, upon those facts, is the law of the case." 205 U. S. 444, 454.

The certificate in the present case is objectionable upon the ground that it does not set forth propositions of law, clearly stated, which may be answered without reference to all the facts, but mixed questions of law and fact which require us to construe various acts of Congress, and, in the light of all the testimony in the case, determine whether the accused could be held guilty of any offense legally punishable by the United States. It is as if the court were asked what, upon the whole case as sent up, should have been the verdict and judgment in the trial court. The certificate is defective and must be dismissed, because not in conformity to the statute.

It is so ordered.

INTERSTATE COMMERCE COMMISSION *v.* CHICAGO GREAT WESTERN RAILWAY COMPANY.

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

No. 73. Argued April 16, 17, 1907.—Decided March 23, 1908.

Railroads are the private property of their owners, and while the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, the public is in no proper sense a general manager. The companies may, subject to change of rates provided for in the Interstate Commerce Act, contract with shippers for single and successive transportations and in fixing their own rates may take into account competition, provided it is genuine and not a mere pretense.

There is no presumption of wrong arising from a change of rate made by a carrier. The presumption of good faith and integrity attends the action of carriers as it does the action of other corporations and individuals and those presumptions have not been overthrown by any legislation in respect to carriers.

A rate on the manufactured article resulting from genuine competition and natural conditions is not necessarily an undue and unreasonable discrimination against a manufacturing community because it is lower than the rate on the raw material; and, under the circumstances of this case, there was no undue and unreasonable discrimination against the Chicago packing-house industries on the part of the railroads in making, as the result of actual competition and conditions, a lower rate for manufactured packing-house products than for livestock from Missouri River points to Chicago.

141 Fed. Rep. 1003, affirmed.

CERTAIN proceedings were had before the Interstate Commerce Commission. They were commenced by the filing of a petition by the Chicago Live Stock Exchange in April, 1902, charging the defendants, who are now the appellees, with the violation of §§ 1 and 3 of the Interstate Commerce Act of February 4, 1887. The specific offense stated was that the defendants were charging higher rates of freight upon live stock shipped from Missouri River points, and other points

similarly situated, to Chicago, than upon dressed meats and the prepared products known as packing-house products. It was contended that this higher rate of freight was an unlawful discrimination against shippers of live stock to Chicago, and gave to shippers of packing-house products an undue and unreasonable preference and advantage over the former; that it subjected the Chicago Live Stock Exchange and its members, who were engaged in the business of selling live stock on commission, as well as the owners of live stock and the shippers thereof, to an unreasonable prejudice and disadvantage. The several defendants, with one or two exceptions, answered, denying the allegations of the complaint. After a hearing, the Interstate Commerce Commission, on January 7, 1905, filed its report and opinion, including findings of fact, and made an order, which is the foundation of this suit. The order is in these words:

"Order of Commission.

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report and opinion containing its findings of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order:

"It is ordered, that, in accordance with said report and opinion, the present relation of rates maintained and enforced by defendants [naming them all, eighteen in number], whereby their rates for transportation are higher upon live cattle and live hogs than upon the dressed or prepared products of cattle and hogs on shipments thereof to Chicago, in the State of Illinois, from points on the Missouri River, Sioux City, in the State of Iowa, to Kansas City, in the State of Missouri, inclusive, and from South St. Paul, in the State of Minnesota, or from points in the territory between the Missouri River or South St. Paul and Chicago, constitutes wrongful prejudice

and discrimination, in violation of the provisions of the act to regulate commerce; and that said defendants be, and each of them is hereby, notified and required to cease and desist, on or before the fifteenth day of February, 1905, from maintaining or enforcing the said unlawful relation of rates, and from further continuing said unlawful prejudice and discrimination.

"And it is further ordered, that a notice embodying this order be forthwith sent to each of the defendant corporations, together with a copy of the report and opinion of the Commission herein, in conformity with the provisions of section 15 of the act to regulate commerce."

The defendants not complying with this order, the Interstate Commerce Commission caused this suit to be commenced in the Circuit Court of the United States for the Northern District of Illinois, seeking to compel compliance. The defendants answered, admitting service of the order and refusal to comply therewith, denying that it was legal or binding, but on the contrary claiming that it was in violation of their rights. After the filing of the petition to enforce the order of the Commission and the answers thereto, and in August, 1905, the Commission also commenced an original proceeding under and by virtue of the act of February 19, 1903 (32 Stat. 847), known as the Elkins Act, charging substantially the same discrimination. These cases were consolidated and heard before the Circuit Court, an enormous volume of additional testimony being taken, and on November 20, 1905, that court announced its opinion, stated its findings of fact and conclusions of law, and ordered that the bill should be dismissed. A decree accordingly was so entered. 141 Fed. Rep. 1003. The findings of fact were as follows:

"First. That the live stock rates are reasonable in themselves. All live stock from points west, southwest and northwest of the Missouri River and St. Paul are shipped on a proportional rate from the Missouri River or St. Paul to Chicago. These rates are equal to or less than the rates on dressed meats

and packing-house products between the same points. There can be, and is, no complaint as to such traffic. The local rates from the Missouri River and St. Paul, and from 150 miles east, to Chicago, are as shown in above schedule. These rates gradually decrease until the Mississippi River is reached, and the average Iowa rate is 21 cents. The great weight of evidence indicates that these rates are at least reasonably low.

"Second. That the cost of carrying live stock is greater than that of carrying dressed meats and packing-house products.

"Third. That the value of the service of carriage is greater to the packers, because of the higher price of a car of dressed meats or packing-house products. Dressed meats and packing-house products are in value worth nearly twice as much as live stock. This factor is important, in ordinary cases, however, in part, because of the greater risk of carriage of high-priced commodities. In these cases, as to the particular commodities in question, the evidence shows that the defendant railroad companies pay out a much larger amount in damages for losses arising from the carriage of live stock than they do for losses arising from the carriage of dressed meats and packing-house products, in proportion to the value of the products carried, and more in damages per car regardless of the value. This makes the risk of carriage greater for live stock. The result is that the value of the service is not such an important factor in this kind of a case as it is considered to be in ordinary cases.

"Fourth. That the rates in question given to the packers at Missouri River and St. Paul were the result of competition. The product of the packers at these points was large in quantity, was certain and continuous in amount, was in the hands of a few people, and for years before the Federal injunction of March, 1902, had been competed for so strenuously by the railroads reaching and passing through these points, as to cause the cutting of rates and the giving of secret rebates in large amounts. Four of the defendant companies, the Chicago,

Milwaukee & St. Paul Railroad Company, the Chicago & Northwestern Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Burlington & Quincy Railroad Company, passed through these points into the territory west of the Missouri River and St. Paul. Four other of the defendant companies, the Chicago Great Western Railway Company, the Chicago & Alton Railway Company, the Illinois Central Railroad Company, and the Wabash Railroad Company reached the Missouri River points and St. Paul, competing for this business. Other railroads, running south to the Gulf of Mexico, also competed more or less for said business, including the Atchison, Topeka & Santa Fé Railway. After said injunction was granted the defendant railroads (according to evidence herein) obeyed it, and until August of that year the said traffic was carried under competition between the defendants at the rate of 23½ cents from Missouri River points to Chicago, and 25 cents from St. Paul to Chicago, etc., as set out above. As a result of such competition, the Chicago Great Western Railway Company became dissatisfied with the proportion of the business it received, and, in order to get what it claimed as its share, cut the rate to 20 cents to Chicago and 18½ cents to the Indiana line for eastern business, and published the same. This it did under a contract with the packers running for seven years. The Chicago Great Western Railway Company was the longest route from Chicago to the Missouri River points. The other railroad defendants, to meet the rate made by the Chicago Great Western Railway Company, as a result of competition, met and published the same rate. These rates were not made voluntarily, but from necessity arising from competition; the necessity being that of carrying the goods at the lower rate or losing the business to which the officers of said companies thought they were entitled. This cutting of the rate by the Chicago Great Western Railway Company was not the origin of competition. That had existed legally since March, 1902, between defendant railroads and also between them and the Atchison, Topeka & Santa Fé

Railway Company. There was not competition enough at said points to lower the rate as to live stock. There was little and different competition on rates as to live stock at points between the Missouri River and St. Paul and Chicago. The only places where the opportunities for competition existed as to live stock the same as to packing-house products were immediately at Missouri River points and St. Paul, and there only as to live stock driven in on foot from the surrounding country. There is comparatively a small amount of this stock. If it was exactly the same kind of a commodity as that furnished by the packers there would be an opportunity for competition in this at these points alone.

"Fifth. That the competition in question did not result from agreement of the defendants, but was actual, genuine competition.

"Sixth. That the present rates on live stock have not materially affected any of the markets, prices, or shipments; that they are reasonably fair to Chicago and to the shippers; that the shipments of live stock from points between Chicago and the Missouri River and St. Paul are as great in proportion to the volume of business as before the present rates were made; that the majority of the live stock comes to Chicago from points as near as 150 miles this side of the Missouri River and St. Paul, and that the lower rate given to the packers does not seem to directly influence or injure the shippers of live stock.

"Seventh. That the rates for carrying packers' products and dressed meats were remunerative. They did not pay any portion of the fixed charges and interest of the railroad companies, nor its full share of the operating expenses, but they did pay more than its cost of movement and leave something to apply upon operating expenses.

"Eighth. That the welfare of the public, including the shippers, consumers, and all localities and markets, does not seem to be materially affected by the present rates.

"Ninth. That the usual custom for railroads is to charge a higher rate for the finished product than for the raw ma-

terial, and this, as a rule, has been applied to live stock and its finished products. This is not universal, however. There are many commodities where the raw material is charged more for carriage than its finished product, as in the case of the raw material of cotton and compressed cotton, straw, unbaled and baled, pig iron and its products, and many other commodities. It also appears that for sixteen years out of twenty-three, between Missouri River points and St. Paul and Chicago, the published rates on live stock were higher than on dressed meats and packing-house products. Many witnesses testified that the ideal rate for the finished product would be higher than the raw material. This, however, was based on the presumption that competition or commercial necessity did not interfere, and that the cost of service and value of the products would be greater in case of the finished products than in that of the raw material."

Section 3 of the Interstate Commerce Act, 24 Stat. 380, so far as it is material for this case, is as follows:

"It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

And § 3 of the Elkins Act, 32 Stat. 847, provides:

"That whenever the Interstate Commerce Commission shall have reasonable ground for believing that any common carrier . . . is committing any discriminations forbidden by law, a petition may be presented alleging such facts" (such discrimination), "to the Circuit Court of the United States sitting in equity having jurisdiction . . . and upon being satisfied of the truth of the allegations of said petition said court shall . . . require a discontinuance of such discrimination by proper orders, writs," etc.

Mr. L. A. Shaver and *Mr. S. H. Cowan* for appellant:

A higher rate on live stock than on its products is contrary to the natural rule or law that the raw-material rate shall not be higher than that on the manufactured article.

A departure from that rule is contrary to public policy, because it involves the destruction of large public interests which have been built up under the rule.

The making of the live-stock rate higher than the product rate is contrary to the almost universal practice of carriers throughout the country under which the rate on live stock is made no higher, but in many instances less, than the rate on the prepared product.

The higher rate on the live stock than on the product is violative of the rule that, other things being equal, value should control or be taken into account in rate making—the article of higher value taking a higher rate than one of lower value.

The changed relation is unlawful because it was made for an unlawful purpose, namely, the building up of the Missouri River markets at the expense of the Chicago markets, and its natural tendency is to that end.

The changed relation is unlawful because it was initiated by the Chicago Great Western Railway Company solely with a view of promoting its own interest and without regard to the public interest involved.

The changed relation is unlawful because there was no legitimate competition in rates necessitating it—the only prior competition being in the shape of rebates.

The contract of the Chicago Great Western Railway Company with the Missouri River packers is unlawful under the so-called "anti-trust" act because it gives that company a "monopoly of a part of the trade or commerce among the several States," and, also, because it is "a contract in restraint of trade and commerce among the several States."

The contract is unlawful because it was for the reduction of a rate on the product claimed to be already unreasonably

low and which, that being the case, as reduced, places a burden upon other traffic.

The contract is unlawful because it gives an undue preference to one article of traffic (the product) over another article of traffic (live stock), both articles being in active competition with each other in the markets.

Mr. Cordenio A. Severance, with whom *Mr. Frank B. Kellogg* and *Mr. Robert E. Olds* were on the brief, for appellee, Chicago Great Western Railway Company:

Findings of fact by the Circuit Court should be accepted on appeal as witnesses testified in open court. *Halsell* v. *Renfrow,* 202 U. S. 291; *Shappirio* v. *Goldberg,* 192 U. S. 240; *Beyer* v. *Le Fevre,* 186 U. S. 119; *Stuart* v. *Hayden,* 169 U. S. 14; *Warren* v. *Keep,* 155 U. S. 267; *Crawford* v. *Neal,* 144 U. S. 596; *Evans* v. *Bank,* 141 U. S. 107.

The contract between respondent Chicago Great Western Railway Company and various packers was proper exercise of its right to compete for business. *Cotting* v. *Godard,* 183 U. S. 79; *Hopkins* v. *United States,* 171 U. S. 600; *Delaware, Lackawanna & Western Ry. Co.* v. *Kutter,* 147 Fed. Rep. 51; *Interstate Comm. Comm.* v. *B. & O. Ry. Co.,* 43 Fed. Rep. 37; *Whitwell* v. *Continental Tobacco Co.,* 125 Fed. Rep. 454.

The rate on live-stock products brought about by the Chicago Great Western contract did not involve an undue preference or unjust discrimination within the meaning of the Interstate Commerce law. *Interstate Comm. Comm.* v. *B. & O. Ry. Co.,* 145 U. S. 276; *East Tenn., V. & G. Ry. Co.* v. *Interstate Comm. Comm.,* 181 U. S. 1; *Texas & Pacific Ry. Co.* v. *Interstate Comm. Comm.,* 162 U. S. 197; *Interstate Comm. Comm.* v. *Alabama Midland Ry. Co.,* 168 U. S. 144; *Louisville & Nashville Ry. Co.* v. *Behlmer,* 175 U. S. 648; *Interstate Comm. Comm.* v. *Louisville & Nashville Ry. Co.,* 190 U. S. 273; *D., L. & W. Ry. Co.* v. *Kutter,* 147 Fed. Rep. 51; *Interstate Comm. Comm.* v. *B. & O. Ry. Co.,* 43 Fed. Rep. 37; *Platt* v. *Le Cocq,* 150 Fed. Rep. 391; *Interstate Comm. Comm.* v. *Western & Atlantic*

Ry. Co., 93 Fed. Rep. 83; Judson on Interstate Commerce, §§ 175–183.

Neither the Commission nor the court had the right to ignore the relative cost of the service in determining whether the apparent discrimination was undue or unreasonable. *Squire* v. *Michigan Central Ry. Co.*, 3 I. C. C. R. 521.

The Commission, previous to the amendment of the law in 1906, had no power to fix rates, and hence no power to establish the relation between rates. *Cincinnati, N. O. & Tex. Pac. Ry. Co.* v. *Interstate Comm. Comm.*, 162 U. S. 184; *Interstate Comm. Comm.* v. *C., N. O. & Tex. Pac. Ry. Co.*, 167 U. S. 479; *Interstate Comm. Comm.* v. *Alabama Midland Ry. Co.*, 168 U. S. 145; *Southern Pacific Co.* v. *Colorado Fuel & Iron Co.*, 101 Fed. Rep. 779.

Findings of fact of the lower court, from which the conclusion necessarily followed that respondents have a decree in their favor, was abundantly supported by the testimony and the law.

Mr. Ed. Baxter for appellees as of record. *Mr. Charles A. Clark* for intervenor, T. M. Sinclair & Company, Limited. *Mr. Frank T. Ransom* for intervenor, Union Stock Yards Company of Omaha, Limited. *Mr. Stephen S. Brown* and *Mr. John E. Dolman* filed a brief on behalf of intervenor, St. Joseph Stock Yards Company of St. Joseph, Missouri. *Mr. S. A. Lynde* filed a brief on behalf of appellee, The Chicago & Northwestern Railway Company.

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

It is unnecessary to define the full scope and meaning of the prohibition found in § 3 of the Interstate Commerce Act—or even to determine whether the language is sufficiently definite to make the duties cast on the Interstate Commerce Commission ministerial, and therefore such as may legally be imposed

upon a ministerial body, or legislative, and therefore, under the Federal Constitution, a matter for Congressional action—for within any fair construction of the terms "undue or unreasonable" the findings of the Circuit Court place the action of the railroads outside the reach of condemnation.

The complainant, before the Interstate Commerce action, was an incorporated association. The purposes for which it was organized were, as stated in its charter, "to establish and maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to provide for the speedy adjustment of all business disputes between its members; to facilitate the receiving and distributing of live stock, as well as to provide for and maintain a rigid inspection thereof, thereby guarding against the sale or use of unsound or unhealthy meats; and generally to secure to its members the benefits of coöperation in the furtherance of their legitimate pursuits." Its members were, as found by the Commerce Commission, "engaged in the purchase, shipment and sale of live stock for themselves and upon commission." It was such an association, with members engaged in the business named, that initiated these proceedings and in whose behalf they were primarily prosecuted. While it may be that the proceedings are not to be narrowly limited to an inquiry whether this particular complainant has been in any way injured by the action of the railroad companies, yet that question must be regarded as the one which was the special object of inquiry and consideration. It is true that the Commission subsequently commenced under the Elkins Act an independent suit in its own name, but it was practically to enforce the award made by the Commission after its inquiry into the controversy between the live stock exchange and the railroad companies.

It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no

proper sense is the public a general manager. As said in *Int. Com. Com.* v. *Ala. Mid. R. R. Co.*, 168 U. S. 144, 172, quoting from the opinion of Circuit Judge Jackson, afterwards Mr. Justice Jackson of this court, in *Int. Com. Com.* v. *B. & O. R. R. Co.*, 43 Fed. Rep. 37, 50:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

It follows that railroad companies may contract with shippers for a single transportation or for successive transportations, subject though it may be to a change of rates in the manner provided in the Interstate Commerce Act—*Armour Packing Co.* v. *The United States*, *ante*, p. 56, and also that in fixing their own rates they may take into account competition with other carriers, provided only that the competition is genuine and not a pretense. *Int. Com. Com.* v. *B. & O. R. R. Co.*, 145 U. S. 263; *T. & P. Ry. Co.* v. *Int. Com. Com.*, 162 U. S. 197; *Int. Com. Com.* v. *Ala. Mid. Ry. Co.*, *supra*; *L. & N. R. R. Co.* v. *Behlmer*, 175 U. S. 648; *East Tenn. &c. Ry. Co.* v. *Int. Com. Com.*, 181 U. S. 1; *Int. Com. Com.* v. *L. & N. R. R. Co.*, 190 U. S. 273.

It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly when rates are changed the carrier making the change must,

when properly called upon, be able to give a good reason therefor, but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done. Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers.

The Commerce Commission did not find whether the rates were reasonable or unreasonable *per se*. Its omission may have been owing, partly at least, to the decision in *Interstate Commerce Commission* v. *C., N. O. & T. P. Ry. Company*, 167 U. S. 506, for this controversy arose before the amendment of June 29, 1906. 34 Stat. 584. On the other hand, the Circuit Court found specifically that the live-stock rates were reasonable, and also that the rates for carrying packers' products and dressed meats were remunerative. See Findings 1 and 7. Obviously shippers had in the rates considered separately no ground of challenge. But the burden of complaint is not that any rates taken by themselves were too high, but that the difference between those on live stock and those on dressed meats and packers' products worked an unjust discrimination.

It is insisted that "the making of the live-stock rate higher than the product rate is violative of the almost universal rule that the rates on raw material shall not be higher than on the manufactured product." This may be conceded, but that the rule is not universal the proposition itself recognizes, and the findings of the court give satisfactory reasons for the exception here shown. See Findings 2, 3 and 9. The cost of carriage, the risk of injury, the larger amount which the companies are called upon to pay out in damages make sufficient explanation. They do away with the idea that in the relation established between the two kinds of charges any undue or unreasonable preference was intended or secured.

Finding No. 6 is very persuasive. It reads:

"Sixth. That the present rates on live stock have not materially affected any of the markets, prices, or shipments;

that they are reasonably fair to Chicago and to the shippers; that the shipments of live stock from points between Chicago and the Missouri River and St. Paul are as great in proportion to the volume of business as before the present rates were made; that the majority of the live stock comes to Chicago from points as near as 150 miles this side of the Missouri River and St. Paul, and that the lower rate given to the packers does not seem to directly influence or injure the shippers of live stock."

If the rates complained of have not materially affected any of the markets, prices, or shipments; if they are reasonably fair to Chicago and the shippers; if the shipments of live stock from the west to Chicago are as great in proportion to the bulk of the business as before the present rates were made, and the lower rate given to the packers does not directly influence or injure the shippers of live stock; it is difficult to see what foundation there can be for the claim of an undue and unreasonable preference. It would seem a fair inference from the findings that the real complaint was that the railroad companies did not so fix their rates as to help the Chicago packing industry; that they recognized the fact that along the Missouri River had been put up large packing-houses, and, without any intent to injure Chicago, had fixed reasonable rates for the carrying of live stock to such packing-houses and also to Chicago; that those packing-houses being nearer to the cattle fields were able to engage in the packing industry as conveniently and successfully as the packing-houses in Chicago. If we were at liberty to consider the mere question of sentiment, certainly to place packing-houses close to the cattle fields, thus avoiding the necessity of long transportation of the living animals—a transportation which cannot be accomplished without more or less suffering to them—and to induce transportation to those nearer packing-houses would deserve to be commended rather than condemned.

With reference to competition we have referred to the cases in this court in which that matter has been considered. Ac-

cording to the fourth finding the rates in question given to the packers at the Missouri River and St. Paul were the result of competition. Without recapitulating all the facts disclosed in that finding it is enough to say that the Chicago Great Western Railway Company, which had the longest line from Chicago to Missouri River points, made a reduction in the rates, and did this, as its president testified, "for the purpose of securing a greater proportion of the traffic in the products of live stock than it had been previously able to obtain." That is one of the facts inducing competition, and one of the results expected to flow from a reduction of rates. It certainly of itself deserves no condemnation. In order to secure to themselves what was likely to be transferred to the Great Western by virtue of its reduction of rates, the other companies also made a reduction and, as shown by the fifth finding, the competition was not the result of agreement, but was an "actual, genuine, competition." It may be true, as contended by counsel for the appellant, that even a genuine competition which results in a change of rates does not necessarily determine the question whether the rates as fixed work an undue preference or create an unlawful discrimination. Those rates fixed may make a preference or discrimination irrespective of the motives which caused the railway companies to adopt them, and yet the fact of a genuine competition does make against the contention that the rates were intended to work injustice. An honest and fair motive was the cause of the change in rates; honest and fair on the part of the Great Western in its effort to secure more business, and equally honest and fair on the part of the other railway companies in the effort to retain as much of the business as was possible. In other words, this competition eliminates from the case an intent to do an unlawful act, and leaves for consideration only the question whether the rates as established do work an undue preference or discrimination; and as the findings of the court show that the result of the new rates has not been to change the volume of traffic going to Chicago, or materially affect the business

of the original complainant, it would seem necessarily to result that the charge of an unlawful discrimination is not proved. In short, there was no intent on the part of the railway companies to do a wrongful act, and the act itself did not work any substantial injury to the rights of the complainant.

We have not attempted to review in detail the great mass of testimony, amounting to two enormous printed volumes. It is enough to say that an examination of it clearly shows sufficient reasons for the findings of fact made by the Circuit Court.

In short, the findings of the Circuit Court were warranted by the testimony, and those findings make it clear that there was no unlawful discrimination.

The decree of the Circuit Court is

Affirmed.

MR. JUSTICE MOODY did not hear the argument nor take part in the decision of this case.

Ex parte YOUNG.

PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI.

No. 10, Original. Argued December 2, 3, 1907.—Decided March 23, 1908.

While this court will not take jurisdiction if it should not, it must take jurisdiction if it should. It cannot, as the legislature may, avoid meeting a measure because it desires so to do.

In this case a suit by a stockholder against a corporation to enjoin the directors and officers from complying with the provisions of a state statute, alleged to be unconstitutional, was properly brought within Equity Rule 94 of this court.

An order of the Circuit Court committing one for contempt for violation of a decree entered in a suit of which it did not have jurisdiction is unlawful; and, in such case, upon proper application, this court will discharge the person so held.

Although the determination of whether a railway rate prescribed by a state statute is so low as to be confiscatory involves a question of fact, its solution raises a Federal question, and the sufficiency of rates is a judicial question over which the proper Circuit Court has jurisdiction, as one arising under the Constitution of the United States.

Whether a state statute is unconstitutional because the penalties for its violation are so enormous that persons affected thereby are prevented from resorting to the courts for the purpose of determining the validity of the statute and are thereby denied the equal protection of the law and their property rendered liable to be taken without due process of law, is a Federal question and gives the Circuit Court jurisdiction.

Whether the state railroad rate statute involved in this case, although on its face relating only to intrastate rates, was an interference with interstate commerce *held* to raise a Federal question which could not be considered frivolous.

A state railroad rate statute which imposes such excessive penalties that parties affected are deterred from testing its validity in the courts denies the carrier the equal protection of the law without regard to the question of insufficiency of the rates prescribed; it is within the jurisdiction, and is the duty, of the Circuit Court to inquire whether such rates are so low as to be confiscatory, and if so to permanently enjoin the railroad company, at the suit of one of its stockholders, from putting them in force, and it has power pending such inquiry to grant a temporary injunction to the same effect.

While there is no rule permitting a person to disobey a statute with impunity at least once for the purpose of testing its validity, where such validity can only be determined by judicial investigation and construction, a provision in the statute which imposes such severe penalties for disobedience of its provisions as to intimidate the parties affected thereby from resorting to the courts to test its validity practically prohibits those parties from seeking such judicial construction and denies them the equal protection of the law.

The attempt of a state officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the State in its sovereign or governmental capacity, and is an illegal act and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to its officer immunity from responsibility to the supreme authority of the United States.

When the question of the validity of a state statute with reference to the Federal Constitution has been first raised in a Federal court that court has the right to decide it to the exclusion of all other courts.

It is not necessary that the duty of a state officer to enforce a statute be declared in that statute itself in order to permit his being joined as a party defendant from enforcing it; if by virtue of his office he has some connection with the enforcement of the act it is immaterial whether it arises by common general law or by statute.

While the courts cannot control the exercise of the discretion of an executive officer, an injunction preventing such officer from enforcing an unconstitutional statute is not an interference with his discretion.

The Attorney General of the State of Minnesota, under his common law power and the state statutes, has the general authority imposed upon him of enforcing constitutional statutes of the State and is a proper party defendant to a suit brought to prevent the enforcement of a state statute on the ground of its unconstitutionality.

While a Federal court cannot interfere in a criminal case already pending in a state court, and while, as a general rule, a court of equity cannot enjoin criminal proceedings, those rules do not apply when such proceedings are brought to enforce an alleged unconstitutional state statute, after the unconstitutionality thereof has become the subject of inquiry in a suit pending in a Federal court which has first obtained jurisdiction thereover; and under such circumstances the Federal court has the right in both civil and criminal cases to hold and maintain such jurisdiction to the exclusion of all other courts.

While making a state officer who has no connection with the enforcement of an act alleged to be unconstitutional a party defendant is merely making him a party as a representative of the State, and thereby amounts to making the State a party within the prohibition of the Eleventh Amendment, individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence an action, either civil or criminal, to enforce an unconstitutional state statute may be enjoined from so doing by a Federal court.

Under such conditions as are involved in this case the Federal court may enjoin an individual or a state officer from enforcing a state statute on account of its unconstitutionality, but it may not restrain the state court from acting in any case brought before it either of a civil or criminal nature, or prevent any investigation or action by a grand jury.

An injunction by a Federal court against a state court would violate the whole scheme of this Government, and it does not follow that because an individual may be enjoined from doing certain things a court may be similarly enjoined.

No adequate remedy at law, sufficient to prevent a court of equity from acting, exists in a case where the enforcement of an unconstitutional state rate statute would require the complainant to carry merchandise at confiscatory rates if it complied with the statute and subject it to excessive penalties in case it did not comply therewith and its validity was finally sustained.

While a common carrier sued at common law for penalties under, or on indictment for violation of, a state rate statute might interpose as a defense the unconstitutionality of the statute on account of the confiscatory character of the rates prescribed, a jury cannot intelligently pass upon such a matter; the proper method is to determine the constitutionality of the statute in a court of equity in which the opinions of experts may be

taken and the matter referred to a master to make the needed computations and to find the necessary facts on which the court may act.

A state rate statute is to be regarded as *prima facie* valid, and the *onus* rests on the carrier to prove the contrary.

The railroad interests of this country are of great magnitude, and the thousands of persons interested therein are entitled to protection from the laws and from the courts equally with the owners of all other kinds of property, and the courts having jurisdiction, whether Federal or state, should at all times be open to them, and where there is no adequate remedy at law the proper course to protect their rights is by suit in equity in which all interested parties are made defendants.

While injunctions against the enforcement of a state rate statute should not be granted by a Federal court except in a case reasonably free from doubt, the equity jurisdiction of the Federal court has been constantly exercised for such purpose.

The Circuit Court of the United States having, in an action brought by a stockholder of the Northern Pacific Railway Company against the officers of the road, certain shippers and the Attorney General and certain other officials of the State of Minnesota, held that a railroad rate statute of Minnesota was unconstitutional and enjoined all the defendants from enforcing such statute, and the Attorney General having refused to comply with such order, the Circuit Court fined and committed him for contempt, and this court refused to discharge him on *habeas corpus*.

AN original application was made to this court for leave to file a petition for writs of *habeas corpus* and certiorari in behalf of Edward T. Young, petitioner, as Attorney General of the State of Minnesota.

Leave was granted and a rule entered directing the United States marshal for the District of Minnesota, Third Division, who held the petitioner in his custody, to show cause why such petition should not be granted.

The marshal, upon the return of the order to show cause, justified his detention of the petitioner by virtue of an order of the Circuit Court of the United States for the District of Minnesota, which adjudged the petitioner guilty of contempt of that court and directed that he be fined the sum of $100, and that he should dismiss the mandamus proceedings brought by him in the name and behalf of the State in the Circuit Court of the State, and that he should stand committed to the custody of the marshal until that order was obeyed. The case

involves the validity of the order of the Circuit Court committing him for contempt.

The facts are these: The legislature of the State of Minnesota duly created a railroad and warehouse commission, and that commission on the sixth of September, 1906, made an order fixing the rates for the various railroad companies for the carriage of merchandise between stations in that State of the kind and classes specified in what is known as the "Western Classification." These rates materially reduced those then existing, and were by the order to take effect November 15, 1906. In obedience to the order the railroads filed and published the schedules of rates, which have ever since that time been carried out by the companies.

At the time of the making of the above order it was provided by the Revised Laws of Minnesota, 1905 (§ 1987), that any common carrier who violated the provisions of that section or willfully suffered any such unlawful act or omission, when no specific penalty is imposed therefor, "if a natural person, shall be guilty of a gross misdemeanor, and shall be punished by a fine of not less than twenty-five hundred dollars, nor more than five thousand dollars for the first offense, and not less than five thousand dollars nor more than ten thousand dollars for each subsequent offense; and, if such carrier or warehouseman be a corporation, it shall forfeit to the State for the first offense not less than twenty-five hundred dollars nor more than five thousand dollars, and for each subsequent offense not less than five thousand dollars nor more than ten thousand dollars, to be recovered in a civil action."

This provision covered disobedience to the orders of the Commission.

On the fourth of April, 1907, the legislature of the State of Minnesota passed an act fixing two cents a mile as the maximum passenger rate to be charged by railroads in Minnesota. (The rate had been theretofore three cents per mile.) The act was to take effect on the first of May, 1907, and was put into effect on that day by the railroad companies, and the same

has been observed by them up to the present time. It was provided in the act that "Any railroad company, or any officer, agent or representative thereof, who shall violate any provision of this act shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not exceeding five thousand (5,000) dollars, or by imprisonment in the State prison for a period not exceeding five (5) years, or both such fine and imprisonment."

On the eighteenth of April, 1907, the legislature passed an act (chapter 232 of the laws of that year), which established rates for the transportation of certain commodities (not included in the Western Classification) between stations in that State. The act divided the commodities to which it referred into seven classes, and set forth a schedule of maximum rates for each class when transported in carload lots and established the minimum weight which constituted a carload of each class.

Section 5 provided that it should not affect the power or authority of the Railroad and Warehouse Commission, except that no duty should rest upon that commission to enforce any rates specifically fixed by the act or any other statute of the State. The section further provided generally that the orders made by the Railroad and Warehouse Commission prescribing rates should be the exclusive legal maximum rates for the transportation of the commodities enumerated in the act between points within that State.

Section 6 directed that every railroad company in the State should adopt and publish and put into effect the rates specified in the statute, and that every officer, director, traffic manager or agent or employé of such railroad company should cause the adoption, publication and use by such railroad company of rates not exceeding those specified in the act; "and any officer, director or such agent or employé of any such railroad company who violates any of the provisions of this section, or who causes or counsels, advises or assists any such railroad company to violate any of the provisions of this section, shall be guilty of a misdemeanor, and may be prosecuted therefor

in any county into which its railroad extends, and in which it has a station, and upon a conviction thereof be punished by imprisonment in the county jail for a period not exceeding ninety days." The act was to take effect June 1, 1907.

The railroad companies did not obey the provisions of this act so far as concerned the adoption and publication of rates as specified therein.

On the thirty-first of May, 1907, the day before the act was to take effect, nine suits in equity were commenced in the Circuit Court of the United States for the District of Minnesota, Third Division, each suit being brought by stockholders of the particular railroad mentioned in the bill, and in each case the defendants named were the railroad company of which the complainants were, respectively, stockholders, and the members of the Railroad and Warehouse Commission, and the Attorney General of the State, Edward T. Young, and individual defendants representing the shippers of freight upon the railroad.

The order punishing Mr. Young for contempt was made in the suit in which Charles E. Perkins, a citizen of the State of Iowa, and David C. Shepard, a citizen of the State of Minnesota, were complainants, and the Northern Pacific Railway Company, a corporation organized under the laws of the State of Wisconsin, Edward T. Young, petitioner herein, and others, were parties defendant. All of the defendants, except the railway company, are citizens and residents of the State of Minnesota.

It was averred in the bill that the suit was not a collusive one to confer on the court jurisdiction of a case of which it could not otherwise have cognizance, but that the objects and purposes of the suit were to enjoin the railway company from publishing or adopting (or continuing to observe, if already adopted) the rates and tariffs prescribed and set forth in the two acts of the legislature above mentioned and in the orders of the Railroad and Warehouse Commission, and also to enjoin the other defendants from attempting to enforce such provisions, or from instituting any action or proceeding against

the defendant railway company, its officers, etc., on account of any violation thereof, for the reason that the said acts and orders were and each of them was violative of the Constitution of the United States.

The bill also alleged that the orders of the Railroad Commission of September 6, 1906, May 3, 1907, the passenger rate act of April 4, 1907, and the act of April 18, 1907, reducing the tariffs and charges which the railway company had theretofore been permitted to make, were each and all of them unjust, unreasonable and confiscatory, in that they each of them would, and will if enforced, deprive complainants and the railway company of their property without due process of law, and deprive them and it of the equal protection of the laws, contrary to and in violation of the Constitution of the United States and the amendments thereof. It was also averred that the complainants had demanded of the president and managing directors of the railway company that they should cease obedience to the orders of the Commission dated September 6, 1906, and May 3, 1907, and to the acts already mentioned, and that the rates prescribed in such orders and acts should not be put into effect, and that the said corporation, its officers and directors, should institute proper suit or suits to prevent said rates (named in the orders and in the acts of the legislature) from continuing or becoming effective, as the case might be, and to have the same declared illegal; but the said corporation, its president and directors, had positively declined and refused to do so, not because they considered the rates a fair and just return upon the capital invested or that they would not be confiscatory, but because of the severity of the penalties provided for the violation of such acts and orders, and therefore they could not subject themselves to the ruinous consequences which would inevitably result from failure on their part to obey the said laws and orders, a result which no action by themselves, their stockholders or directors, could possibly prevent.

The bill further alleged that the orders of the Commission

of September, 1906, and May, 1907, and the acts of April 4, 1907, and April 18, 1907, were, in the penalties prescribed for their violation, so drastic that no owner or operator of a railway property could invoke the jurisdiction of any court to test the validity thereof, except at the risk of confiscation of its property, and the imprisonment for long terms in jails and penitentiaries of its officers, agents and employés. For this reason the complainants alleged that the above-mentioned orders and acts, and each of them, denied to the defendant railway company and its stockholders, including the complainants, the equal protection of the laws, and deprived it and them of their property without due process of law, and that each of them was, for that reason, unconstitutional and void.

The bill also contained an averment that if the railway company should fail to continue to observe and keep in force or to observe and put in force the orders of the Commission and the acts of April 4, 1907, and April 18, 1907, such failure might result in an action against the company or criminal proceedings against its officers, directors, agents or employés, subjecting the company and such officers to an endless number of actions at law and criminal proceedings; that if the company should fail to obey the order of the Commission or the acts of April 4, 1907, and April 18, 1907, the said Edward T. Young, as Attorney General of the State of Minnesota, would, as complainants were advised, and believed, institute proceedings by mandamus or otherwise against the railway company, its officers, directors, agents or employés, to enforce said orders and all the provisions thereof, and that he threatened and would take other proceedings against the company, its officers, etc., to the same end and for the same purpose, and that he would on such failure institute mandamus or other proceedings for the purpose of enforcing said acts and each thereof, and the provisions and penalties thereof. Appropriate relief by injunction against the action of the defendant Young and the railroad commission was asked for.

A temporary restraining order was made by the Circuit Court, which only restrained the railway company from publishing the rates as provided for in the act of April 18, 1907, and from reducing its tariffs to the figures set forth in that act; the court refusing for the present to interfere by injunction with regard to the orders of the Commission and the act of April 4, 1907, as the railroads had already put them in operation, but it restrained Edward T. Young, Attorney General, from taking any steps against the railroads to enforce the remedies or penalties specified in the act of April 18, 1907.

Copies of the bill and the restraining order were served, among others, upon the defendant Mr. Edward T. Young, Attorney General, who appeared specially and only for the purpose of moving to dismiss the bill as to him, on the ground that the court had no jurisdiction over him as Attorney General; and he averred that the State of Minnesota had not consented, and did not consent, to the commencement of this suit against him as Attorney General of the State, which suit was in truth and effect a suit against the said State of Minnesota, contrary to the Eleventh Amendment of the Constitution of the United States.

The Attorney General also filed a demurrer to the bill, on the same grounds stated in the motion to dismiss. The motion was denied and the demurrer overruled.

Thereupon, on the twenty-third of September, 1907, the court, after a hearing of all parties and taking proofs in regard to the issues involved, ordered a temporary injunction to issue against the railway company, restraining it, pending the final hearing of the cause, from putting into effect the tariffs, rates or charges set forth in the act approved April 18, 1907. The court also enjoined the defendant Young, as Attorney General of the State of Minnesota, pending the final hearing of the cause, from taking or instituting any action or proceeding to enforce the penalties and remedies specified in the act above mentioned, or to compel obedience to that act, or compliance therewith, or any part thereof.

As the court refused to grant any preliminary injunction restraining the enforcement of the rates fixed by the Railroad and Warehouse Commission, or the passenger rates under the act of April 4, 1907, because the same had been accepted by the railroads and were in operation, the court stated that in omitting the granting of such preliminary injunction the necessity was obviated upon that hearing of determining whether the rates fixed by the Commission, or the passenger rates together or singly, were confiscatory and did not afford reasonable compensation for the service rendered and a proper allowance for the property employed, and for those reasons that question had not been considered, but inasmuch as the rates fixed by the act of April 18, 1907, had not gone into force, the court observed: "It seems to me, upon this evidence of the conditions before either of those new rates were put into effect (that is, the order of the Commission of September, 1906, or the act of April 4, 1907), and the reductions made by those rates, that if there is added the reduction which is attempted to be made by the commodity act (April 18, 1907) it will reduce the compensation received by the companies below what would be a fair compensation for the services performed, including an adequate return upon the property invested. And I think, on the whole, that a preliminary injunction should issue, in respect to the rates fixed by chapter 232 (act of April 18), talked of as the commodity rates, and that there should be no preliminary injunction as to the other rates, *although the matter as to whether they are compensatory or not is a matter which may be determined in the final determination of the action.*"

The day after the granting of this preliminary injunction the Attorney General, in violation of such injunction, filed a petition for an alternative writ of mandamus in one of the courts of the State, and obtained an order from that court, September 24, 1907, directing the alternative writ to issue as prayed for in the petition. The writ was thereafter issued and served upon the Northern Pacific Railway Company,

commanding the company, immediately after its receipt, "to adopt and publish and keep for public inspection, as provided by law, as the rates and charges to be made, demanded and maintained by you for the transportation of freight between stations in the State of Minnesota of the kind, character and class named and specified in chapter 232 of the Session Laws of the State of Minnesota for the year 1907, rates and charges which do not exceed those declared to be just and reasonable in and by the terms and provisions of said chapter 232. . . ."

Upon an affidavit showing these facts the United States Circuit Court ordered Mr. Young to show cause why he should not be punished as for a contempt for his misconduct in violating the temporary injunction issued by that court in the case therein pending.

Upon the return of this order the Attorney General filed his answer, in which he set up the same objections which he had made to the jurisdiction of the court in his motion to dismiss the bill, and in his demurrer; he disclaimed any intention to treat the court with disrespect in the commencement of the proceedings referred to, but believing that the decision of the court in the action, holding that it had jurisdiction to enjoin him as Attorney General from performing his discretionary official duties, was in conflict with the Eleventh Amendment of the Constitution of the United States, as the same has been interpreted and applied by the United States Supreme Court, he believed it to be his duty as such Attorney General to commence the mandamus proceedings for and in behalf of the State, and it was in this belief that the proceedings were commenced solely for the purpose of enforcing the law of the State of Minnesota. The order adjudging him in contempt was then made.

Mr. Thomas D. O'Brien, Mr. Herbert S. Hadley [1] and *Mr. Edward T. Young*, with whom *Mr. Royal A. Stone, Mr. George T. Simpson* and *Mr. Charles S. Jelly* were on the brief, for petitioner:

[1] Attorney General of the State of Missouri.

This court in this proceeding will determine the jurisdiction of the Circuit Court in the suit in which the order punishing for contempt was made, and if it is found that the Circuit Court had no jurisdiction in the suit, or was without power or authority to make the order enjoining the petitioner, will direct his discharge from custody.

This application does not fall within those decisions where this court has held that the case was not a proper one to be considered in proceedings under the writ of *habeas corpus* or those holding that this court may exercise its discretion in granting or withholding the writ. It is in accordance with the decision rendered in *Ex parte Yarbrough*, 110 U. S. 651. See also *Ex parte Fisk*, 113 U. S. 713; *Ex parte Wells*, 18 How. 307; *Ex parte Lange*, 18 Wall. 163; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Parks*, 93 U. S. 18; *Ex parte Ayers*, 123 U. S. 443; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Royall*, 117 U. S. 241; *Ex parte Mayfield*, 141 U. S. 107; *Ex parte McKenzie*, 180 U. S. 536; *Delgado* v. *Chaves*, 140 U. S. 586; *Ex parte Watkins*, 3 Peters, 193.

The Circuit Court did not have jurisdiction because of diverse citizenship, and no Federal question was presented by the bill of complaint which justified the Circuit Court in assuming jurisdiction.

The sufficiency of the intrastate rates prescribed by chapter 232, did not present a question involving the construction of the Constitution of the United States. The adequacy or inadequacy of a prescribed rate is a question of fact only. *Illinois C. R. Co.* v. *Interstate Commerce Com.*, 206 U. S. 441.

Where the true meaning and construction of a constitutional provision has been settled by decisions of this court, the jurisdiction of the Circuit Court will be determined, upon a consideration of the bill of complainant, in the same manner as it would be if it appeared from all the pleadings in the case that there was no controversy as to the meaning or construction of the Constitution or law under which it is claimed the controversy arises. *Western Union Tel. Co.* v. *Ann Arbor R. Co.*,

178 U. S. 239; *Equitable Life Assurance Co.* v. *Brown*, 187 U. S. 308; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336.

The construction and effect of the provisions of the Constitution of the United States relied upon in the suit in the Circuit Court are settled beyond controversy by the following as well as many other decisions: *Munn* v. *Illinois*, 94 U. S. 113; *C. M. & St. P. R. R.* v. *Minnesota*, 134 U. S. 418; *Wisconsin &c. R. R.* v. *Jacobson*, 179 U. S. 287; *Covington* v. *Bridge Co.*, 154 U. S. 204; *Houston Central Ry. Co.* v. *Mayes*, 201 U. S. 321; *Railroad Commission Cases*, 116 U. S. 307; *Dow* v. *Beidleman*, 125 U. S. 680; *Carson* v. *Durham*, 121 U. S. 421; *Tennessee* v. *Davis*, 100 U. S. 257; *New Orleans* v. *Benjamin*, 153 U. S. 411; *McCain* v. *Des Moines*, 174 U. S. 168; *Defiance Water Co.* v. *City of Defiance*, 191 U. S. 184; *Hooker* v. *Los Angeles*, 188 U. S. 314; *Shoshone Min. Co.* v. *Rutter*, 177 U. S. 505; *Blackburn* v. *Gold Min. Co.*, 175 U. S. 571; *Carson* v. *Durham*, 121 U. S. 421; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48; *Western Union Tel. Co.* v. *Ann Arbor R. Co.*, 178 U. S. 239; *Equitable Life Assurance Co.* v. *Brown*, 187 U. S. 308; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336; *New Orleans* v. *Water Works Co.*, 142 U. S. 79; *Hamblin* v. *Western Land Co.*, 147 U. S. 531; *St. Joseph &c. Co.* v. *Steele*, 167 U. S. 659; *Wilson* v. *North Carolina*, 169 U. S. 586.

The Circuit Court exceeded its power and authority in making its order that the petitioner be enjoined as Attorney General from taking appropriate legal proceedings to compel the railway companies to comply with the act of April 18, 1907.

Had the Eleventh Amendment never been adopted, this suit against the Attorney General could not be maintained, and had he in the first instance fully submitted himself to the jurisdiction of the Circuit Court, any order attempting to control the exercise of the executive discretion vested in him, would be beyond the power and authority of the court.

It should not be assumed under the authority of *Chisholm* v. *Georgia*, that in the absence of the Eleventh Amendment,

a State would be subject to all suits. In that case, it was claimed that the State was indebted to the complainant upon a money demand. The political or governmental powers of the State were in no way involved.

However, be this as it may, the decision in the *Chisholm case* was based upon the positive language of the Constitution. The Eleventh Amendment restored not only immunity of the States from suit, but secured the same immunity to each department of a State which under the Constitution thereof was made independent of the judicial power.

The authority of the Attorney General to prosecute or defend a suit in which the State is concerned is necessarily implied from the nature of his office and he may bring an action where the wrong or injury complained of affects the public. 4 Cyc. 1028–1031; *Hunt* v. *Ry. Co.*, 121 Illinois, 638; *Orton* v. *State*, 12 Wisconsin, 567; *Atty. Genl.* v. *Williams*, 174 Massachusetts, 476; *People* v. *Oakland*, 118 California, 234; *Atty. Genl.* v. *Detroit*, 26 Michigan, 262.

The Attorney General of Minnesota is, therefore, an executive officer of the State second to none in the character and importance of his duties. The name and power of the State, so far as their use in litigation is concerned, are confined to his discretion, subject to control by no other officer, except in certain cases not material here. *State* v. *Tracy*, 48 Minnesota, 497.

Under the statutes of Minnesota, the Attorney General is not required to institute criminal proceedings except on the request of the Governor. Criminal proceedings are in the first instance instituted by the attorneys for the various counties, who have the right, however, to call on the Attorney General for assistance. But when any criminal case reaches the Supreme Court of the State, it comes into the exclusive charge of the Attorney General. Therefore the injunction issued in the Circuit Court interferes with the administration of the criminal laws of the State. Such interference is beyond the power of a court of equity, except where the criminal case is

instituted by a party to a suit already pending before it of which it has jurisdiction to try the same question therein involved. *In re Sawyer*, 124 U. S. 200.

The suit in the Circuit Court against the Attorney General was in effect a suit against the State of Minnesota.

The immunity of a State from suit, as provided by the Eleventh Amendment, is not dependent upon any pecuniary interest, as contended by respondents.

Where the decree of the court can operate only upon the State and only to restrain the action of the State, the suit, no matter against whom it is brought, is in effect one against the State and in such case the pecuniary interest the State may or may not have in the result of the litigation is immaterial. *Governor of Georgia* v. *Madrazo*, 1 Pet. 110; *United States* v. *Beebe*, 127 U. S. 338; *Savings Bank* v. *United States*, 19 Wall. 227; *United States* v. *American Bell Telephone Co.*, 128 U. S. 315; *United States* v. *American Bell Telephone Co.*, 159 U. S. 548; *United States* v. *Telephone Co.*, 167 U. S. 224; *Hans* v. *Louisiana*, 134 U. S. 19. *Reagan Case*, 154 U. S. 362 and *M., K. & T. Ry. Co.* v. *Hickman*, 183 U. S. 53, discussed and distinguished.

The Circuit Court was without jurisdiction under *Fitts* v. *McGhee*, 172 U. S. 516, which cannot be distinguished, and to sustain the suit in Minnesota, it must be shown that *Fitts* v. *McGhee* has been or should be overruled.

The doctrine of that case, however, was in accordance with the previous decisions of this court. *Governor of Georgia* v. *Madrazo*, 1 Pet. 110; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *In re Ayers*, 123 U. S. 443.

The doctrine established by these cases has become the settled rule of decision. And see *Cotting* v. *Godard*, 183 U. S. 79; *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207; *Barney* v. *State of New York*, 193 U. S. 430; *Gunter* v. *Atlantic Coast Line R. R. Co.*, 200 U. S. 273; *Farmers' Nat. Bank* v. *Jones*, 105 Fed. Rep. 459; *Haverhill Gas Light Co.* v. *Parker*,

109 Fed. Rep. 694; *Copper Co.* v. *Freer, Attorney General,* 127 Fed. Rep. 199; *Coneter* v. *Weir,* 127 Fed. Rep. 897; *Coulter* v. *Fargo,* 127 Fed. Rep. 912; *Hitchesen* v. *Smith,* 140 Fed. Rep. 983; *Smith* v. *Alexander,* 146 Fed. Rep. 106; *Telegraph Co.* v. *Anderson,* 154 Fed. Rep. 95.

By leave of court, *Mr. Edward B. Whitney* filed a brief herein as *amicus curiæ,* in support of petitioner's contentions as to the Eleventh Amendment. With him on this brief was *Mr. Abel E. Blackmar.*

Mr. Charles W. Bunn, Mr. Jared How and *Mr. J. F. McGee,* with whom *Mr. Frank B. Kellogg, Mr. Cordenio A. Severance, Mr. Robert E. Olds, Mr. Stiles W. Burr, Mr. Pierce Butler, Mr. William D. Mitchell* and *Mr. William A. Lancaster* were on the briefs, for respondent:

The objections which petitioner makes against the validity of the injunctional order are matters which cannot be inquired into on writ of *habeas corpus.*

Where the contempt, the punishment for which is under review in a *habeas corpus* proceeding, consists of the violation of an order or decree of a court, the commitment will be sustained unless it is found that the order or decree disobeyed was absolutely void because the court was wholly without jurisdiction or power to make it. The proceeding being in the nature of a collateral attack upon the order or judgment which has been disobeyed, the inquiry is limited to the question of jurisdiction. *Ex parte Watkins,* 3 Pet. 193; *In re Coy,* 127 U. S. 731, 757; *In re Wilson,* 140 U. S. 575, 583.

Among the very numerous cases which deal with this question the following are most nearly in point: *Ex parte Watkins,* 3 Pet. 193; *Ex parte Yarbrough,* 110 U. S. 651; *In re Coy,* 127 U. S. 731, 756; *In re Wilson,* 140 U. S. 575, 582; *In re Delgado,* 140 U. S. 586; *In re Schneider,* 148 U. S. 162; *In re Frederich,* 149 U. S. 70, 76; *In re Tyler,* 149 U. S. 164, 180; *In re Swan,* 150 U. S. 637, 648; *In re Chapman,* 156 U. S. 211; *In re Lennon,*166 U. S. 548; *In re McKenzie,* 180 U. S. 536.

That the injunctional order, for violation of which the petitioner was adjudged in contempt, was not void for want of jurisdiction, and could not be ignored or disobeyed with impunity, as an absolute nullity, and is not subject to collateral attack in any form of proceeding, see *Illinois Central* v. *Adams*, 180 U. S. 28.

As to what matters are open for review upon a writ of *habeas corpus* is likewise a question of procedure; and the principles invoked in the *Adams case* are equally applicable to either question.

The case involves a Federal question sufficient to sustain jurisdiction upon that ground alone.

The penalty provisions of the law attacked are violative of the Fourteenth Amendment; as to this see *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79, 99–102; *Consolidated Gas Company* v. *Mayer*, 146 Fed. Rep. 150; *Ex parte Wood*, 155 Fed. Rep. 190.

The rates fixed are confiscatory and the legislation is therefore unconstitutional and void under the Fourteenth Amendment. *Hastings* v. *Ames*, 68 Fed. Rep. 726.

Neither the suit itself, nor the injunction against petitioner is within the prohibition of the Eleventh Amendment.

The doctrine of *Fitts* v. *McGhee*, 172 U. S. 516, if held applicable to the facts of the present case, is not supported by any other decision of this court, is inconsistent with the uniform current of authority, and has been overruled by later decisions of this court. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 218; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241. *Fitts* v. *McGhee* is also inconsistent with the subsequent case of *Prout* v. *Starr*, 188 U. S. 537, and other still more recent cases. The case of *In re Ayers*, 123 U. S. 443, is not in point and does not support the doctrine of *Fitts* v. *McGhee* in any direct sense.

The distinction between the case of *In re Ayers* and cases like the case at bar has been clearly drawn by this court itself in the case of *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9, 10.

See also *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Tindall* v. *Wesley*, 167 U. S. 204; *Starr* v. *C., R. I. & P. Ry.*, 110 Fed. Rep. 3.

The same principle of distinction is applied, in varying language and with greater or less explicitness, in a number of other cases decided since the *Ayers case*, among which are: *In re Tyler*, 149 U. S. 164; *Scott* v. *Donald*, 165 U. S. 107; *Smith* v. *Reeves*, 178 U. S. 436; *C. & N. W. Ry.* v. *Dey* (Brewer, J.), 35 Fed. Rep. 866.

The following cases deal with a state of facts like that in the case at bar and are squarely in conflict with *Fitts* v. *McGhee*, *supra*, in the view of that case which makes it applicable to the present situation. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *Prout* v. *Starr*, 188 U. S. 537; *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 284; *Miss. R. R. Comm.* v. *Illinois Central*, 203 U. S. 335, 340.

If *Fitts* v. *McGhee* can be held applicable to the present case, then that decision is unsound in principle and ought to be overruled upon the ground that the Eleventh Amendment should not be given a construction which would tend to impair the full efficacy of the protecting clauses of the Fourteenth Amendment.

It has become the aim of some legislatures to frame their enactments with such cunning adroitness, and to hedge them about with such savage and drastic penalties, as to make it impossible to test the validity of such statutes in the courts save at a risk no prudent man would dare to assume. An apt comment upon this tendency, and upon the character of such legislation, appears in the opinion by Mr. Justice Brewer in *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79, 99–102.

There is but one effective protection against such legislation—the power that may be exercised by courts of equity, and especially by the Circuit Courts of the United States. If it shall be held that a state statute may be so adroitly framed that the Eleventh Amendment will bar any suit in the Federal

courts of equity jurisdiction, then no corporation nor individual will dare assume the risk of the savage punishments which may be inflicted under such acts, and legislation which flagrantly violates the provisions of the Fourteenth Amendment will be made operative for all practical purposes.

By leave of court, *Mr. Walker D. Hines* filed a brief herein in behalf of the Southern Railway Company, in support of the contentions of the respondent.

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

We recognize and appreciate to the fullest extent the very great importance of this case, not only to the parties now before the court, but also to the great mass of the citizens of this country, all of whom are interested in the practical working of the courts of justice throughout the land, both Federal and state, and in the proper exercise of the jurisdiction of the Federal courts, as limited and controlled by the Federal Constitution and the laws of Congress.

That there has been room for difference of opinion with regard to such limitations the reported cases in this court bear conclusive testimony. It cannot be stated that the case before us is entirely free from any possible doubt nor that intelligent men may not differ as to the correct answer to the question we are called upon to decide.

The question of jurisdiction, whether of the Circuit Court or of this court, is frequently a delicate matter to deal with, and it is especially so in this case, where the material and most important objection to the jurisdiction of the Circuit Court is the assertion that the suit is in effect against one of the States of the Union. It is a question, however, which we are called upon, and which it is our duty, to decide. Under these circumstances, the language of Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 404, is most apposite. In that case he said:

"It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty."

Coming to a consideration of the case, we find that the complainants in the suit commenced in the Circuit Court were stockholders in the Northern Pacific Railway Company, and the reason for commencing it and making the railroad company one of the parties defendant is sufficiently set forth in the bill. *Davis &c. Co.* v. *Los Angeles*, 189 U. S. 207, 220; Equity Rule 94, Supreme Court.

It is primarily asserted on the part of the petitioner that jurisdiction did not exist in the Circuit Court because there was not the requisite diversity of citizenship, and there was no question arising under the Constitution or laws of the United States to otherwise give jurisdiction to that court. There is no claim made here of jurisdiction on the ground of diversity of citizenship, and the claim, if made, would be unfounded in fact. If no other ground exists, then the order of the Circuit Court, assuming to punish petitioner for contempt, was an unlawful order, made by a court without jurisdiction. In such case this court, upon proper application, will discharge the person from imprisonment. *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Fisk*, 113 U. S. 713; *In re Ayers*, 123 U. S. 443, 485. But an examination of the record before us shows that there are Federal questions in this case.

It is insisted by the petitioner that there is no Federal ques-

tion presented under the Fourteenth Amendment, because there is no dispute as to the meaning of the Constitution, where it provides that no State shall 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, and whatever dispute there may be in this case is one of fact simply, whether the freight or passenger rates as fixed by the legislature or by the railroad commission are so low as to be confiscatory, and that is not a Federal question.

Jurisdiction is given to the Circuit Court in suits involving the requisite amount, arising under the Constitution or laws of the United States (1 U. S. Comp. Stat. p. 508), and the question really to be determined under this objection is whether the acts of the legislature and the orders of the railroad commission, if enforced, would take property without due process of law, and although that question might incidentally involve a question of fact, its solution nevertheless is one which raises a Federal question. See *Hastings* v. *Ames* (C. C. A. 8th Circuit), 68 Fed. Rep. 726. The sufficiency of rates with reference to the Federal Constitution is a judicial question, and one over which Federal courts have jurisdiction by reason of its Federal nature. *Chicago &c. R. R. Co.* v. *Minnesota*, 134 U. S. 418; *Reagan* v. *Farmers' &c. Co.*, 154 U. S. 369, 399; *St. Louis &c. Co.* v. *Gill*, 156 U. S. 649; *Covington &c. Turnpike Road Company* v. *Sandford*, 164 U. S. 578; *Smyth* v. *Ames*, 169 U. S. 466, 522; *Chicago &c. Railway Co.* v. *Tompkins*, 176 U. S. 167, 172.

Another Federal question is the alleged unconstitutionality of these acts because of the enormous penalties denounced for their violation, which prevent the railway company, as alleged, or any of its servants or employés, from resorting to the courts for the purpose of determining the validity of such acts. The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of

the unconstitutionality of the acts and orders in question, at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws, although such obedience might also result in the end (though by a slower process) in such confiscation.

Still another Federal question is urged, growing out of the assertion that the laws are, by their necessary effect, an interference with and a regulation of interstate commerce, the grounds for which assertion it is not now necessary to enlarge upon. The question is not, at any rate, frivolous.

We conclude that the Circuit Court had jurisdiction in the case before it, because it involved the decision of Federal questions arising under the Constitution of the United States.

Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face on account of the penalties. For disobedience to the freight act the officers, directors, agents and employés of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible, for the company to obtain officers, agents or employés willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the Commission. The company, in order to test the validity of the acts, must find some

agent or employé to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity. The officers and employés could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. The observations upon a similar question made by Mr. Justice Brewer in *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79, 99, 100, 102, are very apt. At page 100 he stated: "Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss?" Again, at page 102, he says: "It is doubtless true that the State may impose penalties, such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws." The question was not decided in that case, as it went off on another ground. We have the same question now before us, only the penalties are more severe in the way of fines, to which is added, in the case of officers, agents or employés of the company, the risk of imprisonment for years as a common felon. See also *Mercantile Trust Co.* v. *Texas &c. Ry. Co.*, 51 Fed. Rep. 529, 543; *Louisville &c. R. R. Co.* v. *McChord*, 103

Fed. Rep. 216, 223; *Consolidated Gas Co.* v. *Mayer*, 146 Fed. Rep. 150, 153. In *McGahey* v. *Virginia*, 135 U. S. 662, 694, it was held that to provide a different remedy to enforce a contract, which is unreasonable, and which imposes conditions not existing when the contract was made, was to offer no remedy, and when the remedy is so onerous and impracticable as to substantially give none at all the law is invalid, although what is termed a remedy is in fact given. See also *Bronson* v. *Kinzie*, 1 How. 311, 317; *Seibert* v. *Lewis*, 122 U. S. 284. If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now

necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event.

We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates. We also hold that the Circuit Court had jurisdiction under the cases already cited (and it was therefore its duty) to inquire whether the rates permitted by these acts or orders were too low and therefore confiscatory, and if so held, that the court then had jurisdiction to permanently enjoin the railroad company from putting them in force, and that it also had power, while the inquiry was pending, to grant a temporary injunction to the same effect.

Various affidavits were received upon the hearing before the court prior to the granting of the temporary injunction, and the hearing itself was, as appears from the opinion, full and deliberate, and the fact was found that the rates fixed by the commodity act, under the circumstances existing with

reference to the passenger rate act and the orders of the Commission, were not sufficient to be compensatory, and were in fact confiscatory, and the act was therefore unconstitutional. The injunction was thereupon granted with reference to the enforcement of the commodity act.

We have, therefore, upon this record the case of an unconstitutional act of the state legislature and an intention by the Attorney General of the State to endeavor to enforce its provisions, to the injury of the company, in compelling it, at great expense, to defend legal proceedings of a complicated and unusual character, and involving questions of vast importance to all employés and officers of the company, as well as to the company itself. The question that arises is whether there is a remedy that the parties interested may resort to, by going into a Federal court of equity, in a case involving a violation of the Federal Constitution, and obtaining a judicial investigation of the problem, and pending its solution obtain freedom from suits, civil or criminal, by a temporary injunction, and if the question be finally decided favorably to the contention of the company, a permanent injunction restraining all such actions or proceedings.

This inquiry necessitates an examination of the most material and important objection made to the jurisdiction of the Circuit Court, the objection being that the suit is, in effect, one against the State of Minnesota, and that the injunction issued against the Attorney General illegally prohibits state action, either criminal or civil, to enforce obedience to the statutes of the State. This objection is to be considered with reference to the Eleventh and Fourteenth Amendments to the Federal Constitution. The Eleventh Amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens of another State or citizens or subjects of any foreign State. The Fourteenth Amendment provides that no State shall deprive any person of life, liberty or property without due process of law, nor shall it deny to any person within its jurisdiction the equal protection of the laws.

The case before the Circuit Court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of the complainants protected by the latter Amendment. We think that whatever the rights of complainants may be, they are largely founded upon that Amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier Amendment. We may assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant. It applies to a suit brought against a State by one of its own citizens as well as to a suit brought by a citizen of another State. *Hans* v. *Louisiana*, 134 U. S. 1. It was adopted after the decision of this court in *Chisholm* v. *Georgia* (1793), 2 Dall. 419 where it was held that a State might be sued by a citizen of another State. Since that time there have been many cases decided in this court involving the Eleventh Amendment, among them being *Osborn* v. *United States Bank* (1824), 9 Wheat. 738, 846, 857, which held that the Amendment applied only to those suits in which the State was a party on the record. In the subsequent case of *Governor of Georgia* v. *Madrazo* (1828), 1 Pet. 110, 122, 123, that holding was somewhat enlarged, and Chief Justice Marshall, delivering the opinion of the court, while citing *Osborn* v. *United States Bank, supra*, said that where the claim was made, as in the case then before the court, against the Governor of Georgia as governor, and the demand was made upon him, not personally, but officially (for moneys in the treasury of the State and for slaves in possession of the state government), the State might be considered as the party on the record (page 123), and therefore the suit could not be maintained.

Davis v. *Gray*, 16 Wall. 203, 220, reiterates the rule of *Osborn* v. *United States Bank*, so far as concerns the right to enjoin a state officer from executing a state law in conflict with

the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.

In *Virginia Coupon Cases*, 114 U. S. 270, 296 (*Poindexter* v. *Greenhow*), it was adjudged that a suit against a tax collector who had refused coupons in payment of taxes, and, under color of a void law, was about to seize and sell the property of a taxpayer for non-payment of his taxes, was a suit against him personally as a wrongdoer and not against the State.

Hagood v. *Southern*, 117 U. S. 52, 67, decided that the bill was in substance a bill for the specific performance of a contract between the complainants and the State of South Carolina, and, although the State was not in name made a party defendant, yet being the actual party to the alleged contract the performance of which was sought and the only party by whom it could be performed, the State was, in effect, a party to the suit, and it could not be maintained for that reason. The things required to be done by the actual defendants were the very things which when done would constitute a performance of the alleged contract by the State.

The cases upon the subject were reviewed, and it was held, *In re Ayers*, 123 U. S. 443, that a bill in equity brought against officers of a State, who, as individuals, have no personal interest in the subject-matter of the suit, and defend only as representing the State, where the relief prayed for, if done, would constitute a performance by the State of the alleged contract of the State, was a suit against the State (page 504), following in this respect *Hagood* v. *Southern*, *supra*.

A suit of such a nature was simply an attempt to make the State itself, through its officers, perform its alleged contract, by directing those officers to do acts which constituted such performance. The State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State.

On the other hand, *United States* v. *Lee*, 106 U. S. 196, determined that an individual in possession of real estate under the Government of the United States, which claimed to be

its owner, was, nevertheless, properly sued by the plaintiff, as owner, to recover possession, and such suit was not one against the United States, although the individual in possession justified such possession under its authority. See also *Tindal* v. *Wesley*, 167 U. S. 204, to the same effect.

In *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9, a suit against land commissioners of the State was said not to be against the State, although the complainants sought to restrain the defendants, officials of the State, from violating, under an unconstitutional act, the complainants' contract with the State, and thereby working irreparable damage to the property rights of the complainants. *Osborn* v. *United States Bank*, *supra*, was cited, and it was stated: "But the general doctrine of *Osborn* v. *Bank of the United States*, that the Circuit Courts of the United States will restrain a state officer from executing an unconstitutional statute of the State, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from. The same principle is decided in *Scott* v. *Donald*, 165 U. S. 58, 67. And see *Missouri &c.* v. *Missouri Railroad Commissioners*, 183 U. S. 53.

The cases above cited do not include one exactly like this under discussion. They serve to illustrate the principles upon which many cases have been decided. We have not cited all the cases, as we have not thought it necessary. But the injunction asked for in the *Ayers Case*, 123 U. S. (*supra*), was to restrain the state officers from commencing suits under the act of May 12, 1887 (alleged to be unconstitutional), in the name of the State and brought to *recover taxes for its use*, on the ground that if such suits were commenced they would be a breach of a contract with the State. The injunction was declared illegal because the suit itself could not be entertained as it was one against the State to enforce its alleged contract. It was said, however, that if the court had power to entertain such a suit, it would have power to grant the restraining order

preventing the commencement of suits. (Page 487.) It was not stated that the suit or the injunction was necessarily confined to a case of a threatened direct trespass upon or injury to property.

Whether the commencement of a suit could ever be regarded as an actionable injury to another, equivalent in some cases to a trespass such as is set forth in some of the foregoing cases, has received attention in the rate cases, so called. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362 (a rate case), was a suit against the members of a railroad commission (created under an act of the State of Texas) and the Attorney General, all of whom were held suable, and that such suit was not one against the State. The Commission was enjoined from enforcing the rates it had established under the act, and the Attorney General was enjoined from instituting suits to recover penalties for failing to conform to the rates fixed by the Commission under such act. It is true the statute in that case creating the board provided that suit might be maintained by any dissatisfied railroad company, or other party in interest, in a court of competent jurisdiction in Travis County, Texas, against the Commission as defendant. This court held that such language permitted a suit in the United States Circuit Court for the Western District of Texas, which embraced Travis County, but it also held that, irrespective of that consent, the suit was not in effect a suit against the State (although the Attorney General was enjoined), and therefore not prohibited under the amendment. It was said in the opinion, which was delivered by Mr. Justice Brewer, that the suit could not in any fair sense be considered a suit against the State (page 392), and the conclusion of the court was that the objection to the jurisdiction of the Circuit Court was not tenable, whether that jurisdiction was rested (page 393), "upon the provisions of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress and the sanction of the Constitution of the United States." Each of these grounds is effective and both are of equal force.

Union Pacific &c. v. *Mason City Company*, 199 U. S. 160, 166.

In *Smyth* v. *Ames*, 169 U. S. 466 (another rate case), it was again held that a suit against individuals, for the purpose of preventing them, as officers of the State, from enforcing, by the commencement of suits or by indictment, an unconstitutional enactment to the injury of the rights of the plaintiff, was not a suit against a State within the meaning of the Amendment. At page 518, in answer to the objection that the suit was really against the State, it was said: "It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment." The suit was to enjoin the enforcement of a statute of Nebraska because it was alleged to be unconstitutional, on account of the rates being too low to afford some compensation to the company, and contrary, therefore, to the Fourteenth Amendment.

There was no special provision in the statute as to rates, making it the duty of the Attorney General to enforce it, but under his general powers he had authority to ask for a mandamus to enforce such or any other law. *State of Nebraska ex rel. &c.* v. *The Fremont &c. Railroad Co.*, 22 Nebraska, 313.

The final decree enjoined the Attorney General from bringing any suit (page 477) by way of injunction, mandamus, civil action or indictment, for the purpose of enforcing the provisions of the act. The fifth section of the act provided that an action might be brought by a railroad company in the Supreme Court of the State of Nebraska; but this court did not base its decision on that section when it held that a suit of the nature of that before it was not a suit against a State, although brought against individual state officers for the purpose of enjoining them from enforcing, either by civil proceeding or indictment, an unconstitutional enactment to the injury of the plaintiff's right. (Page 518.)

This decision was reaffirmed in *Prout* v. *Starr*, 188 U. S. 537, 542.

Attention is also directed to the case of *Missouri &c. Rwy. Co.* v. *Missouri R. R. &c. Commissioners*, 183 U. S. 53. That was a suit brought in a state court of Missouri by the railroad commissioners of the State, who had the powers granted them by the statutes set forth in the report. Their suit was against the railway company to compel it to discontinue certain charges it was making for crossing the Boonville bridge over the Missouri River. The defendant sought to remove the case to the Federal court, which the plaintiffs resisted, and the state court refused to remove on the ground that the real plaintiff was the State of Missouri, and it was proper to go behind the face of the record to determine that fact. In regular manner the case came here, and this court held that the State was not the real party plaintiff, and the case had therefore been properly removed from the state court, whose judgment was thereupon reversed.

Applying the same principles of construction to the removal act which had been applied to the Eleventh Amendment, it was said by this court that the State might be the real party plaintiff when the relief sought enures to it alone, and in whose favor the judgment or decree, if for the plaintiff, will effectively operate.

Although the case is one arising under the removal act and does not involve the Eleventh Amendment, it nevertheless illustrates the question now before us, and reiterates the doctrine that the State is not a party to a suit simply because the State Railroad Commission is such party.

The doctrine of *Smyth* v. *Ames* is also referred to and reiterated in *Gunter, Attorney General*, v. *Atlantic &c. Railroad Co.*, 200 U. S. 273, 283. See also *McNeill* v. *Southern Railway*, 202 U. S. 543–559; *Mississippi Railroad Commission* v. *Illinois &c. Railroad Co.*, 203 U. S. 335, 340.

The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers

of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

It is objected, however, that *Fitts* v. *McGhee*, 172 U. S. 516, has somewhat limited this principle, and that, upon the authority of that case, it must be held that the State was a party to the suit in the United States Circuit Court, and the bill should have been dismissed as to the Attorney General on that ground.

We do not think such contention is well founded. The doctrine of *Smyth* v. *Ames* was neither overruled nor doubted in the *Fitts case*. In that case the Alabama legislature, by the act of 1895, fixed the tolls to be charged for crossing the bridge. The penalties for disobeying that act, by demanding and receiving higher tolls, were to be collected by the persons paying them. No officer of the State had any official connection with the recovery of such penalties. The indictments mentioned were found under another state statute, set forth at page 520 of the report of the case, which provided a fine against an officer of a company for taking any greater rate of toll than was authorized by its charter, or, if the charter did not specify the amount, then the fine was imposed for charging any unreasonable toll, to be determined by a jury. This act was not claimed to be unconstitutional, and the indictments found under it were not necessarily connected with the alleged unconstitutional act fixing the tolls. As no state officer who was made a party bore any close official connection with the act fixing the tolls, the making of such officer a party defendant was a simple effort to test the constitutionality of such act in that way, and there is no principle upon which it could be done. A state superintendent of schools might as well have been made a party. In the light of this fact it was said in the opinion (page 530):

"In the present case, as we have said, neither of the State officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."

In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.

It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed (154 U. S. 362, 366, § 19 of the act), but that may possibly make the duty more clear; if it otherwise exist it is equally efficacious. The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.

In the course of the opinion in the *Fitts case* the *Reagan* and

Smyth cases were referred to (with others) as instances of state officers specially charged with the execution of a state enactment alleged to be unconstitutional, and who commit under its authority some specific wrong or trespass to the injury of plaintiff's rights. In those cases the only wrong or injury or trespass involved was the threatened commencement of suits to enforce the statute as to rates, and the threat of such commencement was in each case regarded as sufficient to authorize the issuing of an injunction to prevent the same. The threat to commence those suits under such circumstances was therefore necessarily held to be equivalent to any other threatened wrong or injury to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer. The being specially charged with the duty to enforce the statute is sufficiently apparent when such duty exists under the general authority of some law, even though such authority is not to be found in the particular act. It might exist by reason of the general duties of the officer to enforce it as a law of the State.

The officers in the *Fitts case* occupied the position of having no duty at all with regard to the act, and could not be properly made parties to the suit for the reason stated.

It is also objected that as the statute does not specifically make it the duty of the Attorney General (assuming he has that general right) to enforce it, he has under such circumstances a full general discretion whether to attempt its enforcement or not, and the court cannot interfere to control him as Attorney General in the exercise of his discretion.

In our view there is no interference with his discretion under the facts herein. There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty. *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541.

The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.

It is also argued that the only proceeding which the Attorney General could take to enforce the statute, so far as his office is concerned, was one by mandamus, which would be commenced by the State in its sovereign and governmental character, and that the right to bring such action is a necessary attribute of a sovereign government. It is contended that the complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the State of Minnesota so far as litigation is concerned, and that when or how he shall use it is a matter resting in his discretion and cannot be controlled by any court.

The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the

superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. See *In re Ayers, supra*, page 507. It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. If the question of unconstitutionality with reference, at least, to the Federal Constitution be first raised in a Federal court that court, as we think is shown by the authorities cited hereafter, has the right to decide it to the exclusion of all other courts.

The question remains whether the Attorney General had, by the law of the State, so far as concerns these rate acts, any duty with regard to the enforcement of the same. By his official conduct it seems that he regarded it as a duty connected with his office to compel the company to obey the commodity act, for he commenced proceedings to enforce such obedience immediately after the injunction issued, at the risk of being found guilty of contempt by so doing.

The duties of the Attorney General, as decided by the Supreme Court of the State of Minnesota, are created partly by statute and exist partly as at common law. *State ex rel. Young, Attorney General*, v. *Robinson* (decided June 7, 1907), 112 N. W. Rep. 269. In the above-cited case it was held that the Attorney General might institute, conduct and maintain all suits and proceedings he might deem necessary for the enforcement of the laws of the State, the preservation of order and the protection of public rights, and that there were no statutory restrictions in that State limiting the duties of the Attorney General in such case.

Section 3 of chapter 227 of the General Laws of Minnesota, 1905 (same law, § 58, Revised Laws of Minnesota, 1905),

imposes the duty upon the Attorney General to cause proceedings to be instituted against any corporation whenever it shall have offended against the laws of the State. By § 1960 of the Revised Laws of 1905 it is also provided that the Attorney General shall be *ex officio* attorney for the railroad commission and it is made his duty to institute and prosecute all actions which the Commission shall order brought, and shall render the commissioners all counsel and advice necessary for the proper performance of their duties.

It is said that the Attorney General is only bound to act when the Commission orders action to be brought, and that § 5 of the commodity act (April 18, 1907) expressly provides that no duty shall rest upon the Commission to enforce the act, and hence no duty other than that which is discretionary rests upon the Attorney General in that matter. The provision is somewhat unusual, but the reasons for its insertion in that act are not material, and neither require nor justify comment by this court.

It would seem to be clear that the Attorney General, under his power existing at common law and by virtue of these various statutes, had a general duty imposed upon him, which includes the right and the power to enforce the statutes of the State, including, of course, the act in question, if it were constitutional. His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States Circuit Court.

It is further objected (and the objection really forms part of the contention that the State cannot be sued) that a court of equity has no jurisdiction to enjoin criminal proceedings, by indictment or otherwise, under the state law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court having first obtained jurisdiction over the subject matter, has

the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. *Prout* v. *Starr*, 188 U. S. 537, 544. But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court. *Taylor* v. *Taintor*, 16 Wall. 366, 370; *Harkrader* v. *Wadley*, 172 U. S. 148.

Where one commences a criminal proceeding who is already party to a suit then pending in a court of equity, if the criminal proceedings are brought to enforce the same right that is in issue before that court, the latter may enjoin such criminal proceedings. *Davis &c. Co.* v. *Los Angeles*, 189 U. S. 207. In *Dobbins* v. *Los Angeles*, 195 U. S. 223–241, it is remarked by Mr. Justice Day, in delivering the opinion of the court, that "it is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity." *Smyth* v. *Ames* (*supra*) distinctly enjoined the proceedings by indictment to compel obedience to the rate act.

These cases show that a court of equity is not always precluded from granting an injunction to stay proceedings in criminal cases, and we have no doubt the principle applies in a case such as the present. *In re Sawyer*, 124 U. S. 200, 211, is not to the contrary. That case holds that in general a court of equity has no jurisdiction of a bill to stay criminal proceedings, but it expressly states an exception, "unless they are instituted by a party to the suit already pending before it and to try the same right that is in issue there." Various authorities are cited to sustain the exception. The criminal proceedings here that could be commenced by the state authorities would be under the statutes relating to passenger or freight rates, and their validity is the very question involved in the suit in the United States Circuit Court. The right to restrain proceedings by mandamus is based upon the same foundation and governed by the same principles.

It is proper to add that the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a state court would be a violation of the whole scheme of our Government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account.

The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction is plain, and no power to do the latter exists because of a power to do the former.

It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery.

Another obstacle to making the test on the part of the company might be to find an agent or employé who would disobey

the law, with a possible fine and imprisonment staring him in the face if the act should be held valid. Take the passenger rate act, for instance: A sale of a single ticket above the price mentioned in that act might subject the ticket agent to a charge of felony, and upon conviction to a fine of five thousand dollars and imprisonment for five years. It is true the company might pay the fine, but the imprisonment the agent would have to suffer personally. It would not be wonderful if, under such circumstances, there would not be a crowd of agents offering to disobey the law. The wonder would be that a single agent should be found ready to take the risk.

If, however, one should be found and the prosecutor should elect to proceed against him, the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. Questions of the cost of transportation of passengers and freight, the net earnings of the road, the separation of the cost and earnings, within the State from those arising beyond its boundaries, all depending upon the testimony of experts and the examination of figures relating to these subjects, as well, possibly, as the expenses attending the building and proper cost of the road, would necessarily form the chief matter of inquiry, and intelligent answers could only be given after a careful and prolonged examination of the whole evidence, and the making of calculations based thereon. All material evidence having been taken upon these issues, it has been held that it ought to be referred to the most competent and reliable master to make all needed computations and to find therefrom the necessary facts upon which a judgment might be rendered that might be reviewed by this court. *Chicago &c. Railway Co.* v. *Tompkins*, 176 U. S. 167. From all these considerations it is plain that this is not a proper suit for investigation by a jury. Suits for penalties, or in-

dictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that the rates were too low and therefore the act invalid.

We do not say the company could not interpose this defense in an action to recover penalties or upon the trial of an indictment (*St. Louis &c. Ry. Co.* v. *Gill*, 156 U. S. 649), but the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible.

To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take. Over eleven thousand millions of dollars, it is estimated, are invested in railroad property, owned by many thousands of people who are scattered over the whole country from ocean to ocean, and they are entitled to equal protection from the laws and from the courts, with the owners of all other kinds of property, no more, no less. The courts having jurisdiction, Federal or state, should at all times be open to them as well as to others, for the purpose of protecting their property and their legal rights.

All the objections to a remedy at law as being plainly inadequate are obviated by a suit in equity, making all who are directly interested parties to the suit, and enjoining the enforcement of the act until the decision of the court upon the legal question.

An act of the legislature fixing rates, either for passengers or freight, is to be regarded as *prima facie* valid, and the onus rests upon the company to prove its assertion to the contrary. Under such circumstances it was stated by Mr. Justice Miller,

in his concurring opinion in *Chicago &c. Co.* v. *Minnesota*, 134 U. S. 418, 460, that the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its Commission is by a bill in chancery, asserting its unreasonable character, and that until the decree of the court in such equity suit was obtained it was not competent for each individual having dealings with a carrier, or for the carrier in regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive manner. This remedy by bill in equity is referred to and approved by Mr. Justice Shiras, in delivering the opinion of the court in *St. Louis &c. Co.* v. *Gill*, 156 U. S. 649, 659, 666, although that question was not then directly before the court. Such remedy is undoubtedly the most convenient, the most comprehensive and the most orderly way in which the rights of all parties can be properly, fairly and adequately passed upon. It cannot be to the real interest of anyone to injure or cripple the resources of the railroad companies of the country, because the prosperity of both the railroads and the country is most intimately connected. The question of sufficiency of rates is important and controlling, and being of a judicial nature it ought to be settled at the earliest moment by some court, and when a Federal court first obtains jurisdiction it ought, on general principles of jurisprudence, to be permitted to finish the inquiry and make a conclusive judgment to the exclusion of all other courts. This is all that is claimed, and this, we think, must be admitted.

Finally it is objected that the necessary result of upholding this suit in the Circuit Court will be to draw to the lower Federal courts a great flood of litigation of this character, where one Federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the State, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free from doubt. We

think such rule is, and will be, followed by all the judges of the Federal courts.

And, again, it must be remembered that jurisdiction of this general character has, in fact, been exercised by Federal courts from the time of *Osborn* v. *United States Bank* up to the present; the only difference in regard to the case of Osborn and the case in hand being that in this case the injury complained of is the threatened commencement of suits, civil or criminal, to enforce the act, instead of, as in the *Osborn case*, an actual and direct trespass upon or interference with tangible property. A bill filed to prevent the commencement of suits to enforce an unconstitutional act, under the circumstances already mentioned, is no new invention, as we have already seen. The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act, is not of a radical nature, and does not extend, in truth, the jurisdiction of the courts over the subject matter. In the case of the interference with property the person enjoined is assuming to act in his capacity as an official of the State, and justification for his interference is claimed by reason of his position as a state official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature. So, where the state official, instead of directly interfering with tangible property, is about to commence suits, which have for their object the enforcement of an act which violates the Federal Constitution, to the great and irreparable injury of the complainants, he is seeking the same justification from the authority of the State as in other cases. The sovereignty of the State is, in reality, no more involved in one case than in the other. The State cannot in either case impart to the official immunity from responsibility to the supreme authority of the United States. See *In re Ayers*, 123 U. S. 507.

This supreme authority, which arises from the specific provisions of the Constitution itself, is nowhere more fully illustrated than in the series of decisions under the Federal *habeas*

corpus statute (§ 753, Rev. Stat.), in some of which cases persons in the custody of state officers for alleged crimes against the State have been taken from that custody and discharged by a Federal court or judge, because the imprisonment was adjudged to be in violation of the Federal Constitution. The right to so discharge has not been doubted by this court, and it has never been supposed there was any suit against the State by reason of serving the writ upon one of the officers of the State in whose custody the person was found. In some of the cases the writ has been refused as matter of discretion, but in others it has been granted, while the power has been fully recognized in all. *Ex parte Royall*, 117 U. S. 241; *In re Loney*, 134 U. S. 372; *In re Neagle*, 135 U. S. 1; *Baker* v. *Grice*, 169 U. S. 284; *Ohio* v. *Thomas*, 173 U. S. 276; *Minnesota* v. *Brundage*, 180 U. S. 499, 502; *Reid* v. *Jones*, 187 U. S. 153; *United States* v. *Lewis*, 200 U. S. 1; *In re Lincoln*, 202 U. S. 178; *Urquhart* v. *Brown*, 205 U. S. 179.

It is somewhat difficult to appreciate the distinction which, while admitting that the taking of such a person from the custody of the State by virtue of service of the writ on the state officer in whose custody he is found, is not a suit against the State, and yet service of a writ on the Attorney General to prevent his enforcing an unconstitutional enactment of a state legislature is a suit against the State.

There is nothing in the case before us that ought properly to breed hostility to the customary operation of Federal courts of justice in cases of this character.

The rule to show cause is discharged and the petition for writs of *habeas corpus* and certiorari is dismissed.

So ordered.

MR. JUSTICE HARLAN, dissenting.

Although the history of this litigation is set forth in the opinion of the court, I deem it appropriate to restate the principal facts of the case in direct connection with my examination of the question upon which the decision turns.

That question is, whether the suit in the Circuit Court of the United States was, *as to the relief sought against the Attorney General of Minnesota*, forbidden by the Eleventh Amendment of the Constitution of the United States, declaring that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." That examination, I may say at the outset, is entered upon with no little embarrassment, in view of the fact that the views expressed by me are not shared by my brethren. I may also frankly admit embarrassment arising from certain views stated in dissenting opinions heretofore delivered by me which did not, at the time, meet the approval of my brethren, and which I do not now myself entertain. What I shall say in this opinion will be in substantial accord with what the court has heretofore decided, while the opinion of the court departs, as I think, from principles previously announced by it upon full consideration. I propose to adhere to former decisions of the court, whatever may have been once my opinion as to certain aspects of this general question.

The plaintiffs in the suit referred to, Perkins and Shepard, were shareholders of the Northern Pacific Railway Company and citizens, respectively, of Iowa and Minnesota. The defendants were the railway company, Edward T. Young, Attorney General of Minnesota, the several members of the State Railroad and Warehouse Commission, and certain persons who were shippers of freight over the lines of that railway.

The general object of the suit was to prevent compliance with the provisions of certain acts of the Minnesota legislature and certain orders of the State Railroad and Warehouse Commission, indicating the rates which the State permits to be charged for the transportation of passengers and commodities upon railroads within its limits; also, to prevent shippers from bringing actions against the railway company to enforce those acts and orders.

The bill, among other things, prayed that Edward T. Young, "as Attorney General of the State of Minnesota," and the members of the State Railroad and Warehouse Commission (naming them) be enjoined from all attempts to compel the railway company to put in force the rates or any of them prescribed by said orders, and "from taking any action, step or proceeding against said Railway Company, or any of its officers, directors, agents or employés, to enforce any penalties or remedies for the violation by said Railway Company of said orders or either of them;" and that said Young, "as Attorney General," be enjoined from taking any action, step or proceeding against the railway company, its officers, agents or employés, to enforce the penalties and remedies specified in those acts.

The court gave a temporary injunction as prayed for. The Attorney General of Minnesota appeared specially and, without submitting to or acknowledging the jurisdiction of the court, moved to dismiss the suit as to him, upon the ground that the State had not consented to be sued, and also because the bill was exhibited against him "as, and only as, the Attorney General of the State of Minnesota," to restrain him, by injunction, from exercising the discretion vested in him to commence appropriate actions, on behalf of the State, to enforce or to test the validity of its laws. He directly raised the question that the suit as to him, in his official capacity, was one against the State, in violation of the Eleventh Amendment.

In response to an order to show cause why the injunction asked for should not be granted the Attorney General also appeared specially and urged like objections to the suit against him in the Circuit Court.

After hearing the parties the court made an order, September 23, 1907, whereby the railway company, its officers, directors, agents, servants and employés, were enjoined until the further order of the court from publishing, adopting or putting into effect the tariffs, rates or charges specified in the

act of April 18, 1907. The court likewise enjoined the defendant Young, "as Attorney General of the State of Minnesota," from "taking or instituting any action, suit, step or proceeding to enforce the penalties and remedies specified in said acts or either thereof, or to compel obedience to said act or compliance therewith or any part thereof." A like injunction was granted against the defendant shippers.

On the next day, September 24, 1907, the State of Minnesota, "on the relation of Edward T. Young, Attorney General," commenced an action in one of its own courts against the Northern Pacific Railway Company—*the only relief sought* being a mandamus ordering the company to adopt, publish, keep for public inspection, and put into effect, as the rates and charges to be maintained for the transportation of freight between stations in Minnesota, those named and specified in what is known as chapter 232 of the Session Laws of Minnesota for 1907. That was the act which it was the object of the Perkins-Shepard suit in the Federal court to strike down and nullify. An alternative writ of mandamus, such as the State asked, was issued by the state court.

The institution, in the state court, by the State, on the relation of its Attorney General, of the mandamus proceeding against the railway company having been brought to the attention of the Federal Circuit Court, a rule was issued against the defendant Young to show cause why he should not be punished as for contempt. Answering that rule, he alleged, among other things, that the mandamus proceeding was brought by and on behalf of the State, through him as its Attorney General; that in every way possible he had objected to such jurisdiction on the ground that the action was commenced against him solely as the Attorney General for Minnesota in order to prevent him from instituting in the proper courts civil actions for and in the name of the State to enforce or test the validity of its laws; *that there is no other action or proceeding pending or contemplated by this defendant against said railway company, except said proceedings in mandamus*

hereinbefore referred to. Defendant expressly disclaimed any intention to treat this court with disrespect in the commencement of the proceedings referred to, "but believing that the decision of this court in this action, holding that it had jurisdiction to enjoin this defendant, as such Attorney General, from performing his discretionary official duties, was in conflict with the Eleventh Amendment of the Constitution of the United States, as the same has been interpreted and applied by the United States Supreme Court, defendant believed it to be his duty as such Attorney General to commence said mandamus proceedings for and in behalf of the State, and it was in this belief that said proceedings were commenced solely for the purpose of enforcing the said law of the State of Minnesota."

The rule was heard, and the Attorney General was held to be in contempt, the order of the Federal court being: "Ordered further, that said Edward T. Young *forthwith dismiss or cause to be dismissed the suit of The State of Minnesota* on the Relation of Edward T. Young, Attorney General, Plaintiff, *v.* Northern Pacific Railway Company, Defendant, heretofore instituted by him in the District Court of the County of Ramsey, Second Judicial District, State of Minnesota. Ordered further, that for his said contempt said Edward T. Young be fined the sum of one hundred dollars and *stand committed in the custody* of the Marshal of this court until the same be paid, and until he purge himself of his contempt by dismissing or causing to be dismissed said suit last herein mentioned."

The present proceeding was commenced by an original application by Young to this court for a writ of *habeas corpus.* The petitioner, in his application, proceeds upon the ground that he is held in custody in violation of the Constitution of the United States. The petition set out all the steps taken in the suit in the Federal court, alleging, among other things: "That your petitioner's office as Attorney General of the State of Minnesota is established and provided for by the constitution of the said State, section 1 of Article V thereof

providing as follows, to wit: 'The Executive Department shall consist of a Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer and Attorney General, who shall be chosen by the electors of the State.' That neither by statute nor otherwise is your petitioner charged with any special duty of a ministerial character in the doing or not doing of which said complainants in the said bill of complaint or the said Northern Pacific Railway Company had any legal right, and that whatever duties your petitioner had or has with respect to the several matters complained of in the said bill of complaint, are of an executive and discretionary nature. That in no case could your petitioner, even though it was his intention so to do, which it was not, deprive the said complainants or the said Northern Pacific Railway Company, or either of them, of any property, nor could he trespass upon their rights in any particular, and that all he could do *as Attorney General* as aforesaid and all that it was his duty to do in that capacity, and all that he intended to do or would do, *was to commence formal judicial proceedings in the appropriate court of Minnesota against the said Northern Pacific Railway Company, its officers, agents and employés*, to compel the said company, its agents and servants, to adopt and put in force the schedule of freight rates, tariffs and charges prescribed by said chapter 232, Laws 1907, of the State of Minnesota." He renewed the objection that the suit instituted by Perkins and Shepard, in so far as the same is against him, was a suit against the State to prevent his commencing the proposed action in the name of the State, and was in restraint of the State itself, "and that the said suit is one against the said State in violation of the Eleventh Amendment to the Constitution of the United States, and that therefore the same is and was, so far as your petitioner is concerned, beyond the jurisdiction of the said Circuit Court," etc.

This statement will sufficiently indicate the nature of the question to be now examined upon its merits.

Let it be observed that the suit instituted by Perkins and

Shepard in the Circuit Court of the United States was, as to the defendant Young, one against him *as, and only because he was,* Attorney General of Minnesota. No relief was sought against him individually but only in his capacity *as* Attorney General. And the manifest, indeed the avowed and admitted, object of seeking such relief was *to tie the hands* of the *State* so that it could not in any manner or by any mode of proceeding, *in its own courts,* test the validity of the statutes and orders in question. It would therefore seem clear that within the true meaning of the Eleventh Amendment the suit brought in the Federal court was one, in legal effect, against the State—as much so as if the State had been formally named on the record as a party—and therefore it was a suit to which, under the Amendment, so far as the State or its Attorney General was concerned, the judicial power of the United States did not and could not extend. If this proposition be sound it will follow—indeed, it is conceded that if, so far as relief is sought against the Attorney General of Minnesota, this be a suit against the State—then the order of the Federal court enjoining that officer from taking any action, suit, step or proceeding to compel the railway company to obey the Minnesota statute was beyond the jurisdiction of that court and wholly void; in which case, that officer was at liberty to proceed in the discharge of his official duties as defined by the laws of the State, and the order adjudging him to be in contempt for bringing the mandamus proceeding in the state court was a nullity.

The fact that the Federal Circuit Court had, prior to the institution of the mandamus suit in the state court, preliminarily (but not finally) held the statutes of Minnesota and the orders of its Railroad and Warehouse Commission in question to be in violation of the Constitution of the United States, was no reason why that court should have laid violent hands upon the Attorney General of Minnesota and by its orders have deprived the State of the services of its constitutional law officer in its own courts. Yet that is what was done by

the Federal Circuit Court; for, the intangible thing, called a State, however extensive its powers, can never appear or be represented or known in any court in a litigated case, except by and through its officers. When, therefore, the Federal court forbade the defendant Young, as Attorney General of Minnesota, from taking any action, suit, step or proceeding whatever looking to the enforcement of the statutes in question, it said in effect to the State of Minnesota: "It is true that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to its people, and it is true that under the Constitution the judicial power of the United States does not extend to any suit brought against a State by a citizen of another State or by a citizen or subject of a foreign State, yet the Federal court adjudges that you, the State, although a sovereign for many important governmental purposes, shall not appear in your own courts, by your law officer, with the view of enforcing, or even for determining the validity of the state enactments which the Federal court has, upon a preliminary hearing, declared to be in violation of the Constitution of the United States."

This principle, if firmly established, would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the National and state governments. It would enable the subordinate Federal courts to supervise and control the official action of the States as if they were "dependencies" or provinces. It would place the States of the Union in a condition of inferiority never dreamed of when the Constitution was adopted or when the Eleventh Amendment was made a part of the Supreme Law of the Land. I cannot suppose that the great men who framed the Constitution ever thought the time would come when a subordinate Federal court, having no power to compel a State, in its corporate capacity, to appear before it as a litigant, would yet assume to deprive a State of the right to be represented in its own courts by its

regular law officer. That is what the court below did, as to Minnesota, when it adjudged that the appearance of the defendant Young *in the state court*, as the Attorney General of Minnesota, representing his State as its chief law officer, was a contempt of the authority of the Federal court, punishable by fine and imprisonment. Too little consequence has been attached to the fact that the courts of the States are under an obligation equally strong with that resting upon the courts of the Union to respect and enforce the provisions of the Federal Constitution as the Supreme Law of the Land, and to guard rights secured or guaranteed by that instrument. We must assume—a decent respect for the States requires us to assume—that the state courts will enforce every right secured by the Constitution. If they fail to do so, the party complaining has a clear remedy for the protection of his rights; for, he can come by writ of error, in an orderly, judicial way, from the highest court of the State to this tribunal for redress in respect of every right granted or secured by that instrument and denied by the state court. The state courts, it should be remembered, have jurisdiction concurrent with the courts of the United States of all suits of a civil nature, at common law or equity involving a prescribed amount, arising under the Constitution or laws of the United States. 25 Stat. 434. And this court has said: "A state court of original jurisdiction, having the parties before it, may consistently with existing Federal legislation determine cases at law or in equity arising under the Constitution or laws of the United States or involving rights dependent upon such Constitution or laws. Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties

made under their authority, as the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding.' If they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination." *Robb* v. *Connolly*, 111 U. S. 624, 637. So that an order of the Federal court preventing the State from having the services of its Attorney General in one of its own courts, except at the risk of his being fined and arrested, cannot be justified upon the ground that the question of constitutional law, involved in the enforcement of the statutes in question, was beyond the competency of a state court to consider and determine, primarily, as between the parties before it in a suit brought by the State itself.

At the argument of this case counsel for the railway company insisted that the provisions of the act in question were so drastic that they could be enforced by the State in its own courts with such persistency and in such a manner as, in a very brief period, to have the railway officers and agents all in jail, the business of the company destroyed and its property confiscated by heavy and successive penalties, before a final judicial decision as to the constitutionality of the act could be obtained. I infer from some language in the court's opinion that these apprehensions are shared by some of my brethren. And this supposed danger to the railway company and its shareholders seems to have been the basis of the action of the Federal Circuit Court when, by its order directed against the Attorney General of Minnesota, it practically excluded the State from its own courts in respect of the issues here involved. But really no such question as to the state statute is here involved or need be now considered; for it cannot possibly arise on the hearing of the present application of that officer for discharge on *habeas corpus*. The only question now before this court is whether the suit by Perkins and Shepard in the Federal

court was not, upon its face, *as to the relief sought against the Attorney General of Minnesota*, a suit against the State. Stated in another form, the question is whether that court may, *by operating upon that officer in his official capacity*, by means of fine and imprisonment, prevent the State from being represented by its law officer in one of its own courts? If the Federal court could not thus put manacles upon the State so as to prevent it from being represented by its Attorney General in its own court and from having the state court pass upon the validity of the state enactment in question in the Perkins-Shepard suit, that is an end to this *habeas corpus* proceeding, and the Attorney General of Minnesota should be discharged by order of this court from custody.

It is to be observed that when the State was in effect prohibited by the order of the Federal court from appearing in its own courts, there was no danger, absolutely none whatever, from anything that the Attorney General had ever done or proposed to do, that the property of the railway company would be confiscated and its officers and agents imprisoned, beyond the power of that company to stay any wrong done *by bringing to this court, in regular order, any final judgment of the state court, in the mandamus suit, which may have been in derogation of a Federal right.* When the Attorney General instituted the mandamus proceeding in the state court against the railway company there was in force, it must not be forgotten, an order of injunction by the Federal court which prevented that company from obeying the state law. There was consequently no danger from that direction. Besides, the mandamus proceeding was not instituted for the recovery of any of the penalties prescribed by the state law, and therefore no judgment in that case could operate directly upon the property of the railway company or upon the persons of its officers or agents. The Attorney General in his response to the rule against him assured the Federal court that he did not contemplate any proceeding whatever against the railway company except the one in mandamus. Suppose the

mandamus case had been finally decided in the state court, the way was open for the railway company to preserve any question it made as to its rights under the Constitution, and, in the event of a decision adverse to it in that court, at once to carry the case to the highest court of Minnesota and thence by a writ of error bring it to this court. That course would have served to determine every question of constitutional law raised by the suit in the Federal court in an orderly way without trampling upon the State, and without interfering, in the meantime, with the operation of the railway property in the accustomed way. Instead of adopting that course—so manifestly consistent with the dignity and authority of both the Federal and state judicial tribunals—the Federal court practically closed the state courts against the State itself when it adjudged that the Attorney General, without regard to the wishes of the Governor of Minnesota, and without reference to his duties as prescribed by the laws of that State, should stand in the custody of the Marshal, unless he dismissed the mandamus suit. If the Federal court could thus prohibit the law officer of the State from representing it in a suit brought in the state court, why might not the bill in the Federal court be so amended that that court could reach all the district attorneys in Minnesota and forbid them from bringing to the attention of grand juries and the state courts violations of the state act by the railway company? And if a grand jury was about to inquire into the acts of the railway company in respect of the matter of its rates, why may not the Federal court, proceeding upon the same grounds on which it has moved against the Attorney General, enjoin the finding or returning of indictments against the railway company? If an indictment was returned against the railway company, and was about to be tried by a petit jury, why could not the Federal court, upon the principles now announced, forbid the jury to proceed against the railway company, and if it did, punish every petit juryman as for contempt of court? Indeed, why may it not lay its hands on the Governor of the State and

forbid him from appealing to the courts of Minnesota in the name of the State to test the validity of the act in question? And why may not the Federal court lay its hands even upon the judge of the state court itself, whenever it proceeds against the railway company under the state law?

The subject matter of these questions has evidently been considered by this court, and the startling consequences that would result from an affirmative answer to them have not been overlooked; for, in its opinion, I find these observations: "It is proper to add that the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a state court would be a violation *of the whole scheme of our government.* If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account. The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction is plain, and no power to do the latter exists because of a power to do the former." If an order of the Federal court forbidding a state court or its grand jury from attempting to enforce a state enactment would be "a violation of the whole scheme of our government," it is difficult to perceive why an order of that court, forbidding the chief law officer and all the district attorneys of a State to represent it in the courts, in a particular case, and practically, in that way, closing the doors of the state court against the State, would not also be inconsistent with the whole scheme of our government, and, therefore, beyond the power of the court to make.

Whether the Minnesota statutes are or are not violative of the Constitution is not, as already suggested, a question in this *habeas corpus* proceeding. I do not, therefore, stop to consider whether those statutes are repugnant to the Constitution upon the ground that by their necessary operation, when enforced, they will prevent the railway company from contesting their validity, or upon the ground that they are confiscatory and therefore obnoxious to the requirement of due process of law. While the argument at the bar in support of each of these propositions was confessedly of great force and persuasiveness, those points need not be now examined. I express no opinion about them. Their soundness may, however, be conceded for the purposes of this discussion. Indeed, it may be assumed for the purposes of this discussion that these state enactments are harsh and intemperate and, in some of their features, invalid. But those questions are wholly apart from the present proceeding. If we now consider them we must go out of our way in order to do so. We have no evidence in this proceeding, as to the effect which the statutes, if enforced, would have upon the value either of the railway property or of the bonds or stocks of the railway company. The question of their validity has not been finally decided by the Circuit Court, and we have not before us even the evidence upon which its preliminary injunction was based. The essential and only question now before us or that need be decided is whether an order by the Federal court which prevents the State from being represented in its own courts, by its chief law officer, upon an issue involving the constitutional validity of certain state enactments, does not make a suit against the State within the meaning of the Eleventh Amendment. If it be a suit of that kind, then, it is conceded, the Circuit Court was without jurisdiction to fine and imprison the petitioner and he must be discharged, whatever our views may be as to the validity of those state enactments. This must necessarily be so unless the Amendment has less force and a more restricted meaning now than it had at the time of its adop-

tion, and unless a suit against the Attorney General of a State, in his official capacity, is not one against a State under the Eleventh Amendment when its determination depends upon a question of constitutional power or right under the Fourteenth Amendment. In that view I cannot concur. In my opinion the Eleventh Amendment has not been modified in the slightest degree as to its scope or meaning by the Fourteenth Amendment, and a suit which, in its essence, is one against the State remains one of that character and is forbidden even when brought to strike down a state statute alleged to be in violation of that clause of the Fourteenth Amendment forbidding the deprivation by a State of life, liberty or property without due process of law. If a suit be commenced in a state court, and involves a right secured by the Federal Constitution, the way is open under our incomparable judicial system to protect that right, first, by the judgment of the state court, and ultimately by the judgment of this court, upon writ of error. But such right cannot be protected by means of a suit which, at the outset, is, directly or in legal effect, one against the State whose action is alleged to be illegal. That mode of redress is absolutely forbidden by the Eleventh Amendment and cannot be made legal by mere construction, or by any consideration of the consequences that may follow from the operation of the statute. Parties cannot, in any case, obtain redress by a suit *against the State.* Such has been the uniform ruling in this court, and it is most unfortunate that it is now declared to be competent for a Federal Circuit Court, by exerting its authority over the chief law officer of the State, without the consent of the State, to exclude the State, in its sovereign capacity, from its own courts when seeking to have the ruling of those courts as to its powers under its own statutes. Surely, the right of a State to invoke the jurisdiction of its own courts is not less than the right of individuals to invoke the jurisdiction of a Federal court. The preservation of the dignity and sovereignty of the States, within the limits of their constitutional powers,

is of the last importance, and vital to the preservation of our system of government. The courts should not permit themselves to be driven by the hardships, real or supposed, of particular cases to accomplish results, even if they be just results, in a mode forbidden by the fundamental law. The country should never be allowed to think that the Constitution can, in any case, be evaded or amended by mere judicial interpretation, or that its behests may be nullified by an ingenious construction of its provisions.

The importance of the question under consideration is a sufficient justification for such a reference to the authorities as will indicate the precise grounds on which this court has oftentimes proceeded when determining what is and what is not a suit against a State within the meaning of the Eleventh Amendment. All the cases agree in declaring the incapacity of a Federal court to exercise jurisdiction over a State as a party. But assaults upon the Eleventh Amendment have oftenest been made in cases in which the effort has been, without making the State a formal party, to control the acts of its officers and agents, by such orders directed to them as will accomplish, by indirection, the same results that could be accomplished by a suit directly against the State, if such a suit were possible. It will be well to look at some of the principal adjudged cases.

The general question was examined in *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446–451, where the court said that it was conceded in all the cases, and "may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution." The court has not in any case departed from this constitutional principle. In *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9, it said that "this immunity of a State from suit is

absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a State, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the State itself." In *Cunningham* v. *Macon & Brunswick R. R. Co.*, just cited, the distinction was drawn between a suit in which the State is the real party in interest, although not technically a party on the record, and one in which "an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government;" in which last case, the court observed, the defendant "is not sued *as, or because he is,* the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer." Let it not be forgotten that the defendant Young was sued, not as an individual or because he had any personal interest in these matters, but *as, and solely because he is,* an officer of the State charged with the performance of certain public duties.

In *Hagood* v. *Southern,* 117 U. S. 52, 67, 68, which involved the validity of certain scrip alleged to have been issued by the State of South Carolina, it appeared that the State having denied its obligation to pay, the plaintiff sought relief by simply suing certain state officers, as such, without making the State a formal party. The court said: "These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses; and, except with that consent, it could not be brought before the court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed, the one required to perform the decree, and the only

party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject-matter of the suit, and defending *only as representing the State.* And the things required by the decrees to be done and performed by them, are the very things, which when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States, which declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.' " Again: "If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in Federal tribunals, it is difficult to conceive the frame of one which would be. If the State is named as a defendant, it can only be reached either by mesne or final process through its officers and agents, and a judgment against it could neither be obtained nor enforced, except as the public conduct and government of the ideal political body called a State could be reached and affected through its official representatives. A judgment against these latter, in their official and representative capacity, commanding them to perform official functions on behalf of the State according to the dictates and decrees of the court, is, if anything can be, a judicial proceeding against the State itself. If not, it may well be asked, what would constitute such a proceeding? In the present cases the decrees were not only against the defendants *in their official capacity*, but, that there might be no mistake as to the nature and extent of the duty to be performed, also against their successors in office." Is it to be said that an order requiring the Attorney General of a

State to perform certain official functions on behalf of the State is a suit against the State, while an order forbidding him, *as Attorney General*, not to perform an official function on behalf of the State is not a suit against the State?

The leading case upon the general subject, and one very similar in many important particulars to the present one, is *In re Ayers*, 123 U. S. 443, 496, 497, 505. The facts in that case were briefly these: The legislature of Virginia, in 1887, passed an act which holders of sundry bonds and tax-receivable coupons of that Commonwealth alleged to be in violation of their rights under the Constitution of the United States. They instituted a suit in equity in the Circuit Court of the United States against the Attorney General and Auditor of Virginia, and against the Treasurers and Commonwealth attorneys of counties, cities and towns in Virginia, the relief asked being a decree enjoining and restraining the said state officers, and each of them, from bringing or commencing any suit provided for by the above act of 1887, or from doing anything to put that act into operation. The Circuit Court entered an order, enjoining the Attorney General of Virginia and each and all the state officers named "from bringing or commencing any suit against any person who has tendered the State of Virginia tax-receivable coupons in payment of taxes due to said State, as provided for and directed by the act of the legislature of Virginia, approved May 12, 1887." Subsequently the Circuit Court of the United States was informed that the Attorney General of Virginia had disobeyed its order of injunction. Thereupon that officer was ruled to show cause why he should not be fined and imprisoned. He responded to the rule, admitting that after being served with the injunction he had instituted a suit, in the state Circuit Court, against the Baltimore and Ohio Railroad Company to recover taxes due the State, and alleging "that he instituted the said suit because he was thereunto required by the act of the General Assembly of Virginia aforesaid, and because he believed this court had no jurisdiction whatever to award the injunction

violated." He disclaimed any intention to treat the court with disrespect, and stated that he had been actuated alone by the desire to have the law properly administered. He was, nevertheless, adjudged guilty of contempt, was required forthwith to dismiss the suit he had brought, was fined $500 for contempt of court, and committed *to the custody of the marshal* until the fine was paid, and until he purged himself of his contempt *by dismissing the suit in the state court.* The Attorney General then applied directly to this court for a writ of *habeas corpus*, which was granted, and upon hearing he was released by this court from custody. The order for his discharge recited that the suit in which the injunctions were granted was "in substance and in law a suit against the State of Virginia," and "within the prohibition of the Eleventh Amendment to the Constitution;" that it was one "to which the judicial power of the United States does not extend;" that the Circuit Court was without jurisdiction to entertain it; that all its proceedings in the exercise of jurisdiction were null and void; that it had no authority or power to adjudge the Attorney General in contempt; and that his imprisonment was without authority of law. In the opinion in the *Ayers case* the court said: "It follows, therefore, in the present case, that the personal act of the petitioners sought to be restrained by the order of the Circuit Court, reduced to *the mere bringing of an action in the name of and for the State against taxpayers*, who, although they may have tendered tax-receivable coupons, are charged as delinquents, cannot be alleged against them as an individual act in violation of any legal or contract rights of such taxpayers." Again: "The relief sought is against the defendants, not in their individual, but *in their representative capacity as officers of the State of Virginia.* The acts sought to be restrained are the bringing of suits by the State of Virginia in its own name and for its own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintained—it would have been subject

to the jurisdiction of the court by process served upon its Governor and Attorney General, according to the precedents in such cases. *New Jersey* v. *New York*, 5 Pet. 284, 288, 290; *Kentucky* v. *Dennison*, 24 How. 66, 96, 97; Rule 5 of 1884, 108 U. S. 574. If a decree could have been rendered enjoining the State from bringing suits against its taxpayers, it would have operated upon the State *only through the officers who by law were required to represent it in bringing such suits, viz., the present defendants, its Attorney General, and the Commonwealth's attorneys for the several counties.* For a breach of such an injunction, these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment thereof by attachment and imprisonment. The nature of the case, as supposed, is identical with that of the case as actually presented in the bill, with the single exception that the State is not named as a defendant. How else *can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant?"* Further: "The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the members of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaran-

teed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but *those also against its officers, agents and representatives where the State, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates.* But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of *personal trespasses and wrongs*, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, *and the act to be done or omitted is purely ministerial*, in the performance or omission of which the plaintiff has a legal interest."

It is said that the *Ayers case* is not applicable here, because the orders made by the Federal Circuit Court had for their object to compel Virginia to perform its contract with bondholders, which is not this case. But that difference between the *Ayers case* and this case cannot affect the principle involved. The proceeding against the Attorney General of Virginia had for its object to compel, by indirection, the performance of the contract which that Commonwealth was alleged to have made with bondholders—such performance, on the part of the State, to be effected by means of orders in a Federal Circuit Court directly controlling the official action of that officer. The proceeding in the Perkins-Shepard suit against the Attorney General of Minnesota had for its object, by means of orders in a Federal Circuit Court, directed to that officer, *to control the action of that State* in reference to the enforcement of certain statutes by judicial proceedings commenced in its own courts. The relief sought in each case was to control the State *by controlling the conduct of its law-officer,*

against its will. I cannot conceive how the proceeding against the Attorney General of Virginia could be deemed a suit against that State, and yet the proceeding against the Attorney General of Minnesota is not to be deemed a suit against Minnesota, when the object and effect of the latter proceeding was, beyond all question, to shut that State entirely out of its own courts, and prevent it through its law-officer from invoking their jurisdiction in a special matter of public concern, involving official duty, about which the State desired to know the views of its own judiciary. In my opinion the decision in the *Ayers case* determines this case for the petitioner.

More directly in point, perhaps, for the petitioner Young is the case of *Fitts* v. *McGhee*, 172 U. S. 516, 528, 529, 530. That suit was brought by the receivers of a railroad company against the Governor and Attorney General of Alabama. Its object was to prevent the enforcement of the provisions of an Alabama statute prescribing the maximum rates of toll to be charged on a certain bridge across the Tennessee River. The statute imposed a penalty for each time that the owners, lessees or operators of the bridge demanded or received any higher rate of toll than was prescribed by it. The relief asked was an injunction prohibiting the Governor and Attorney General of the State and all other persons from instituting any proceeding against the complainants, or either of them, to enforce the statute. An injunction, as prayed for, was granted. In the progress of the cause the solicitor of the district in which the case was pending was made a defendant and the injunction was extended to him. By amended pleadings it was made to appear that the tollgate keepers at the public crossing of the bridge were indicted for collecting tolls in violation of the statute. In the progress of the cause the plaintiffs dismissed the case as to the State, and the cause was discontinued as to the Governor. But the case was heard upon the motion to dismiss the bill upon the ground that the suit was one against the State in violation of the Constitution of the United States.

After stating the principles settled in the *Ayers case* and in other cases this court said: "If these principles be applied in the present case there is no escape from the conclusion that, although the State of Alabama was dismissed as a party defendant, this suit against its officers is really one against the State. *As a State can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings,* in execution of the statute of February 9, 1895, *is one which restrains the State itself, and the suit is consequently as much against the State as if the State were named as a party defendant on the record.* If the individual defendants held possession or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination, in a suit against them, of the question of the right to such possession by simply asserting that they held or were entitled to hold the property in their capacity as officers of the State. In the case supposed, they would be compelled to make good the State's claim to the property, and could not shield themselves against suit because of their official character. *Tindal* v. *Wesley,* 167 U. S. 204, 222. No such case is before us." Again, in the same case: "It is to be observed that neither the Attorney General of Alabama nor the Solicitor of the Eleventh Judicial Circuit of the State appear to have been charged by law with any special duty in connection with the act of February 9, 1895. In support of the contention that the present suit is not one against the State, reference was made by counsel to several cases, among which were *Poindexter* v. *Greenhow,* 114 U. S. 270; *Allen* v. *Baltimore & Ohio Railroad,* 114 U. S. 311; *Pennoyer* v. *McConnaughy,* 140 U. S. 1; *In re Tyler,* 149 U. S. 164; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 388; *Scott* v. *Donald,* 165 U. S. 58, and *Smyth* v. *Ames,* 169 U. S. 466. Upon examination it will be found that the defendants in each of those cases were officers of the State, especially charged with the execution of a state enactment

alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit *some specific wrong or trespass* to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a *suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State.* In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and Attorney General, based upon the theory that the former as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrong. Under the view we take of the question, the citizen is not without effective remedy, when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land; for, whatever the form of proceeding against him, he can make his defense upon the

ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination." I am unable to distinguish that case, in principle, from the one now before us. The *Fitts case* is not overruled, but is, I fear, frittered away or put out of sight by unwarranted distinctions.

Two cases in this court are much relied on to support the proposition that the Perkins-Shepard suit in the Circuit Court is not a suit against the State. I refer to *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, and *Smyth* v. *Ames*, 169 U. S. 466, 472. But each of those cases differs in material respects from the one instituted by Perkins and Shepard in the court below. In the *Reagan case* it appears that the very act, under which the railroad commission proceeded, authorized the railroad company, or any interested party, if dissatisfied with the action of the commission in establishing rates, to bring suit against that commission in any court, in a named county, with right to appeal to a higher court. This court when combatting the suggestion that only the state court had jurisdiction to proceed against the commission, and give relief in respect of the rates it established, said: "It may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts. . . . It comes, therefore, within the very terms of the act. It cannot be doubted that a State, like any other government, can waive exemption from suit." The declaration of the court in the *Reagan case*, that that suit was not, within the true meaning of the Eleventh

Amendment, to be regarded as a suit against the State, must therefore be taken in connection with the declaration in the same case that the State having consented that the commission might be sued in one of its own courts, in respect of the rates established by the statute, must be taken to have waived its immunity from suit in the Circuit Court of the United States sitting in Texas. In *Smyth* v. *Ames*, above cited, which was a suit in a Circuit Court of the United States, involving the constitutional validity of certain rates established for railroads in Nebraska, it appeared that the statute expressly authorized any railroad company claiming that the rates were unreasonable to bring an action *against the State* before the Supreme Court in the name of the railroad company or companies bringing the same. Thus the State of Nebraska waived its immunity from suit, and having authorized a suit against itself in one of its courts, in respect of the rates there in question, it could not, according to the decision in the *Reagan case*, deny its liability to like suit in a court of the United States. It is true that this court, in its opinion in *Smyth* v. *Ames*, did not lay any special stress on the fact that Nebraska, by the statute, agreed that it might be sued, but it took especial care in its extended statement of the case to bring out that fact. Its silence on that point is not extraordinary, in view of the fact, as appears from the opinion of this court, that the question whether that suit was to be deemed one against the State was not discussed at the bar by the Nebraska State Board. We there quoted from the *Reagan case* these words: "Whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts." That the *Reagan* and *Smyth cases* did not go as far as is now claimed for them is made clear by the later case of *Fitts* v. *McGhee*, already re-

ferred to, in which the doctrines of *In re Ayers* were reaffirmed and applied.

We may refer in this connection to *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 291, in which case one of the points made was that the Circuit Court of the United States had no power to restrain the Attorney General of South Carolina and the counsel associated with him from prosecuting in the state courts actions authorized by the laws of the State, and hence that the court erred in awarding an injunction against said officers. This court said: "Support for the proposition is rested upon the terms of the Eleventh Amendment and the provisions of section 720 of the Revised Statutes, forbidding the granting of a writ by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. The soundness of the doctrine relied upon is undoubted. *In re Ayers*, 123 U. S. 443; *Fitts* v. *McGhee*, 172 U. S. 516. The difficulty is that the doctrine is inapplicable to this case. Section 720 of the Revised Statutes was originally adopted in 1793, whilst the Eleventh Amendment was in process of formation in Congress for submission to the States, and long, therefore, before the ratification of that Amendment. The restrictions embodied in the section were, therefore, but a partial accomplishment of the more comprehensive result affectuated by the prohibitions of the Eleventh Amendment. Both the statute and the Amendment relate to the power of courts of the United States to deal, against the will and consent of a State, with controversies between it and individuals. None of the prohibitions, therefore, of the Amendment or of the statute relate to the power of a Federal court to administer relief in causes where jurisdiction as to a State and its officers has been acquired *as a result of the voluntary action of the State in submitting its rights to judicial determination.* To confound the two classes of cases is but to overlook the distinction which exists between the power of a court to deal with a subject over which it has

jurisdiction and its want of authority to entertain a controversy as to which jurisdiction is not possessed."

Counsel for the railway company placed some reliance on *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 18, in which the previous cases on the general subject of suits against the States were classified. That case was a suit in equity against certain parties "who, under the constitution of Oregon, as Governor, Secretary of State, and Treasurer of that State, comprised the Board of Land Commissioners of that State, to restrain and enjoin them from selling and conveying a large amount of land in that State, to which the plaintiff asserted title." That suit, in view of the nature of the relief asked, and of the relations of the defendants to the matters involved, was held not to be one against the State within the meaning of the Eleventh Amendment. But after a review of the facts the court, *as explanatory of the conclusion reached by it*, took especial care to observe: "In this connection it must be borne in mind that this suit is not nominally against the Governor, Secretary of State, and Treasurer, *as such officers*, but against them collectively, as the board of land commissioners." The present suit is, in terms, against Young "as Attorney General of Minnesota," and the decree was sought against him, as such officer, not against him individually, or as a mere administrative officer charged with certain duties.

One of the cases cited in support of the decision now rendered is *Missouri, Kansas & Texas Railway Co.* v. *Missouri R. R. & Warehouse Commissioners*, 183 U. S. 53, 58, 59. But although that particular suit was held not to be one against the State, the case, in respect of the principles announced by the court, is in harmony with the views I have expressed. For, the court there says: "Was the State the real party plaintiff? It was at an early day held by this court, construing the Eleventh Amendment, that in all cases where jurisdiction depends on the party, it is the party named in the record. *Osborn* v. *United States Bank*, 9 Wheat. 738. But that technical construction has yielded to one more in consonance with the

spirit of the Amendment, and in *In re Ayers*, 123 U. S. 443, it was ruled upon full consideration that the Amendment covers not only suits against a State by name *but those also against its officers, agents and representatives where the State, though not named as such, is nevertheless the only real party against which in fact the relief is asked, and against which the judgment or decree effectively operates.* And that construction of the Amendment has since been followed." In the present case, the State, although not named on the record as a party, is the real party whose action it is sought to control.

There are other cases in this court in which the scope and meaning of the Eleventh Amendment were under consideration, but they need not be cited, for they are well known. They are all cited in *In re Ayers*, 123 U. S. 443, 500. "The vital principle in all such cases," this court said in the *Ayers case*, "is that the defendants, though professing to act as officers of the State, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable," or cases in which the officer sued refused to perform a purely ministerial duty, about which he had no discretion and in the performance of which the plaintiff had a direct interest. The case before us is altogether different. The statutes in question did not impose upon the Attorney General of Minnesota any special duty to see to their enforcement. In bringing the mandamus suit he acted under the general authority inhering in him as the chief law officer of his State. He could not become personally liable to the railway company *simply because of his bringing the mandamus suit.* The Attorney General stated that all he did, or contemplated doing, was to bring the mandamus suit. The mere bringing of such a suit could not be alleged against him as an individual in violation of any legal right of the railway company or its shareholders. *In re Ayers*, 123 U. S. 443, 496. The plaintiffs recognized this fact and hence did not proceed in their suit upon the ground that the defendant was individually liable. They sued him only as Attorney General,

and sought a decree against him in his official capacity, not otherwise.

Some reference has been made to *Ex parte Royall*, 117 U. S. 241, and other cases, that affirm the authority of a Federal court, under existing statutes, to discharge upon *habeas corpus* from the custody of a state officer one who is held in violation of the Federal Constitution for an alleged crime against a State. Those cases are not at all in point in the present discussion. Such a *habeas corpus* proceeding is *ex parte*, having for its object only to inquire whether the applicant for the writ is illegally restrained of his liberty. If he is, then the state officer holding him in custody is a trespasser, and cannot defend the wrong or tort committed by him, by pleading his official character. The power in a Federal court to discharge a person from the custody of a trespasser may well exist, and yet the court has no power in a suit before it, by an order directed against the Attorney General of a State, as such, to prevent the State from being represented by that officer, as a litigant in one of its own courts. The former cases, it may be argued, come within the decisions which hold that a suit which only seeks to prevent or restrain a trespass upon property or person by one who happens to be a state officer, but is proceeding in violation of the Constitution of the United States, is not a suit against a State within the meaning of the Eleventh Amendment, but a suit against the trespasser or wrongdoer. But the authority of the Federal court to protect one against a trespass committed or about to be committed by a state officer in violation of the Constitution of the United States is very different from the power now asserted, and recognized by this court as existing, to shut out a sovereign State from its own courts by the device of forbidding its Attorney General, under the penalty of fine and imprisonment, from appearing in such courts in its behalf. *The mere bringing of a suit on behalf of a State, by its Attorney General*, cannot (this court has decided in the *Ayers case*) make that officer a trespasser and individually liable to the

party sued. To enjoin him from representing the State in such suit is therefore, for every practical or legal purpose, to enjoin the State itself. This court, in the *Debs Case,* 158 U. S. 564, 584, said: "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligation which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court. This proposition in some of its relations has heretofore received the sanction of this court." If there be one power that a State possesses, which ought to be deemed beyond the control, in any mode, of the National Government or of any of its courts, it is the power *by judicial proceedings* to appear in its own courts, by its law-officer or by attorneys, and seek the guidance of those courts in respect of matters of a justiciable nature. If the state court, by its judgment, in such a suit, should disregard the injunctions of the Federal Constitution, that judgment would be subject to review by this court upon writ of error or appeal.

It will be well now to look at the course of decisions in other Federal courts.

Attention is first directed to *Arbuckle* v. *Blackburn,* 113 Fed. Rep. 616, 622, which was a suit in equity, one of the principal objects of which was to restrain the enforcement of an act of the Ohio legislature relating to food products, particularly of a named coffee in which the plaintiffs were interested. The Circuit Court of Appeals held that the bill was properly dismissed, saying, among other things: "What, then, is the object of the injunction sought in this case? It is no more or less than to restrain the officer of the State from bringing prosecutions for violations of an act which said offi-

cer is expressly charged to enforce in the only way he is authorized to proceed—by bringing criminal prosecutions in the name of the State. This is virtually to enjoin the State from proceeding through its duly qualified and acting officers. If the food commissioner may be enjoined from instituting such prosecutions, why may not the prosecuting attorney, or any officer of the State charged with the execution of the criminal laws of the State? While the State may not be sued, if the bill can be sustained against its officers, it is as effectually prevented from proceeding to enforce its laws as it would be by an action directly against the State. This view of the case, in our judgment, is amply sustained by the cases above cited, and by the later case of *Fitts* v. *McGhee*, 172 U. S. 516. In so far as this action seeks an injunction against the respondent from proceeding to enforce by prosecution the provisions of the statutes of Ohio above cited, the courts of the United States are deprived of jurisdiction by the Eleventh Amendment to the Constitution."

In *Union Trust Co.* v. *Stearns*, 119 Fed. Rep. 790, 791, 792, 795, the Circuit Court of the United States for the District of Rhode Island had occasion to consider the scope of the Eleventh Amendment. The case related to a statute regulating the hours of labor of certain employés of street railways, and imposing a fine for a violation of its provisions. The court upon an elaborate review of all the cases in this court dismissed the action. The defendants Stearns and Greenough were, respectively, the Attorney General and Assistant Attorney General of the State. They were not named in the act, nor charged with any special duty in connection therewith. The court said: "The purpose of the present bill, in substance and effect, is to enjoin the State of Rhode Island from the enforcement of a penal statute. Indictments under the act are brought in the name and on behalf of the State for the protection of the State. These defendants, the Attorney General and his assistant, merely represent the State in such proceedings. They are simply the officers and agents of the State. It is not as

individuals, but solely by virtue of their holding such offices, that they prefer and prosecute indictments in the name of the State. A State can only act or be proceeded against through its officers. If a decree could be entered against the State of Rhode Island enjoining prosecutions under this act, it could only operate against the State through enjoining these defendants. An order restraining the Attorney General and his assistant from the enforcement of this statute is an order restraining the State itself. The present suit, therefore, is as much against the State of Rhode Island as if the State itself were named a party defendant." After referring to *In re Ayers*, and *Fitts* v. *McGhee*, and upon a review of the cases, the court proceeded: "The defendants Stearns and Greenough hold no special relation to the act of June 1, 1902. They are not specially charged with its execution. They are not thereby constituted a board or commission with administrative powers, nor are they as individuals, and apart from the official authority under which they act, threatening to seize the property of the complainant, or to commit any wrong or trespass against its personal or property rights. They have no other connection with this statute than the institution of formal judicial proceedings for its enforcement in the courts of the State in the name and behalf of the State. Upon reason and authority the present bill is a suit against the State of Rhode Island, within the meaning of the Eleventh Amendment to the Constitution of the United States."

In *Morenci Copper Co.* v. *Freer*, 127 Fed. Rep. 199, 205, which was an action in equity to restrain and inhibit the defendant, in his official capacity as Attorney General of West Virginia, from proceeding to institute an action in the state court for forfeiture of the charter of the plaintiff corporation for a failure to pay a license tax imposed by a state statute, and which statute was alleged to be in violation of the Federal Constitution, the Circuit Court reviewed the decisions of this court upon the question as to what were and what were not suits against the State. The Circuit Court held that it had no juris-

diction of the case, saying: "But it may be said, if the court holds that no remedy of this sort will lie in the Circuit Court of the United States to prevent this breach of a contract by the State of West Virginia by means of the machinery of a law violative of the Constitution of the United States, how are the rights of corporations to be preserved? The answer is that such alleged unconstitutionality is matter of defense to any suit brought for the forfeiture of complainant's charter, and could be set up as an answer and defense to any bill brought for that purpose, and, if the highest court of the State ruled adversely to that contention, appeal would lie to the Supreme Court of the United States. Or the case can be removed to the Circuit Court of the United States if it presents a case arising under the Constitution or laws of the United States."

A well-considered case is that of *Western Union Tel. Co.* v. *Andrews*, 154 Fed. Rep. 95, 107. In that case the telegraph company sought by bill, to enjoin the prosecuting attorneys of the various judicial circuits of Arkansas from instituting any proceeding for penalties for its failure or refusal to comply with the provisions of an act of the legislature of Arkansas relating to foreign corporations doing business in that State and fixing fees, etc. The bill charged that the various prosecuting attorneys would, unless restrained, institute numerous actions for the recovery of the penalties prescribed by the act, which was no less than $1,000 for each alleged violation. The defense was, among other things, that the action was one against the State, and, therefore, prohibited by the Constitution. After a careful review of the adjudged cases in this court and in the subordinate Federal courts, the Circuit Court held the action to be one against the State, forbidden by the Eleventh Amendment, saying among other things: "The allegations in the bill show that this is an attempt to prevent the State of Arkansas, through its officers, who by its laws are merely its attorneys, to represent it in all legal actions in its favor or in which it is interested, from instituting and prosecuting suits for the recovery of penalties incurred for alleged

violation of its laws, actions which can only be instituted in the name of the State and for its use and benefit."

Upon the fullest consideration and after a careful examination of the authorities, my mind has been brought to the conclusion that no case heretofore determined by this court requires us to hold that the Federal Circuit Court had authority to forbid the Attorney General of Minnesota from representing the State in the mandamus suit in the state court, or to adjudge that he was in contempt and liable to be fined and imprisoned simply because of his having, as Attorney General, brought that suit for the State in one of its courts. On the contrary, my conviction is very strong that, if regard be had to former utterances of this court, the suit of Perkins and Shepard in the Federal court, in respect of the relief sought therein against Young, in his official capacity, as Attorney General of Minnesota, is to be deemed—under the *Ayers* and *Fitts cases* particularly—a suit against the State of which the Circuit Court of the United States could not take cognizance without violating the Eleventh Amendment of the Constitution. Even if it were held that suits to restrain the instituting of actions directly to recover the prescribed penalties would not be suits against the State, it would not follow that we should go further and hold that a proceeding under which the State was, in effect, denied access, by its Attorney General, to its own courts, would be consistent with the Eleventh Amendment. A different view means, as I think, that although the judicial power of the United States does not extend to any suit expressly brought against a State by a citizen of another State without its consent or to any suit the legal effect of which is to tie the hands of the State, although not formally named as a party, yet a Circuit Court of the United States, in a suit brought against the Attorney General of a State may, by orders directed specifically against that officer, control, entirely control, by indirection, the action of the State itself in judicial proceedings in its own courts involving the constitutional validity of its statutes. This court has heretofore held that

that could not be done, and that such a result would, for most purposes, practically obliterate the Eleventh Amendment and place the States, in vital particulars, as absolutely under the control of the subordinate Federal courts, as if they were capable of being directly sued. I put the matter in this way, because to forbid the Attorney General of a State (under the penalty of being punished as for contempt) from representing his State in suits of a partiular kind, in its own courts, is to forbid the State itself from appearing and being heard in such suits. Neither the words nor the policy of the Eleventh Amendment will, under our former decisions, justify any order of a Federal court the necessary effect of which will be to exclude a State from its own courts. Such an order attended by such results cannot, I submit, be sustained consistently with the powers which the States, according to the uniform declarations of this court, possess under the Constitution. I am justified, by what this court has heretofore declared, in now saying that the men who framed the Constitution and who caused the adoption of the Eleventh Amendment would have been amazed by the suggestion that a State of the Union can be prevented by an order of a subordinate Federal court from being represented by its Attorney General in a suit brought by it in one of its own courts; and that such an order would be inconsistent with the dignity of the States as involved in their constitutional immunity from the judicial process of the Federal courts (except in the limited cases in which they may constitutionally be made parties in this court) and would be attended by most pernicious results.

I dissent from the opinion and judgment.

Dissent.

HUNTER, SHERIFF OF BUNCOMBE COUNTY, NORTH CAROLINA, *v.* WOOD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

No. 474. Argued December 18, 19, 1907.—Decided March 23, 1908.

Where the Circuit Court of the United States has, in an action within its jurisdiction, issued an interlocutory injunction against the enforcement of a state railroad rate statute, and in such order directed the conditions under which tickets shall be sold at rates higher than those prescribed under the state statute, a ticket agent who sells tickets in conformity with such conditions, and who is proceeded against, convicted, and sentenced therefor by the state authorities, is in custody for an act done pursuant to an order, process or decree of a court or judge of the United States within the meaning of § 753, Rev. Stat., and may apply for a writ of *habeas corpus* to the United States circuit judge who has the power and right under such section to discharge him.

Ex parte Young, *ante*, p. 123, followed as to the jurisdiction of the Circuit Court of the United States of such an action.

JAMES H. Wood, the appellee, being one of the ticket agents of the Southern Railway Company, was, on July 17, 1907, charged in the police justice's court of the city of Asheville, in the county of Buncombe, in the State of North Carolina, with unlawfully and willfully overcharging one T. J. Harmon for a railroad ticket from Asheville, North Carolina, to Canton, North Carolina, in violation of the state law. He was arrested and brought before the court, and on the trial, July 18, 1907, was convicted and sentenced by the court to imprisonment in the county jail of Buncombe county for the term of thirty days, to be worked out on the public roads of that county for that time, and to pay all costs.

The appellee applied to the United States circuit judge in the Western District of North Carolina for a writ of *habeas corpus* to be directed to Hunter, appellant, as sheriff of Buncombe

county, to inquire into the cause of his detention and to obtain his discharge. The writ was issued and, after a hearing, the Circuit Judge discharged the appellee from imprisonment, and directed that a copy of the order of the discharge should be certified to the police justice's court of the city of Asheville and to the sheriff of Buncombe county, in whose custody the petitioner then was. *Ex parte Wood*, 155 Fed. Rep. 190.

It appeared that prior to the passage, in 1907, of the acts of the North Carolina legislature in relation to passenger and freight rates on railroads within the State, the Southern Railway Company were charging the rates then allowed by law. After the passage of the acts above mentioned, which greatly reduced the rates of compensation for the transportation of both passengers and freight, the Southern Railway Company commenced a suit in equity in the Circuit Court of the United States for the Western District of North Carolina against the corporation commission and the attorney general and assistant attorney general of the State, to enjoin the taking of any proceedings or the commencement of any suits or actions to enforce the acts in question or to recover penalties for the disobedience of such acts by the company. The bill alleged that the acts were unconstitutional, and that if the rates were enforced the result would be to prevent the company earning anything upon its investment, and deprive it of its property without due process of law, and deny it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States. The bill also averred that a duty rested upon the corporation commission and the attorney general and assistant attorney general to take such proceedings as they might deem expedient for the enforcement of the acts, and that the corporation commission would, for the purpose of putting the acts into effect, do those things which it was provided should be done, and in case of continuous refusal on the part of the company to charge only the rate specified the attorney general and his assistant would proceed to enforce the same as prescribed in the acts.

The Circuit Judge upon this bill granted an interlocutory injunction, until the further order of the court, against the members of the corporation commission and the attorney general and assistant attorney general, restraining them from taking any proceedings towards the enforcement of the acts, or putting the acts in respect to freight charges or passenger rates, or any part or either of the acts, into effect, and from prosecuting any suit or action, civil or criminal, against the railway company, its officers, agents or employés. The order also provided for the execution of a bond on the part of the railway company in the sum of $325,000, conditioned to pay into the registry of the court from time to time, as the court might order, such sums of money as should be equal to the difference between the aggregate freight and passenger rates and excess baggage charges, charged and received by the company for intrastate service on its lines in the State of North Carolina, and what would have been the aggregate amounts for such service at the rates fixed in or under the acts of the assembly, above mentioned. The order provided a method of procedure by giving to each purchaser of a ticket a coupon for the payment of the difference stated, on presenting the coupon to the registry clerk, if the act should be finally held valid.

Section 4 of the act of the legislature, prescribing the maximum charges for the transportation of passengers in North Carolina, enacted that any railroad company violating the provisions of the act should be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved, recoverable in an action in his name in any court of competent jurisdiction in the State; and any agent, servant or employé of a railroad company violating the act was declared guilty of a misdemeanor, and, upon conviction, was to be punished by fine or imprisonment, or both, in the discretion of the court. The act in relation to freight, by the second section, provided that if the company should make charges for the shipment of freight in violation of the act it should be guilty of a misdemeanor, and, upon conviction, fined not less than one hundred

dollars, and the officer or agent should be fined or imprisoned, or both, in the discretion of the court.

Upon the hearing of the motion for an injunction, after granting the same, the Circuit Judge wrote an opinion (155 Fed. Rep. 756), in which he reached the conclusion that § 4 of the act in regard to passenger rates was on its face unconstitutional and void.

Notwithstanding the fact that an injunction had been granted, proceedings were thereafter taken against the appellee, a ticket agent of the company, to punish him for not complying with the act in relation to the sale of tickets, resulting in his conviction, as already stated.

The sheriff of Buncombe county, in whose custody the appellee was restrained, duly appealed to this court from the order discharging the appellee from his custody.

Mr. E. J. Justice, Mr. J. H. Merrimon and *Mr. C. B. Aycock* for appellant on the point of whether the remedy of *habeas corpus* was proper:

The writ from a Circuit Judge to a sheriff cannot properly require the production of a prisoner held by the sheriff for violation of a state law, when the prisoner has had a trial with right to sue out a writ of error to the United States Supreme Court, or when he is about to be put upon his trial, if these facts appear upon the face of the petition, or upon the return of the sheriff such are found to be the facts; in such case this ousts the jurisdiction of the Federal judge who issued the writ, and he should so hold and discharge the writ. Whenever it appears that the prisoner is held by an officer of the state court for a violation of the state law, and is not denied a hearing, the jurisdiction of the Federal judge who issued the writ of *habeas corpus* is ousted, and the prisoner must make his application for his writ of *habeas corpus* to a state court.

This is so even though the guilt or innocence of the prisoner depends upon whether the state law is in conflict with the Federal Constitution, for this can be determined by the state court, and finally by the Supreme Court of the United States. *Ex*

parte Crouch, 112 U. S. 178; *Ex parte Fonda*, 117 U. S. 516; *Ex parte Royall*, 117 U. S. 241; *In re Thomas H. Harding*, 120 U. S. 782; *Ex parte Ayres*, 123 U. S. 443; *State of New York* v. *Eno*, 155 U. S. 90; *Thomas* v. *Loney*, 134 U. S. 372; *Pepke* v. *Cronan*, 155 U. S. 98; *Andrews* v. *Swartz*, 156 U. S. 273; *Bergemann* v. *Backer*, 157 U. S. 655; *Whitten* v. *Tomlinson*, 160 U. S. 234; *Minnesota* v. *Brundage*, 180 U. S. 499; *Storti* v. *Massachusetts*, 183 U. S. 46; *Reid* v. *Jones*, 187 U. S. 151; *Riggins* v. *United States*, 199 U. S. 547; *Fitts* v. *McGhee*, 172 U. S. 516.

Mr. Alfred P. Thom, *Mr. Walker D. Hines* and *Mr. Alexander P. Humphrey* for appellee on the same point:

Wood's release upon writ of *habeas corpus* was a lawful and essential step in carrying out the decision of the court and enforcing the jurisdiction of the court.

Revised Statutes, § 753, sanctions the use of the writ of *habeas corpus* in the present case, because Wood was in custody for an act done in pursuance of an order of a court of the United States.

The right of the court to protect its order and process by the issue of the writ is unquestioned.

The expediency of the action of the court is manifest.

The court had decided that the passenger-rate statute ought not to be enforced pending final determination of the question. This decision would have been absolutely nullified if the agents of the railway company could have been imprisoned by the state authorities. This is not a mere surmise as to possible consequences, but is simply a statement of what was imminent at the time of Wood's arrest and subsequent discharge.

Not only was the supremacy of the judicial power of the United States menaced by the action of which the arrest and conviction of Wood was a part, but the whole interstate commerce of the Southern Railway Company and its transportation of the United States mails were vitally involved.

For illustrations of the discharge of persons in custody (under state authority) upon writs of *habeas corpus* by Federal courts

to effectuate their jurisdiction, see *United States* v. *Spink*, 19 Fed. Rep. 631; *In re Houston*, 94 Fed. Rep. 119; *Anderson* v. *Elliott*, 101 Fed. Rep. 609; *State* v. *Laing*, 133 Fed. Rep. 887.

The other questions involved in this case are fully discussed in *Ex parte Young*, *ante*, p. 123.

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

After the jurisdiction of the Circuit Court of the United States had attached by the filing of the bill of complaint in the case already mentioned, of the *Southern Railway Company* v. *McNeil and others*, members of the Corporation Commission, and after the issuing and service of the injunction, as above stated, the defendant Wood, acting under and in obedience to the provisions of such injunction, sold the railroad tickets at the usual price and at the same time complied with the conditions contained in the injunction, by giving the coupons for the difference in price, and while so complying with the terms of such injunction was arrested and proceeded against criminally for disobedience of the act fixing rates. Being detained in custody by virtue of this conviction by one of the police courts of the State, he had the right to apply for a writ of *habeas corpus* to the United States Circuit Judge, and that judge had power to issue the writ and discharge the prisoner under § 753 of the Revised Statutes of the United States (1 U. S. Comp. Stat., p. 592), as he was then in custody for an act done pursuant to an order, process or decree of a court or judge of the United States. See *In re Neagle*, 135 U. S. 1. The writ being properly issued, the judge had the right, and it was his duty, to examine into the facts, and he had jurisdiction to discharge the petitioner under the circumstances stated.

The other questions raised herein have been sufficiently discussed in *Ex parte Young*, just decided, and require no further attention.

For the reasons given in that opinion, the order appealed from herein must be

Affirmed.

MR. JUSTICE HARLAN, dissenting.

In my judgment the appellee should have been put to his writ of error for the review of the judgment against him in the highest court of the State, competent under the state laws to reëxamine that judgment—thence to this court to inquire whether any right belonging to him under the Federal Constitution had been violated. He should not have been discharged on *habeas corpus*. *Ex parte Royall*, 117 U. S. 241; *Minnesota* v. *Brundage*, 180 U. S. 499; *Urquhart* v. *Brown*, 205 U. S. 179, and authorities cited in each case.

Upon the question as to what is and what is not a suit against the State within the meaning of the Eleventh Amendment, my views are fully expressed in my dissenting opinion in *Ex parte Young*, just decided. For the reasons there stated I dissent from the opinion and judgment of the court in this case.

GENERAL OIL COMPANY *v.* CRAIN, INSPECTOR OF COAL OIL.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 128. Argued January 23, 1908.—Decided March 23, 1908.

Where complainant is entitled to equitable relief against the enforcement by state officers of an unconstitutional state statute, the judgment of the state court dismissing the bill for lack of jurisdiction on the ground that the suit is one against the State gives effect to the statute, denies complainant a constitutional right and is reviewable by this court under § 709, Rev. Stat.

A suit against state officers to enjoin them from enforcing a state statute which violates complainant's constitutional rights either by its terms or by

the manner of its enforcement is not a suit against the State within the meaning of the statute of 1873 of Tennessee, denying jurisdiction to the courts of the State, of suits against the State.

Provisions of the Federal Constitution and of the Fourteenth Amendment cannot be nullified by the State prohibiting suits in its own courts against state officers to prevent their enforcing unconstitutional statutes and contending that the National tribunals are also precluded from entertaining such suits under the Eleventh Amendment.

Merchandise may cease to be interstate commerce at an intermediate point between the place of shipment and ultimate destination; and if kept at such point for the use and profit of the owners and under the protection of the laws of the State it becomes subject to the taxing and police power of the State. The act of 1899 of Tennessee providing for the inspection of oil is not an unconstitutional burden on interstate commerce as applied to oil coming from other States and ultimately intended for sale and distribution in other States but meanwhile stored in Tennessee for convenience of distribution and for reshipping from tank cars and barreling.

95 S. W. Rep. 824, affirmed.

PLAINTIFF in error, which was also plaintiff in the courts below, invokes the protection of the commerce clause of the Constitution of the United States against the collection of a tax for the inspection of certain of its oils in Tennessee. The bill prayed an injunction against the defendant, based on the following facts summarized from the bill:

The plaintiff is a Tennessee corporation with its principal place of business in Memphis, Tennessee. It is engaged in the manufacture and sale of coal oil and other illuminating oils in the various States of the Union. Its wells and refining and manufacturing plants are all located in the States of Pennsylvania and Ohio, from which it ships its products to the States in which they are sold and used. On account of the tendency of the oils to leak and evaporate, and, under change of temperature, to burst the vessel in which they are contained, it is necessary to ship the oils in tank cars, and it is also necessary to have distributing points for such oils in various places in the United States at which it may receive the oils so shipped and place it in barrels or other similar vessels suitable in size for filling orders, which vary in amounts from one barrel upward. It would be impracticable to carry on business in or to have apparatus and

machinery for the reception and delivery of oil at every point at which plaintiff ships oil. For some years plaintiff has been engaged in business at Memphis, and has made that city not only a place of business at which to sell oil to the citizens and residents of Tennessee, but also has made it one of its distributing points to which its oils are shipped from Pennsylvania and Ohio in tank cars, from which cars the oils are unloaded into various tanks, barrels and other receptacles for the purpose of being forwarded to its customers in Arkansas, Louisiana and Mississippi, in which States it has many regular customers from whom it always has on hand many unfilled orders for oil to be delivered as soon as possible or convenient.

At Memphis plaintiff has numerous tanks or receptacles for oil of various kinds and sizes, among which are the following: (1) A tank or vessel in which is kept oil for which orders have been received from the States above mentioned before its shipment from the manufacturing plants and which are especially shipped to fill such orders. This oil is unloaded at Memphis only for the purpose of distribution in smaller vessels to meet the requirements of such orders, and is kept separate from oils for sale in Tennessee, in a tank plainly and conspicuously marked "Oil already sold in Arkansas, Louisiana and Mississippi," and remains in Tennessee only long enough (a few days) to be properly distributed according to the orders therefor. (2) Another tank or vessel for oil to be sold in those States, but for which no orders at the time of shipment from the manufacturing plants. This tank is marked "Oil to be sold in Arkansas, Louisiana and Mississippi," and is kept separate and apart from all other oil until required to supply orders to plaintiff's customers in those States, and is never sold except upon the receipt of such orders.

The defendant, as inspector of oils, from time to time inspects plaintiff's oils at Memphis and charges and collects for such inspection a regular fee of twenty-five cents per barrel, as provided in § 8 of the act of April 21, 1899, of the legislature of Tennessee, c. 349, pp. 811, 814, and the plaintiff has fully

paid such charges up to the present time on all of its oils shipped into Tennessee, whether intended for sale in that State or other States. Until recently plaintiff has unloaded the greater portion of its oil from its tank cars to its stationary tanks without attempting to separate the oil sold or intended to be sold in the States above mentioned from that to be sold in the State of Tennessee, and paid the inspection charges upon all. Plaintiff, however, is now separating its oil in the manner above described, because it has been advised that the oil intended to be sold outside of Tennessee is not subject to inspection in that State if kept separate from the oil sold or intended to be sold in that State.

Defendant claims the right to inspect such oils, although he knows and admits no sales thereof are made in Tennessee, and claims that he is not only entitled but that it is his duty to inspect the same and collect the regular fees for such inspection.

Plaintiff is advised and shows that defendant has no right to inspect the oil or collect the fees, because the act of 1899 does not apply to them, for reasons which are elaborately set out, but it is alleged that if the act should be construed to apply to them the act is unconstitutional, "in so far as it provides for or requires an inspection of any of the oil in said tanks, because such inspection would be a regulation of and interference with commerce between the States of Pennsylvania and Ohio, from which said oil was shipped, and the States of Arkansas, Louisiana and Mississippi, to which the same was shipped, in violation of the Constitution and laws of the United States, and especially of the third clause of § 8 of Article I of the Constitution of the United States, which provides that Congress shall have power 'To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.'"

Plaintiff alleges that the act of 1899 and the inspection thereunder is not a valid exercise of the police power of the State, and to that extent the act is unconstitutional and void, because (1) none of the oil is manufactured in Tennessee and the inspection, therefore, is not necessary for the protection either of

the residents and citizens of Tennessee or the reputation of her manufactured products. (2) The fees are unreasonable and exorbitant for the service performed and very much greater than necessary to provide for inspection, and that after payment of the salaries and other expenses incident to inspection there is a surplus of many thousands of dollars put into the treasury annually. (3) The act is void under the constitution of the State of Tennessee, because the inspection is not necessary or conducive to the benefit of the State of Tennessee or the citizens thereof, and the act is therefore unnecessary, unreasonable and not a valid exercise of the police power of the State, but a mere tax or charge imposed under the guise of a police regulation, and as such is in conflict with article II, § 28, of the constitution of Tennessee, which requires all property to be taxed according to its value and that taxes be equal and uniform throughout the State.

It is alleged that the act provides in § 2 a heavy penalty, consisting of a fine of from twenty to fifty dollars for each offense, against any dealer or manufacturer who shall obstruct the inspector in the discharge of his duties, or refuse to permit him upon his premises for the performance thereof; and provides in § 4 that it shall be a misdemeanor for any person to sell any oil before having it inspected as provided in the act, and on conviction shall be fined $300, and the oil, if found to be rejected, shall be forfeited and sold. Plaintiff therefore, it is alleged, on account of the severe penalties, could not afford to take the risk of selling any oil without inspection or take the risk of refusing permission to inspect. That it is doubtful if plaintiff, if it paid the fees under protest, could recover the same, and if they could be recovered it would be necessary for plaintiff to bring suit every thirty days for the charges paid for the preceding thirty days, so that an indefinite number of suits would be necessary. Irreparable injury will therefore result, it is alleged, if the inspection against plaintiff's oils under the act of 1899 be not enjoined.

Defendant filed a demurrer which attacked the bill for want

of equity, and also the jurisdiction of the court to hear and determine the cause, for the reason that it was a "suit against the State, or against an officer of the State, acting by authority of the State, with a view to reach the State, its treasury funds or property." By this ground of demurrer defendant attempted to avail himself of an act of the State of Tennessee, approved February 28, 1873, c. 13, p. 15, being § 4507 of Shannon's Code, which provides as follows: "That no court in the state of Tennessee has, nor shall hereafter have, any power, jurisdiction or authority to entertain any suit against the State, or any officer acting by the authority of the State, with a view to reach the State, its treasury, funds, or property, and all such suits now pending, or hereafter brought, shall be dismissed as to the State, or such officer, on motion, plea or demurrer of the law officer of the State, or counsel employed by the State."

The demurrer was overruled "as to that part of the bill in reference to the first tank mentioned in said bill." It was sustained "as to all that part of the bill in reference to the second tank mentioned in said bill." The ground of demurrer which went to the jurisdiction of the court was overruled "as to the oil in both tanks."

A preliminary injunction which had been granted was continued in force. Inspection, however, it was adjudged, might proceed, the fees to be paid into court pending appeal to the Supreme Court of the State.

An appeal was taken, and the Supreme Court decided that the suit was one against the State, and reversed the decree of the chancery court. 95 S. W. Rep. 824.

Mr. H. J. Livingston, Junior, with whom *Mr. Thomas B. Turley* was on the brief, for plaintiff in error:

The bill undoubtedly presents for determination Federal questions, as certain rights under the Constitution of the United States are asserted. It also further shows special conditions which prevent plaintiff in error from obtaining adequate protection in said constitutional rights except by injunction. This

being true, the mere refusal of the chancery court of Tennessee to take jurisdiction and grant this injunctive relief is a practical denial of the above constitutional rights, which may be reviewed by this court.

More especially is this true where the refusal of said state court to grant such relief is in obedience to or under color of an express state statute which is in itself in conflict with the Constitution of the United States. A state statute which closes the doors of the courts and prevents adequate protection against an illegal inspection of an article which is not subject to inspection under the Federal Constitution, itself amounts to an interference with interstate commerce, deprives plaintiff in error of its property without due process of law, and denies it the equal protection of the laws.

This is not a suit against the State of Tennessee. Actions against state officers to restrain them from the commission of wrongful acts to the prejudice of plaintiff's rights are not suits against the State. *Davis* v. *Gray*, 16 Wall. 203; *Pennoyer* v. *McConnaughy*, 140 U. S. 10; *Hans* v. *Louisiana*, 135 U. S. 1; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Poindexter* v. *Greenhow*, 114 U. S. 270; *United States* v. *Lee*, 106 U. S. 196; *Williams* v. *United States*, 138 U. S. 514; *Re Tyler*, 149 U. S. 164; *Cummings* v. *Merchants' National Bank*, 101 U. S. 153; *Dodge* v. *Woolsey*, 18 How. 331; *Reagan* v. *Farmers' Loan & T. Co.*, 154 U. S. 362; *Scott* v. *Donald*, 165 U. S. 107; *Belknap* v. *Schild*, 161 U. S. 107.

The oil in both of the tanks described in the bill is engaged in and a part of interstate commerce while in Tennessee.

The inspection thereof is an interference with interstate commerce, such as is contrary to the Constitution of the United States.

When goods start on their journey from State to State they become interstate commerce, and are protected from interference or regulation by any State through which they may pass until they reach their ultimate destination; notwithstanding on the way they may be delayed for a reasonable time on

account of inadequate means of transportation, or for reshipment, or assortment, or distribution, or on account of any accident, or any other cause which may intervene to prevent the goods going directly from the initial point of shipment to the point of destination. *Coe* v. *Errol*, 116 U. S. 517; *Kelley* v. *Rhoads*, 188 U. S. 1; *State* v. *Engle*, 5 Vroom (N. J.), 425; *State* v. *Carrigan*, 10 Vroom (N. J.), 35; *The Daniel Ball*, 10 Wall. 557; *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17; *State* v. *Engle*, 5 Vroom (N. J.), 425.

In the case at bar it is conceded that none of the oil in said two tanks will finally remain in Tennessee; the question is whether said oil while in Tennessee is in transit or at rest. With this question the original package doctrine has nothing to do; the question involved is rather analogous to those involved in the following cases hereinbefore cited: *Coe* v. *Errol*, 116 U. S. 516; *Kelley* v. *Rhoads*, 188 U. S. 1; *State* v. *Engle*, 34 N. J. L. 425; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500.

In order to be valid, a so-called inspection law must be such in fact, and must be enacted for the purpose and must be calculated to accomplish the ends for which valid inspection laws may be enacted.

None of said oil is sold in Tennessee, and none of it is manufactured in Tennessee. Hence the inspection thereof is unnecessary to protect either the citizens of Tennessee or the reputation of her manufactured products abroad.

The fees provided by said act are unreasonable and exorbitant, and very much greater than necessary to provide for the expense of such inspection, so that the treasury of Tennessee annually receives a large surplus therefrom, which is diverted to other purposes.

The mere fact that a state statute is enacted in good faith as an exercise of the police power will not render it valid if it in fact amounts to a regulation of interstate commerce. 17 A. & E. Enc. Law, 75; *Bowman* v. *Chicago &c. Ry. Co.*, 125 U. S. 465; *State Freight Tax Case*, 15 Wall. 232; *Leisy* v. *Hardin*, 135 U. S. 100; *Louisville &c. Ry. Co.* v. *Mississippi*, 133 U. S. 587;

Hall v. *DeCuir*, 95 U. S. 485; *Brennan* v. *Titusville*, 153 U. S. 289; *Missouri R. R. Co.* v. *Haber*, 169 U. S. 613; *Hannibal &c. Co.* v. *Husen*, 95 U. S. 473.

Mr. Charles T. Cates, Junior, Attorney General of the State of Tennessee, for defendant in error, submitted:

The holding that the court below had no jurisdiction, involved no Federal question, but only the powers and jurisdiction of the courts of the State of Tennessee, in respect of which the Supreme Court of Tennessee is the final arbiter.

The construction of a state statute by the court of last resort of the State will be followed by this court, and therefore the construction by the state court of the act of 1873 and its application is conclusive upon this court. *Noble* v. *Georgia*, 168 U. S. 398; *Aberdeen Bank* v. *Chehalee County*, 166 U. S. 440; *N. Y. &c. R. R. Co.* v. *Pennsylvania*, 158 U. S. 431; *Sioux City &c. Co.* v. *Trust Co.*, 173 U. S. 99; *Clark* v. *Clark*, 178 U. S. 186; *Mo. &c. Ry. Co.* v. *McCann*, 174 U. S. 580; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 601; *Railroad Co.* v. *Hopkins*, 94 U. S. 11; *Trip* v. *Santa Rosa &c.*, 144 U. S. 130; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648; *Loeber* v. *Schroeder*, 149 U. S. 580, 585.

The oil in question in this case was not protected from inspection by the commerce clause of the Federal Constitution.

There is no claim made in the bill that the oil is sold elsewhere than at the place of business of plaintiff in error in Memphis. It is true that plaintiff in error brings all of the oil sold by it at its place of business in Memphis from its refineries in other States, but when this oil has reached Memphis and is there stored and at rest as a part of the general mass of property in the State, it becomes subject to inspection by the Tennessee authorities. *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500.

The object of inspection laws is not only to protect the community, so far as they apply to domestic sales, from frauds and impositions, but in relation to articles designed for exportation, to preserve the character and reputation of the State in

foreign markets. *Chutsman* v. *Northrop*, 8 Cowen, 46; *Patapsco Guano Co.* v. *Board of Agriculture*, 171 U. S. 356.

All inspection laws may have a remote and in some cases a considerable influence on commerce, as is recognized in the cases above cited, but it is not every statute passed under the police power of the State that is void because it in some way affects commerce between the States. Many agencies employed in interstate commerce are subject to the proper police power of the State. *Hennengton* v. *Georgia*, 163 U. S. 299; *Lake Shore Ry. Co.* v. *Ohio*, 173 U. S. 285; *N. Y. &c. R. R. Co.* v. *N. Y.*, 165 U. S. 628; *Erb* v. *Morasch*, 177 U. S. 584; *Smith* v. *Alabama*, 124 U. S. 465; *Richmond &c. R. R. Co.* v. *Patterson*, 169 U. S. 311; *Mo. &c. R. R. Co.* v. *Haber*, 169 U. S. 633; *Nashville &c. R. R. Co.* v. *Alabama*, 128 U. S. 96; *L., N. O. & T. P. R. R.* v. *Mississippi*, 133 U. S. 589; *Plessy* v. *Ferguson*, 163 U. S. 537; *Smith* v. *State*, 100 Tennessee, 494; *Pittsburg &c. Coal Co.* v. *Louisiana*, 156 U. S. 590, 600.

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

It is contended by defendant in error that this court is without jurisdiction because no matter sought to be litigated by plaintiff in error was determined by the Supreme Court of Tennessee. The court simply held, it is said, that, under the laws of the State, it had no jurisdiction to entertain the suit for any purpose. And it is insisted "that this holding involved no Federal question, but only the powers and jurisdiction of the courts of the State of Tennessee, in respect to which the Supreme Court of Tennessee is the final arbiter."

Opposing these contentions, plaintiff in error urges that whether a suit is one against a State cannot depend upon the declaration of a statute, but depends upon the essential nature of the suit, and that the Supreme Court recognized that the statute "added nothing to the axiomatic principle that the State, as a sovereign, is not subject to suit save by its own

consent." And it is hence insisted that the court by dismissing the bill gave effect to the law which was attacked. It is further insisted that the bill undoubtedly presents rights under the Constitution of the United States and conditions which entitle plaintiff in error to an injunction for the protection of such rights, and that a statute of the State which operates to deny such rights, or such relief, "is itself in conflict with the Constitution of the United States."

Plaintiff in error to sustain its contention that the suit is not one against the State, but one to restrain "unconstitutional aggression" by a state officer upon private property, cites many cases in this court. To these cases defendant in error makes no other reply than to say that they were cases in the Federal courts and within the acknowledged range of the jurisdiction of courts, while the question presented by the motion to dismiss is not the rights plaintiff in error may have, but what remedies it has and the power of the State over those remedies so far as its own courts are concerned. This difference is urged as material, and the following cases are adduced: *Semple* v. *Hagar,* 4 Wall. 431; *Norton* v. *Shelby County,* 118 U. S. 425; *Smith* v. *Adsit,* 16 Wall. 185, 190; *Callen* v. *Bransford,* 139 U. S. 197; *Freeport Water Co.* v. *Freeport City,* 180 U. S. 587, 601; *Newman* v. *Gates,* 204 U. S. 89, 95; *Chambers* v. *Baltimore & Ohio R. R. Co.,* 207 U. S. 142.

A review of these cases becomes necessary. In *Semple* v. *Hagar,* Semple had a patent from the United States for a certain tract of land. He sued Hagar to quiet his title, alleging that Hagar claimed the land under a fraudulent Mexican grant, and a patent of the United States issued in affirmance of the grant. Semple prayed that the grant be declared void "as issued upon false suggestion and without authority of law." Hagar demurred to the bill, on the ground, among others, that the court had no jurisdiction of the action. The demurrer was sustained and the case was brought to this court by writ of error. A motion to dismiss was made, which was granted. The court said: "We have here a very brief record, and, on the facts of

the case, we cannot shut our eyes to the total want of jurisdiction, under the twenty-fifth section, or any other section of the Judiciary Act. It is plain that if the court had assumed jurisdiction, and had declared the defendant's patent void, for the reason alleged in the bill, the defendant would have had a case which might have been reviewed by this court, under the twenty-fifth section, and one on which there might have been a question and difference of opinion. But it is hard to perceive how the twenty-fifth section could apply to a judgment of a state court, which did not decide that question, and refused to take jurisdiction of the case. The matter is too plain for argument." In other words, it was decided that the Federal question must be decided before it can be reviewed. Apparently there was no thought of considering whether the question of jurisdiction was rightly decided. That was seemingly considered out of the power of this court to inquire into.

Norton v. *Shelby County* was a writ to enforce the payment of certain bonds issued by the board of commissioners of Shelby county. One of the questions in the case was whether the board of commissioners was a legally constituted body. The Supreme Court of the State decided it was not, and this court accepted the decision as binding. "The determination made," we said through Mr. Justice Field, "relates to the existence of an inferior tribunal of the State, and that depending upon the constitutional power of the legislature of the State to create it and supersede a preëxisting institution. Upon a subject of this nature the Federal courts will recognize as authoritative the decision of the state court." *Claiborne County* v. *Brooks*, 111 U. S. 400, 410, was cited.

Smith v. *Adsit* was a suit for equitable relief against a sale of land which a third party had undertaken to make in violation of an act of Congress. A decree was entered against Adsit for $6,829 and dismissed as to other defendants. The decree was reversed by the Supreme Court of the State and the bill dismissed for want of jurisdiction, and the case was brought to this court by writ of error. A motion to dismiss was granted,

Mr. Justice Strong, speaking for the court, saying: "In view of this [the action of the state court] we do not perceive that we have any authority to review the judgment of the state court." It was intimated in the opinion that a Federal question had been presented, but it was not decided. "As we have seen," Mr. Justice Strong said, "the bill was dismissed for want of jurisdiction. The judgment of the court respecting the extent of its equitable jurisdiction is, of course, not reviewable here." And, further: "It may well have been determined that the plaintiff's remedy against Adsit was at law, and not in equity, even if the sale from Holmes was utterly void, but whatever may have been the reasons for the decision, whether the court had jurisdiction of the case or not, is a question exclusively for the judgment of the state court."

In *Callen* v. *Bransford* a writ of error to the Court of Appeals of Virginia was dismissed on the ground that that court had disposed of the case on the ground that the matters involved were purely pecuniary, and that the amount in controversy in each case was less than sufficient to give the court jurisdiction under the constitution of the State. "This being so," this court said, "we are of opinion that the writs of error to that court must be dismissed."

In *Freeport Water Company* v. *Freeport City* we said: "With what functions the Circuit Courts of the State [Illinois] may be invested may not be of Federal concern. It is also a matter of construction in which we might be obliged to follow the state courts."

In *Newman* v. *Gates* the Federal right was asserted under that provision of the Constitution of the United States requiring due faith and credit to be given by each State to the public acts, records and judicial proceedings of every other State. The Supreme Court of the State (Indiana) dismissed the appeal to it as not having been properly taken. The case was brought here but dismissed. We said, through Mr. Justice White: "As the jurisdiction of this court to review judgments or decrees of state courts when a Federal question is presented is limited to

the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a State in which a decision in the suit could be had, and, as for want of an appropriate appeal, no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting."

Chambers v. *Baltimore & Ohio Railroad Company*, 207 U. S. 142, involved a statute of Ohio giving an action for death caused by the wrongful act in another State only when the death was that of a citizen of Ohio. The statute was attacked on the ground that it violated that clause of the Constitution of the United States which entitles the citizens of each State to all the privileges and immunities of citizens in the several States. The statute was sustained by this court. Mr. Justice Moody, speaking for the court, said, p. 148:

"But, subject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its court, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the State will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different States may have different policies and the same State may have different policies at different times. But any policy the State may chose to adopt must operate in the same way on its own citizens and those of other States. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other States is void, because in conflict with the supreme law of the land."

But in none of these cases was the same question presented that is presented here, nor were all of the cases cited by plaintiff in error to sustain the jurisdiction of this court cases in the Federal courts. *Poindexter* v. *Greenhow*, 114 U. S. 270, and *Chaffin* v. *Taylor*, 114 U. S. 309, were brought in the state courts

of Virginia, and they involve questions very much like those in the case at bar. *Poindexter* v. *Greenhow* was an action of detinue for personal property distrained by Greenhow for delinquent taxes, in payment of which Poindexter had tendered coupons cut from bonds issued by the State of Virginia under act of the State passed in 1871. This act, it was held, constituted a contract between the holder of the coupons and the State that they should be received for taxes, which contract, it was further held, was impaired by the subsequent act under which Greenhow justified the distraint of Poindexter's property.

It was urged that the action could not be maintained because it was substantially an action against the State to which it had not assented. It was further urged that the remedy was afforded of a right to recover back all the taxes after payment under protest, and that this constituted the sole remedy.

The first contention was discussed at length and rejected. The court said, in effect, that the defendant in the action was sued as a wrongdoer, and could only justify himself under a valid law. And it was said: "The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter to be taken, to be without warrant of law. *He stands then stripped of his official character, and confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defense.*" (Italics ours.)

A distinction was made between the State and its government, and it was said that an officer representing and acting for the latter is not an agent of the former. That and other cases were reviewed in *Belknap* v. *Schild*, 161 U. S. 10, and Mr. Justice Gray, speaking for the court, said: "In a suit to which the State is neither formally nor really a party, its officers, although acting by its order and for its benefit, may be re-

strained by injunction, when the remedy at law is inadequate, from doing positive acts, for which they are personally and individually liable, taking or injuring the plaintiff's property, contrary to a plain official duty requiring no exercise of discretion, and in violation of the Constitution or laws of the United States." Cases were cited. And again: "But no injunction can be issued against officers of a State to restrain or control the use of property already in the possession of the State, or money in its treasury when the suit is commenced; or to compel the State to perform its obligations; or where the State has otherwise such an interest in the object of the suit as to be a necessary party." The case and those cited expose the error, which appears with a kind of periodicity, varied in presentation, to accommodate the particular exigency, that a State is inevitably brought into court when the execution of its laws is arrested by a suit against its officers. It seems to be an obvious consequence that as a State can only perform its functions through its officers, a restraint upon them is a restraint upon its sovereignty from which it is exempt without its consent in the state tribunals, and exempt by the Eleventh Amendment of the Constitution of the United States, in the national tribunals. The error is in the universality of the conclusion, as we have seen. Necessarily to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a State to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation. And it will not do to say that the argument is drawn from extremes. Constitutional provisions are based on the

possibility of extremes. There need not, however, be imagination of extremes, if by extremes be meant a deliberate purpose to prevent the assertion of constitutional rights. Zeal for policies, estimable, it may be, of themselves, may overlook or underestimate private rights. The swift execution of the law may seem the only good, and the rights and interests which obstruct it be regarded as in a kind of outlawry. See *Ex parte Young, ante*, p. 123, where this subject is fully discussed and the cases reviewed.

The principles of the cases which we have cited were applied by the Supreme Court of Tennessee in *Lynn* v. *Polk*, 8 Lea, 121, where a suit against the funding board of the State was maintained against the contention that it was a suit against the State or against the officers of the State within the meaning of the act of 1873, on the ground that an officer executing an unconstitutional statute is not acting by the authority of the State. The court, however, distinguishes that case from the one at bar by saying that plaintiff in error did not assail the inspection law for being void upon its face, but only on the ground "that the oil upon which defendant was about to impose inspection fees was in law affected with interstate commerce." To enter into the inquiry involved in the contention, it was further said, "the court would be bound first to determine whether the oil in these tanks was in fact and in law, as claimed by complainant, a part of interstate commerce, and to do this we would be bound to hold, and proceed upon the theory, that the court had jurisdiction of the whole controversy." And that the court declared it was precluded from doing by the act of 1873. In other words, refused to consider that which might bring the oils under the protection of the Constitution of the United States.

A similar distinction was attempted to be made in *Poindexter* v. *Greenhow*, 114 U. S. 270, and the court replied by saying: "It is no objection to the remedy in such cases that the statute whose application in the particular case is sought to be restricted is not void on its face, but is complained of only be-

cause its operation in the particular instance works a violation of a constitutional right; for the cases are numerous where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States." And inquiries of fact may be necessary to exhibit the unconstitutionality of a statute, as in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, and *Smyth* v. *Ames*, 169 U. S. 466.

It being then the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court. *Wilmington &c.* v. *Asbrook*, 146 U. S. 279.

We are brought, then, to consider whether the law would, if administered against the oils in controversy, violate any constitutional right of plaintiff in error.

As determining an affirmative answer to this question, it is contended that the oil in both tanks was in transit from the place of manufacture, Pennsylvania, to the place of sale, Arkansas. The delay at Memphis, it is urged, was merely for the purpose of separation, distribution and reshipment, and was no longer than required by the nature of the business and the exigencies of transportation. The difference in the oil in tank No. 1 and that in tank No. 2, it is further said, is that the former was sold before shipment, and the latter was to be held in Tennessee for sale, but in neither case was the oil to be sold in Tennessee, and it is hence insisted that the interstate transit of the oil was never finally ended in Memphis, but was only temporarily interrupted there.

The beginning and the ending of the transit which constitutes interstate commerce are easy to mark. The first is de-

fined in *Coe* v. *Errol*, 116 U. S. 517, to be the point of time that an article is committed to a carrier for transportation to the State of its destination, or started on its ultimate passage. The latter is defined to be in *Brown* v. *Houston*, 114 U. S. 622, the point of time at which it arrives at its destination. But intermediate between these points questions may arise. *State* v. *Engel*, 5 Vroom (N. J.), 435; *State* v. *Carrigan*, 10 Vroom (N. J.), 35; *The Daniel Ball*, 10 Wall. 557.

In *Pittsburg Coal Company* v. *Bates*, 156 U. S. 577, coal in barges shipped from Pittsburg, Pennsylvania, to Baton Rouge, Louisiana, was stopped about nine miles above destination. It was held that it had ceased to be interstate commerce, and was subject to taxation by the State of Louisiana.

In *Diamond Match Company* v. *Ontonagon*, 188 U. S. 82, logs in transit to a point without the State were held subject to taxation under a statute of the State where they would "naturally leave the State in the ordinary course of transit."

In *Kelley* v. *Rhoads*, 188 U. S. 1, a flock of sheep driven from a point in Utah across Wyoming to a point in Nebraska for the purpose of shipment by rail from the latter point was held to be property engaged in interstate commerce and exempt from taxation by Wyoming under the statute taxing all live stock brought into the State "for the purpose of being grazed." There was no difficulty in the case except that which arose from the contention that the manner of transit was adopted as an evasion of the statute. Otherwise the grazing of the sheep was as incidental as feeding them would be if transported by rail. The pertinence of the case to the present controversy is in its summary of the principles of prior cases expressed in the following passage: "The substances of these cases is that, while property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another State, it becomes the subject of interstate commerce and is exempt from local assessment." Property, therefore, at an intermediate point between the place of

shipment and ultimate destination may cease to be a subject of interstate commerce. Necessarily, however, the length and purpose of the interruption of transit must be considered.

In *State* v. *Engle, Receiver, &c.*, 5 Vroom (N. J.), 425, 435, coal mined in Pennsylvania and sent by rail to Elizabethport, in New Jersey, where it was deposited on the wharf for separation and assortment for the purpose of being shipped by water to other markets for the purpose of sale, it was held that the property was not subject to taxation in New Jersey. The court said: "Delay within the State, which is no longer than is necessary for the convenience of transhipment for its transportation to its destination, will not make it property within the State for the purpose of taxation." See also in *State* v. *Carrigan*, 10 Vroom (N. J.), 36, where coal also shipped from Pennsylvania to a port in New Jersey and remaining there no longer than was necessary to obtain vessels to transport it to other places was held to be in course of transportation and not subject to the taxing power of the State. In *Burlington Lumber Co.* v. *Willetts*, 118 Illinois, 559, the principle was recognized that property *in transitu* was not subject to the taxing power of a State, but it was held that logs in rafts sent from Wisconsin to Burlington, Iowa, by the Mississippi River, a part of which were stopped at a place in Illinois called Boston Harbor, to be there kept until needed at Burlington for mill purposes, were subject to taxation. The court said that the property was "kept at New Boston on account of the profit of the owners to keep it there;" and further, that the company was engaged in business in the State beneficial to itself, and its property was so located as to claim the protection of the laws of the State and hence was liable to taxation.

Like comment is applicable to plaintiff in error and its oil. The company was doing business in the State, and its property was receiving the protection of the State. Its oil was not in movement through the State. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as

in *State &c.* v. *Engle, supra,* but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the State beyond a mere halting in its transportation. It required storage there—the maintenance of the means of storage, of putting it in and taking it from storage. The bill takes pains to allege this. "Complainant shows that it is impossible, in the coal oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank cars, because of the great delay and expense in the way of freight charges incident to such a plan, and for the further reason that an extensive plant and apparatus is necessary, in order to properly and conveniently unload and receive the oil from said tank cars, and it would be impracticable, if not impossible, to have such apparatus and machinery at every point to which complainant ships said oil."

This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the State and for which the protection of the State is necessary, a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500.

We have considered this case so far in view of the cases which involve the power of taxation. It may be that such power is more limited than the power to enact inspection laws. *Patapsco Guano Co.* v. *Board of Agriculture,* 171 U. S. 345, 356. The difference, if any exists, it is not necessary to observe. The cases based on the taxing power show the contentions of plaintiff in error are without merit; in other words, show that its oil was not property in interstate commerce.

As our conclusion is that no constitutional right of the oil company was violated by the enforcement of the law of 1899, it follows that no error prejudicial to the company was committed by the Supreme Court of Tennessee, and, for the reasons stated, its judgment is *Affirmed.*

MR. JUSTICE HARLAN, concurring.

The fundamental question before the state court of original jurisdiction was whether it had jurisdiction, under the constitution and laws of Tennessee, of a suit like this. Manifestly, if that court was forbidden by the laws under which it was created to take cognizance of cases like this, it had no alternative but to dismiss this suit. The court overruled a demurrer to the bill, one of the grounds of demurrer being that the suit was one "against the State or against an officer of the State, acting by authority of the State with a view to reach the State, its treasury, funds or property." It thereby sustained its jurisdiction, and proceeded to a decree on the merits. The case being carried to the Supreme Court of Tennessee, that court reversed the judgment and held that no court of Tennessee could, *under its statutes*, take cognizance of this suit and give the decree asked. Upon that ground it did what it said the inferior state court should have done, namely, dismissed the suit for want of jurisdiction to give the relief asked.

The statute of Tennessee which the Supreme Court of that State construed and held to be prohibitory of this suit was an act passed February 28, 1873, c. 13, p. 15. It provides: "That no court in the State of Tennessee has, nor shall hereafter have, any power, jurisdiction or authority to entertain any suit against the State, or any officer acting by the authority of the State, with a view to reach the State, its treasury, funds or property, and all such suits now pending, or hereafter brought, shall be dismissed as to the State, or such officer, on motion, plea or demurrer of the law officer of the State, or counsel employed by the State."

The oil company seeks a reversal of the decree of the state court, contending that it was denied a right arising under the commerce clause of the Constitution. But back of any question of that kind was the question before the Supreme Court of Tennessee whether the inferior state court, under the law of its organization, that is, under the law of Tennessee, could

entertain jurisdiction of the suit. The question, we have seen, was determined adversely to jurisdiction. That certainly is a state, not a Federal question. Surely, Tennessee has the right to say of what class of suits its own courts may take cognizance, and it was peculiarly the function of the Supreme Court of Tennessee to determine such a question. When, therefore, its highest court has declared that the Tennessee statute referred to in argument did not allow the inferior state court to take cognizance of a suit like this, that decision must be accepted as the interpretation to be placed on the local statute. Otherwise, this court will adjudge that the Tennessee court *shall* take jurisdiction of a suit of which the highest court of the State adjudges that it cannot do consistently with the laws of the State which created it and which established its jurisdiction. It seems to me that this court, accepting the decision of the highest court of Tennessee, as to the meaning of the Tennessee statute in question, as I think it must, has no alternative but to affirm the judgment, on the ground simply that the ground upon which it is placed is broad enough to support the judgment without reference to any question raised or discussed by counsel.

What is said in the opinion of the court about the Eleventh Amendment, is, I submit, entirely irrelevant to any decision of the present case by this court. That Amendment relates wholly to the judicial power of the United States, and has absolutely nothing to do with the inquiry as to the jurisdiction of the inferior state court under the Tennessee statute of 1873. In determining what relief this court can or should give, in respect of the judgment under review, we need not consider the scope and meaning of the Eleventh Amendment; for, it was long ago settled that a writ of error to review the final judgment of a state court, even when a State is a formal party and is successful in the inferior court, is not a suit within the meaning of the Amendment. *Cohens* v. *Virginia*, 6 Wheat. 264, 408, 409.

In my opinion, the decision of the Supreme Court of Tennessee, that the inferior state court was forbidden by the law of

its being from taking cognizance of this suit, is conclusive here, and the judgment of that court should, therefore, be affirmed without reference to any other question raised or discussed.

Mr. Justice Moody, dissenting.

I am unable to agree to the judgment in this case, for the reason that the statute here in question, as it was enforced against the property of the plaintiff in error, in my opinion was an interference with interstate commerce, which was beyond the power of the State. It is to be observed that the court below did not construe the statute as applying to articles in the course of transportation between the States and not destined for sale to consumers in the State, or, in other words, the court did not hold that the statute applied to the property here affected by it. On the contrary, the court expressly refrained from passing upon the merits of the controversy, and dismissed the bill for want of jurisdiction. We, however, have assumed jurisdiction of the controversy, for reasons given in the opinion of the court, in which I concur, and therefore cannot escape the duty of interpreting the meaning of the statute. I think we should, if it be possible, give to the statute a meaning which places its constitutionality beyond doubt. The law seems clearly to be designed to protect state manufacturers and consumers within the State. Its operation is limited by the words of the first section, which directs the Governor to appoint inspectors for illuminating fluids "which may be manufactured or offered for sale in the State." Far from enlarging the meaning of these restrictive words, the other provisions of the law accord with and confirm them. The oil in tank No. 1 at least, which was neither manufactured in the State nor offered for sale in the State, is by this interpretation removed from the operation of the statute, and I think we ought so to decide.

But, if it be assumed that the oil in tank No. 1 is subjected to inspection by the law, in my opinion the law is unconstitu-

tional. The law is not sustained by the judgment of the court as an inspection law, which it purports to be. Perhaps it could not be under the doctrine announced and applied in *Minnesota* v. *Barber*, 136 U. S. 313, and *Brimmer* v. *Rebman*, 138 U. S. 78. I am therefore relieved from considering whether the law, because it is a mere cloak for exacting revenue from interstate commerce, is bad as an inspection law. The judgment of the court treats it as such, and it is sustained not as an inspection but as a revenue law. I do not dissent from such an interpretation of its effect. But, with unfeigned deference to the opinions of my brethren, I venture to think that the statute, as enforced in the case at bar, is bad as a taxing law. The case of *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, holds that articles before they have ceased to be the subjects of interstate commerce may still be reached by the taxing power of the State. Accordingly it was held that the property of a citizen of another State which had been brought into the State of Tennessee, placed in a warehouse for sale, and from there sold to persons within as well as without the State, was subject to a state tax. It was observed in the opinion in that case that the property had come to rest in the State and was enjoying the protection of its laws. But the case at bar, so far as it concerns the oil in tank No. 1, to which I confine my observations, is sharply distinguished from that case. The judgment here takes a step forward which I think ought not to be taken. The oil in that tank had been sold while in Pennsylvania and Ohio to purchasers in other States than Tennessee, before it started in the course of interstate transportation. It was shipped especially in pursuance of such sales. It was in Tennessee only momentarily ("a few days"), for the purpose of repacking and reshipping it, and for no other purpose whatever. The delay was to meet the exigencies of interstate commerce, which arose out of the nature of the transaction. It does not seem to me important, if such be the case, that it would begin the remainder of its interstate journey under a new contract of shipment. It would no more seem to be the subject of state taxation than

a drove of cattle, whose long interstate journey was interrupted, for humane reason, to give them a few days of rest and refreshment. With respect to this oil, no business whatever was done in the State except that which was required to conduct the transaction of interstate commerce begun in another State and to be completed in a third State. The single consideration that the property enjoys in Tennessee the protection of the laws of the State cannot be enough to justify state taxation. If that were so, all property in the course of interstate transportation would be subject to state tax in every State through which it should pass. I conclude that the oil in question was actually in the course of transportation between the States, was delayed in the State of Tennessee only for the purpose of conveniently continuing that transportation, and was, therefore, protected from state taxation by the commerce clause of the Constitution. *Coe* v. *Errol*, 116 U. S. 517, 525; *Kelley* v. *Rhoads*, 188 U. S. 1. Cases of taxation upon property before it has entered the channels of interstate transportation, or after the transportation has finally ended, seem to me to have no application. In the former class the property is taxable because it has not ceased to be a part of the mass of the property of the State, and in the latter class because it has come to rest as a part of the mass of the property of the State. Between those two points of time it is exempt from the taxing power of the State. In every case where the tax has been sustained there were facts present regarded as essential by the court, which are absent here. The property had either not began its interstate journey, as in *Coe* v. *Erroll*, *ub. sup.*, and *Diamond Match Company* v. *Ontonagon*, 188 U. S. 82, or it had ended that journey and was held for sale in common with other property in the State, as in *Brown* v. *Houston*, 114 U. S. 622; *Pittsburg Coal Company* v. *Bates*, 156 U. S. 577, and *American Steel & Wire Company* v. *Speed*, *ub. sup.*

MR. JUSTICE HOLMES concurs.

DOTSON *v.* MILLIKEN.

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

No. 48. Argued March 4, 5, 1908.—Decided March 23, 1908.

A broker employed to sell land subject to a requirement of the purchaser which the vendor declares will be complied with is entitled to his commissions if the sale falls through solely because the vendor's representations are inaccurate.

The fact that the particular portion of a tract of land for which a broker finds a purchaser in accordance with the vendor's offer cannot be identified does not defeat the broker's claim for commissions if the sale falls through entirely for other reasons for which the vendor was exclusively responsible.

27 App. D. C. 500, affirmed.

THE facts are stated in the opinion.

Mr. R. Burnham Moffat and *Mr. A. S. Worthington,* for plaintiff in error.

Mr. J. J. Darlington for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for a commission of $2.50 an acre on 10,000 acres of coal land belonging to the defendant, the plaintiff in error, for which, although not sold, the defendant in error, the plaintiff, says that he furnished a purchaser, satisfying the terms of the understanding on which he was employed. The errors alleged and now insisted upon are the giving of an instruction requested by the plaintiff and refusing one asked by the defendant. To explain them it will be necessary to give a summary of the evidence, or part of it.

Relations between the parties were opened by a letter from the defendant, written on April 24, 1902, at the request of a

friend of the plaintiff's, enclosing circulars concerning 124,000 acres of coal land in Kentucky. The letter said: "We have arranged with R. R. Companies to build a branch into it and develop the lands," and the circulars also stated that the owners had an understanding with the railroads near the land, by which they were to build a branch into the land as soon as the owners were ready to open up mines, etc., with more of the same sort. On April 30 the parties met and the plaintiff, Milliken, told the defendant, Dotson, that he knew the land, and, as was the truth, that the important thing was about the railroad, whether there was any way to get the property to market. Dotson replied that he had an arrangement with Spencer, President of the Southern Railway, to build a road in there at once, that at that time they had their surveyors in there and were locating a line of road, etc. Thereupon it was arranged that Dotson would give $2.50 an acre for every acre Milliken could sell at $20, and that Milliken was to go to work for a purchaser, which Milliken accordingly did.

After a letter on May 2, giving an account of a first interview and an answer dwelling on the great increase of value that would come from the building of railroads at once through the property, Milliken wrote on May 7, saying that he was writing to the two roads to know if they would "build the road in there, as soon as we are ready to begin the development of the property," and that the prospective purchasers "want to know positively about the railroad being built in there, if they go into it." The plaintiff seems to have written as his letter stated, but he testified that an assurance from Dotson would have been satisfactory and was satisfactory when it came. On May 8, to meet the purchasers' doubts, he telegraphed to Dotson: "See Spencer and write me to-night how much development he will require before building road into property," etc. On the same day Dotson replied: "I have already discussed fully with Mr. Spencer the point . . . and am glad to say that Mr. Spencer is willing to build the road into the property without placing any requirements on the property holders

to put in certain sized plants, or any number of coke ovens," with further details. This seemed at the time to satisfy the purchasers. On May 12 Milliken wrote to Dotson that if his coal would make as good coke as the Stonega coal and the Southern would build a branch line into the property, the parties would put their capital in; that it was for Dotson to "substantiate these two points, which I believe you will do;" that he had a letter from Mr. H. Smith, the President of the Louisville and Nashville, declining to build a branch line, but that if Dotson had Spencer safely committed to him they did not care for Smith's road. On the same day Dotson wrote to Spencer, asking for a letter to show, which Spencer answered the next day, declining until he had more definite knowledge and obligation as to improvement, and professing to repeat what he had said, viz., that if the property of the amount previously named should be put into such shape as to warrant the construction of a railroad they would take up and consider favorably a plan. This is thought by the plaintiff to contradict the statements that Dotson had made to him. Spencer testified that there never was any agreement, or more than what just has been stated from his letter, and Dotson's answer, written May 16, confirms the testimony by the absence of any tone of surprise.

Dotson testified that he showed Spencer's letter to Milliken. Milliken testified the contrary, and his case was that, having no notice of the correspondence, he was going ahead under Dotson's letter of May 8. On May 29 Dotson wrote as to samples of coal, adding that he understood the Southern Railway Company had secured their right of way with one or two exceptions, but that he hoped Spencer would call his men out and keep them out "until we get our tracts rounded up." On June 9 Milliken wrote to Dotson, communicating a very favorable report on his coal, and saying: "I may wire you by the time this letter reaches you to come up here to close the deal [for 5,000 acres]. They asked me in particular this afternoon how soon the railroad could be built into this land from Middles-

boro." He added that Easter, one of the purchasers, asked if he could go and have a talk with Spencer on the subject, with Dotson, and that Milliken answered yes. On June 12 Dotson answered that as Mr. Spencer's plans were fixed, Spencer would not hesitate to say to Mr. Easter that they would build the road into that section at once, and urged prompt action. In another letter, of July 8, he said: "After we completed arrangements with the R. R. Company for the development of the property, we advanced price to $20 per acre." On July 24 an option on "ten thousand acres of land in Harlan County, Ky.," at $20 per acre for sixty days, was given to Easter in consideration of his forthwith sending an engineer to examine and report on the same, and on August 25 Milliken wrote to Dotson that Easter's party had decided to take the 10,000 acres on condition that Mr. Spencer would assure them as to the building of the railroad to Harlan court house, that they had written to Spencer, and if his answer confirmed Dotson's representations they would close the purchase. If it did not, they did not want the land at any price. There was an interview, it seems, on September 5, at which Easter asked Dotson to get a letter from Spencer, but Dotson said that Easter was the proper party, and that they would have to offer some inducements to get such an assurance, but he thought that if Easter would let Spencer know what he was willing to do, Spencer would not object. Thereupon there was some correspondence, it turned out that the Railroad company would not build, and the transaction fell through.

The foregoing letters show that the plaintiff was employed and went to work. He spent a good deal of time and money in his efforts, as the defendant knew. There is no reasonable doubt as to the rate at which he was to be paid, and the substantial question is what he had to do to entitle himself to his compensation. The bargain made may have been improvident and may have been different from that which the defendant would have made if he had taken all the chances into account. But the general question is what the jury was warranted in

finding to have been made in fact. It was recognized that what the railroads would do was decisive, and it was to be expected that parties thinking of a purchase would require an assurance from them, or something more definite than what the defendant had said. The plaintiff was to go to work at once, and the jury well might find that he was not understood to take the risk of what the railroads might do. The question is between the broker and seller, not between the purchaser and seller. The seller was willing and meant that the broker should accept his confidence as well founded, although he must have known that the purchaser would or might ask more. The correspondence indicates very strongly that Milliken really relied upon Dotson's statement that an agreement had been made. So, again, it might be found that Dotson was willing to take his chances as to the specification of the ten thousand acres in the larger tract at the defendant's command. The option that satisfied him and his purchasers was enough, if accepted, to entitle the plaintiff to his pay. The jury was warranted in finding that the plaintiff was employed at the rate named to make a bargain for land to be identified later and subject to requirement of the purchaser that the railroads or one of them would agree to build a road into the land.

The ruling requested for the plaintiff was as follows:

"If the jury believe from the evidence that the defendant, on or about the 30th day of April, 1902, represented to the plaintiff that he, the defendant, was desirous of securing a purchaser for either the whole or any considerable quantity of the Harlan County coal lands at the price of $20.00 per acre, that he had obtained from the Southern Railway Company its consent or agreement to construct a branch railroad into the said coal lands, and that he would pay to the plaintiff the sum of $2.50 for each and every acre for which he should find a purchaser at and for the price of $20.00 per acre, and that shortly thereafter, namely, on or about the 8th day of May, 1902, he further represented to the plaintiff that the Southern Railway Company was willing to build the said railroad into

the said property without placing any requirements on the purchasers or holders of the said lands to put in any certain size of plants or number of coke ovens, and that the plaintiff, relying upon the said representations of the defendant, expended time and effort in the attempt to find a purchaser, and did find a purchaser able, ready and willing to purchase ten thousand acres of the said lands at the said price provided the defendant's said representations were correct, and that the said sale failed because of the inaccuracy of the defendant's representations that the said Railway Company had so consented or agreed to construct a branch railroad into the said coal lands, then the plaintiff is entitled to recover the said stipulated sum of $2.50 per acre on the ten thousand acres, or $25,000 in all."

This was given, and the defendant took a general exception.

It is objected to this ruling that the jury was not required to find and could not have found that any particular land was agreed upon. But it at least would have been warranted in finding that the plaintiff had done in this respect all that his bargain required him to do. The agreement failed for a wholly different reason, and no difficulty in completing the sale arose on that ground. We are of opinion that the objection is entitled to no consideration, especially upon a mere general exception and upon a point not taken in the trial court. *McDermott* v. *Severe*, 202 U. S. 600, 611. A second objection taken is that the condition of the consent to purchase was misstated; that the condition was not that the defendant's representation was correct, but that the railroad should agree to build. But this is evidently a point that should have been called to the attention of the court. We cannot doubt that the plaintiff's counsel and the judge meant to state what the letters showed to have happened, and would have stated it more exactly if the inaccuracy had been pointed out. Probably in speaking of the defendant's representations proving correct, statements of past facts were less referred to than those sounding in warranted prophecy. But the instruction was justified as it stood. If the defendant had had such an agreement as at one time he

gave the plaintiff to understand, no doubt the purchaser would have been content and the sale would have been made.

One or two subordinate objections need only a word. It is said that the instructions did not require the jury to find that the owner and purchaser had agreed on terms. But this is best answered by reading the instruction. What is meant is that on the evidence there were possible points of disagreement open. This may or may not be true. But a finding that the parties had agreed was warranted and was presupposed in the request. So as to the ability of the purchaser. No question ever was raised about it; the defendant was satisfied with it, and it is questioned here only as a technical means of getting a large and doubtful verdict set aside. It is urged, faintheartedly, that a binding agreement was necessary before a commission was earned. This is not the prevailing view, and could not be the law in a case like this, where the jury must have found the defendant liable on a contract with the broker that might be performed before an absolute agreement with the purchaser should be reached.

The ruling requested for the defendant was as follows:

"If the jury believe from the evidence that any *bona fide* purchaser was actually found by the plaintiff for 10,000 acres of said land as claimed in the declaration, upon the representations of said plaintiff to said purchaser as to the existence of a certain agreement between the defendant and the Southern Railway Company concerning the construction of a branch railroad into said lands and the purchaser did not rely on the said statements and representations of said plaintiff, but with the knowledge or coöperation of said plaintiff and at his suggestion sought and undertook to verify the truth of such statements and representations during the pendency of the negotiations for the purchase of said land before any transaction was closed for the purchase thereof, and that said purchaser had the opportunity of investigating, ascertaining and verifying the truthfulness of such statements and representations, and took advantage of that opportunity by interviews,

conferences or written communications, either personally or by attorney, or by others, with the president and first vice-president of the Southern Railway Company, for the purpose of verifying the said statements and representations so made by the plaintiff as to any agreement existing between the defendant and Southern Railway Company in regard to the construction of the said branch railroad, and ascertained from the said officers of the said Railway Company, from time to time during said negotiations and before September 15, 1902, the date upon which it is alleged in the declaration that said purchaser was found, that no agreement existed between the defendant and said Southern Railway Company to build said branch railroad, but that the subject of building such branch railroad had only been discussed, and that the building thereof depended on the development and improvements to be placed on said land prior to the construction of any railroad, in the way of opening coal mines, establishing coke ovens, or furnishing the railroad with a sufficient amount of tonnage, and that said plaintiff and alleged purchaser had full knowledge and information from the proper officers of the Southern Railway Company of all the facts relating to the conditions upon which said branch railroad would be constructed and of the non-existence of any agreement between the defendant and Southern Railway as alleged, then the defendant is not responsible for the non-appearance of the alleged sale or purchase of the land between the plaintiff and the alleged purchaser, and you should find for the defendant."

As to this request we must repeat that it does not matter how much or how little the purchaser relied upon the defendant's representations if the plaintiff relied upon them and obtained a purchaser ready and able to purchase upon the basis that the defendant's representations to the plaintiff were true. That the plaintiff did rely upon them until the time when, on August 25, he announced Easter's readiness to purchase, hardly is open to dispute. But the judge told the jury that if the plaintiff at the beginning had made inquiries of the railroad and

found that it would not build, he could not complain. The judge called attention to the failure to specify any time at which the plaintiff began to inquire, and said what we understand to mean that the prayers were based on the theory that if, after the purchaser was ready to complete the sale and the question as to the railroad alone prevented it, the purchaser made an attempt to induce the railroad to build, and so discovered the truth, and thereupon refused to go on, the plaintiff could not recover. At all events, he said enough to warn the defendant to make some necessary amendments. He gave as his reason for refusing the instructions asked that they did not undertake to refer to any time prior to the consummation of the sale. The request assumed that no agreement had been reached until September 15, on evidence which it has not been necessary to state. But the plaintiff's argument was that he had earned his commission on August 25, and there was evidence on which his conclusion might be sustained. On the instructions given we have no doubt that the jury understood the true conditions of the plaintiff's case. They were told in terms that if the plaintiff was to recover they must find that the plaintiff did his work and found a purchaser, relying on the defendant's representations, if he made them, and that the purchase failed because they were inaccurate and the railroad had not agreed to build.

Judgment affirmed.

HUTCHINS *v.* MUNN.

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

No. 163. Argued March 10, 1908.—Decided March 23, 1908.

The measure of protection to be given by the undertaking required on issuing a restraining order under § 718, Rev. Stat., is to make good the injuries inflicted upon a party observing the order until it is dissolved, and such undertaking inures to the benefit of a defendant suffering injuries irrespective of the exact time when that party has knowledge of the pendency of the action or appears therein; nor is this protection denied because the only defendant sustaining injuries is a woman and the undertaking is to make good "to the defendant all damages by him suffered."

Findings of an auditor assessing damages on an undertaking should not be set aside by the court unless there has been an error of law or a conclusion of fact unwarranted by the evidence.

The owner of a house in Washington, D. C., who was prevented by a restraining order from completing alterations during the winter months, the house meanwhile being only partially habitable, was held, in this case, to have lost the entire use of the house and to be entitled to recover on the undertaking the reasonable rental value of the house for the season.

28 App. D. C. 271, affirmed.

THE facts are stated in the opinion.

Mr. Edwin C. Brandenburg, with whom *Mr. Clarence A. Brandenburg* and *Mr. F. Walter Brandenburg* were on the brief, for appellants.

Mr. Samuel Maddox, with whom *Mr. H. Prescott Gatley* was on the brief, for appellee.

MR. JUSTICE MOODY delivered the opinion of the court.

This is an appeal from a judgment of the Court of Appeals of the District of Columbia. The appellee Carrie L. Munn was

the owner of a lot of land, with a dwelling house thereon, situated on Massachusetts avenue, in the city of Washington. The premises adjoining this lot were owned by Stilson Hutchins, one of the appellants. Mrs. Munn's dwelling house did not occupy the whole of her lot, and she decided to build an addition to it. She contracted with an architect and builder to design and construct this addition. The work under these contracts was begun about July 1, 1902, and it was expected that it would be completed about November 1, 1902, so that the enlarged structure would be ready for occupation during the season of 1902 and 1903. After making the contracts Mrs. Munn went to Europe with her family, intending to return and occupy the house on its completion in November. On August 14, 1902, Mr. Hutchins filed a bill in equity in the Supreme Court of the District of Columbia, praying an injunction against the continuance of the erection of the addition. Mrs. Munn, her husband, the architect, and the builder were made parties defendant. The grounds upon which the injunction was sought are not material here. On the day of the filing of the bill a justice of the Supreme Court of the District entered an order that the defendants show cause, on September 4 next, why the prayer for an injunction should not be granted, and further ordered that, until the hearing, the defendants be "restrained and enjoined from continuing the erection of the building." On the same day Mr. Hutchins, with the other appellants as sureties, filed an undertaking, approved by the court, which is as follows: "Stilson Hutchins, the complainant, and William J. Dante, Ben B. Bradford, sureties, hereby undertake to make good to the defendant 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." Thereupon the work on the addition was suspended and not resumed until

November 25, 1902, when, upon hearing, the court dissolved the injunction and discharged the order to show cause. The work was then continued until its completion in April, 1903. Subsequently the decree of November 25, 1902, was affirmed by the Court of Appeals, and the cause was referred to an auditor to ascertain the damages caused to the defendants, or any of them, by the wrongful suing out of the injunction. The auditor reported that Mrs. Munn had sustained damages to the amount of six thousand dollars, and that the other defendants had sustained no damage. Exceptions to the auditor's report were overruled by the Supreme Court, and the appellants were decreed to pay to Mrs. Munn, in accordance with the terms of the undertaking, the sum found by the auditor as damages. This decree was affirmed by the Court of Appeals in the judgment now under review.

It is contended that the undertaking does not, by its terms, include Mrs. Munn in its protection, because it is expressed to be an undertaking "to make good to the *defendant* all damages by *him* suffered." Little pains need be expended on the argument which arises out of the letter of the bond. The undertaking was exacted by the court, it was offered by the complainant at a time when none of the defendants knew of the pendency of the suit, and it was entitled "No. 23468 Equity Docket, Stilson Hutchins, Complainant, Charles A. Munn et al., Defendants." It accompanied a restraining order directed against "the defendants and each of them," and we think it should be held to run to all the defendants who were included in that order.

It is further contended that, as Mrs. Munn was never served with a subpœna, or notice either of the order to show cause or of the restraining order, she is not entitled to the benefits of the undertaking. The order of the court was served immediately upon the architect and the builder, and the work was instantly stopped. No injury from the wrongful acts of the injunction was inflicted upon either of the defendants served with the court's order, but only upon the owner of the house. It is now

said that, although the court had, as a condition of issuing the restraining order, exacted an undertaking to indemnify her, she cannot recover upon it, because she was beyond the reach of the process of the court. But this view is based upon a misconception of a restraining order and the undertaking to make good the injury resulting from its wrongful use. The nature of the order and undertaking received the consideration of this court in *Houghton* v. *Meyer*, 208 U. S. 149. The authority for the issue of such an order was shown to be § 718 of the Revised Statutes. This section contemplates, in cases where irreparable injury may be anticipated if the *status quo* be not preserved, the issue without notice of a temporary restraining order, to be enforced only until an order to show cause on the motion for an injunction can be heard and decided. The order may be granted with or without security to the defendants, in the discretion of the court. In the case at bar the order accomplished its purpose and instantly arrested the progress of the work by restraining those who were engaged in it. The injury against which the undertaking was designed to indemnify was incurred by Mrs. Munn, and we find nothing in the facts of this case which takes away the remedy on the undertaking exacted by the court for her protection. It is true that she did not learn of the issue of the restraining order for two weeks. But counsel, though without express authority, undertook to guard her interests, and moved to discharge the order on August 17. With all reasonable speed authority to file an answer was obtained and acted upon, the cause was heard and the restraining order dissolved. In the meantime the restraining order was obeyed by all, had its full effect, and inflicted its full injury upon Mrs. Munn's rights. Under these circumstances it is beyond doubt that she is entitled to recover against those who undertook to make good her injuries, the damages which she sustained. It is enough that the order was obtained without notice to her, that it was wrongfully sued out, that it was observed until dissolved, and that it inflicted injury upon her rights. These facts, irrespective of the exact time when she

had knowledge of the pendency of the suit or appeared in it, bring her within the terms of the undertaking. That is precisely the measure of protection which the law ought to give, and by the statute does give, to one against whom, without notice and hearing, an order of this kind is made.

The appellants alleged various exceptions to the auditor's report, which are directed to the findings of facts, upon which the liability was based and of the amount of damages, and here, apparently, argue those exceptions on the theory that this court is at liberty to consider the evidence *de novo*, weigh and balance it, and draw such inferences and conclusions as seem proper. But this theory overlooks the proper function of an auditor, which was correctly appreciated by the court below. The findings should not be set aside unless it is shown that there has been an error in law or a conclusion of fact unwarranted by the evidence. It is enough to say that there was evidence which supported the findings of fact of the auditor and his assessment of damages. Nor does it appear that the auditor committed any error of law. His report shows the following facts, briefly stated: It was the habit of Mrs. Munn to occupy her house during the late autumn, the winter and the early spring, and to live elsewhere during the remainder of the year. This was the common season of occupancy in Washington of houses of this character. She intended to occupy her house during the season of 1902 and 1903, but was prevented from doing so by the wrongful use of the restraining order. The addition which, if the work had not been stopped, would have been completed by November 1, was not completed until April, and could not have been completed, if reasonable speed had been used, before March. In the meantime the house, some of whose exterior walls had been removed, was practically uninhabitable. Shelter could doubtless have been found in some of the rooms which could have been closed and warmed. But the owner was entitled to a house which could be occupied as a whole and was available for use as a home for herself and her family. This was denied to her by the defendants' wrongful act. We

think that the auditor correctly adopted as the measure of damages the value of the use of the property for the period and season during which she was thus deprived of it as the direct result of the restraining order which, in another proceeding, has been found to have been wrongfully and inequitably sued out. The decree of the court below is

Affirmed.

ASBELL *v.* STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 166. Submitted March 6, 1908.—Decided March 23, 1908.

While the State may not legislate for the direct control of interstate commerce, a proper police regulation which does not conflict with congressional legislation on the subject involved is not necessarily unconstitutional because it may have an indirect effect upon interstate commerce.

Until Congress acts on the subject a State may, in the exercise of its police power, enact laws for the inspection of cattle coming from other States. *Reid* v. *Colorado*, 187 U. S. 137.

Congress has not enacted any legislation destroying the right of a State to provide for the inspection of cattle and prohibiting the bringing within its borders of diseased cattle not inspected and passed as healthy either by the proper state or national officials.

A State may not under pretense of protecting the public health exclude the products or merchandise of other States, and this court will determine for itself whether it is a genuine exercise of the police power or really and substantially a regulation of interstate commerce.

Section 27 of Chap. 495 of the laws of Kansas of 1905, prohibiting the transportation of cattle from any point south of the State into the State except for immediate slaughter which have not been passed as healthy by the proper state officials or by the National Bureau of Animal Industry is a proper police regulation within the power of the State, is not in conflict with the act of February 2, 1903, 32 Stat. 791, or the act of March 3, 1905, 33 Stat. 1204, in regard to inspection of cattle, and is not unconstitutional as a direct regulation of interstate commerce.

60 Kansas, 51, affirmed.

THE facts are stated in the opinion.

Mr. Archie D. Neale and *Mr. Nelson Case* for plaintiff in error:

A statute which prohibits the bringing of cattle into the State

without having them first inspected, regardless of whether such cattle are infected or are perfectly healthy, is not a proper exercise of the police power.

This statute not only interferes with interstate commerce, but also conflicts with the United States statute and the rules and regulations of the Department of Agriculture. In cases of this kind where Congress has legislated on the subject such legislation is exclusive on that subject.

The Secretary of Agriculture has the power and authority, under the Federal statute, to promulgate rules and regulations for the transportation of cattle, and he does so, but the State of Kansas steps in and nullifies his orders by the passage of the statute under consideration, or rather attempts to do so. A statute attempting such a thing is unconstitutional and void.

Commodities which may lawfully become the subject of purchase, sale or exchange are articles of interstate commerce, within the protection of the commerce clause of the Constitution. *Leisy* v. *Hardin*, 135 U. S. 100; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *In re Ware*, 53 Fed. Rep. 783; *Donald* v. *Scott*, 74 Fed. Rep. 859; *Sawrie* v. *Tennessee*, 82 Fed. Rep. 615; *In re Schietlin*, 94 Fed. Rep. 272; *Bennett* v. *American Express Co.*, 83 Maine, 236; *Ballock* v. *State*, 73 Maryland, 1; *S. C.*, 23 Am. St. Rep. 559.

A State has not the power to prevent the importation of lawful subjects of commerce. Cases *supra* and *Lyng* v. *Michigan*, 135 U. S. 161; *Hannibal &c. Ry. Co.* v. *Husen*, 95 U. S. 465; *Bowman* v. *Chicago &c. Ry. Co.*, 125 U. S. 489.

In this case defendant brought the cattle in question from the Indian Territory (now Oklahoma) into Kansas and proceeded with them to the railroad and shipped them to Missouri. He was engaged in interstate commerce, and was in possession of a lawful subject of interstate commerce. *State* v. *Duckworth*, 51 Pac. Rep. (Idaho) 456.

If the animals with which defendant was charged with bringing into the State were not diseased, they were lawful subjects of commerce. It was not charged that they were diseased; the

trial court charged the jury that it made no difference whether they were or were not diseased, and the Supreme Court of Kansas agreed with the trial court. Whether an article is or is not a subject of lawful interstate commerce depends upon the intrinsic state or condition of the article, and not upon a mere declaration of a state legislature. *In re Rahrer*, 140 U. S. 545.

This statute being a regulation of commerce under the guise of an inspection law, cannot be upheld, but must be condemned. *State of Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Gulf. C. &. S. F. Ry. Co.* v. *Hefley & Lewis*, 158 U. S. 99, 105.

Mr. E. L. Burton, *Mr. C. E. Pile* and *Mr. W. B. Glasse* for defendant in error:

The regulation of the rights and duties of all persons within the jurisdiction of a State belongs primarily to such State under its reserved power to guard the safety of persons and property within its borders, and even where the subject of such regulations is one over which Congress exercises exclusive control, any action of the State upon the subject which is not a direct interference with rights secured by the Constitution of the United States or by some valid act of Congress must be respected until Congress intervenes. *Patapsco Guano Co.* v. *Board of Agriculture of North Carolina*, 171 U. S. 345; *Minnesota* v. *Barber*, 136 U. S. 313; *M., K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613; *Morgan's La. & Texas R. R. Co.* v. *Bd. of Health of La.*, 118 U. S. 455, and cases cited. See also *Patterson* v. *Kentucky*, 97 U. S. 501; *Kammish* v. *Ball*, 129 U. S. 217, and cases cited.

Mr. Justice Moody delivered the opinion of the court.

A statute of the State of Kansas makes it a misdemeanor, punishable by fine or imprisonment, or both, for any person to transport into the State cattle from any point south of the south line of the State, except for immediate slaughter, without hav-

lative power which was not withdrawn from it expressly or by implication by the scheme of government put into operation by the Federal Constitution. It may sometimes happen that a law passed in pursuance of the acknowledged power of the State will have an indirect effect upon interstate commerce. Such a law, though it is essential to its validity that authority be found in a governmental power entirely distinct from the power to regulate interstate commerce, may reach and indirectly control that subject. It was at an early day observed by Chief Justice Marshall that legislation referable to entirely different legislative powers might affect the same subject. He said in *Gibbon* v. *Ogden*, 9 Wheat. 194, 204:

"So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means. All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

"In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other."

lative power which was not withdrawn from it expressly or by implication by the scheme of government put into operation by the Federal Constitution. It may sometimes happen that a law passed in pursuance of the acknowledged power of the State will have an indirect effect upon interstate commerce. Such a law, though it is essential to its validity that authority be found in a governmental power entirely distinct from the power to regulate interstate commerce, may reach and indirectly control that subject. It was at an early day observed by Chief Justice Marshall that legislation referable to entirely different legislative powers might affect the same subject. He said in *Gibbon* v. *Ogden*, 9 Wheat. 194, 204:

"So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means. All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

"In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other."

Foreseeing cases where national and state legislation based upon different powers might, in their application, be brought into conflict, he, in the same case (p. 211), declared that then "the law of the State, though enacted in the exercise of powers not controverted, must yield," a rule which has constantly been applied by this court. These general principles control the decision of the case at bar. Cattle, while in the course of transportation from one State to another, and in that respect under the exclusive control of the law of the National Government, may at the same time be the conveyance by which disease is brought within the State to which they are destined, and in that respect subject to the power of the State exercised in good faith to protect the health of its own animals and its own people. In the execution of that power the State may enact laws for the inspection of animals coming from other States with the purpose of excluding those which are diseased and admitting those which are healthy. *Reid* v. *Colorado*, 187 U. S. 137.

The State may not, however, for this purpose exclude all animals, whether diseased or not, coming from other States, *Railroad* v. *Husen*, 95 U. S. 465, nor under the pretense of protecting the public health, employ inspection laws to exclude from its borders the products or merchandise of other States; and this court will assume the duty of determining for itself whether the statute before it is a genuine exercise of an acknowledged state power, or whether, on the other hand, under the guise of an inspection law it is really and substantially a regulation of foreign or interstate commerce which the Constitution has conferred exclusively upon the Congress. *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345. Tested by these principles, the statute before us is an inspection law and nothing else, it excludes only cattle found to be diseased, and in the absence of controlling legislation by Congress it is clearly within the authority of the State, even though it may have an incidental and indirect effect upon commerce between the States.

The cause, however, cannot be disposed of without inquiring whether there was at the time of the offense any legislation of Congress conflicting with the state law. If such legislation were in existence the state law, so far as it affected interstate commerce, would be compelled to yield to its superior authority. This question was considered and the national legislation carefully examined in *Reid* v. *Colorado*, *supra*, and the conclusion reached that Congress had not then taken any action which had the effect of destroying the right of the State to act on the subject. It was there said, p. 148: "It did not undertake to invest any officer or agent of the Department with authority to go into a State, and, without its assent, take charge of the work of suppressing or extirpating contagious, infectious or communicable diseases there prevailing, and which endangered the health of domestic animals. Nor did Congress give the Department authority, by its officers or agents, to inspect cattle within the limits of a State and give a certificate that should be of superior authority in that or other States, or which should entitle the owner to carry his cattle into or through another State without reference to the reasonable and valid regulations which the latter State may have adopted for the protection of its own domestic animals. It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested." There has, however, been later national legislation which needs to be noticed. Large powers to control the interstate movement of cattle liable to be afflicted with a communicable disease have been conferred upon the Secretary of Agriculture by the act of February 2, 1903, 32 Stat. 791, and the act of March 3, 1905, 33 Stat. 1204. The provisions of these acts need not be fully stated. The only part of them which seems relevant to this case and the question under consideration which arises in it is contained in the law of 1903. In that law it is enacted that when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected cattle or live stock and found

them free from infectious, contagious or communicable disease, "such animals so inspected and certified may be shipped, driven, or transported . . . into . . . any State or Territory . . . without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture." There can be no doubt that this is the supreme law, and if the state law conflicts with it the state law must yield. But the law of Kansas now before us recognizes the supremacy of the national law and conforms to it. The state law admits cattle inspected and certified by an inspector of the Bureau of Animal Industry of the United States, thus avoiding a conflict with the national law. Rule 13, issued by the Secretary of Agriculture under the authority of the statute, is brought to our attention by the plaintiff in error. It is enough to say now that the rule is directed to transportation of cattle from quarantined States, which is not this case, and that in terms it recognizes restrictions imposed by the State of destination. Our attention is called to no other provision of national law which conflicts with the state law before us, and we have discovered none.

Judgment affirmed.

THOMAS *v.* STATE OF IOWA.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 533. Argued February 26, 1908.—Decided March 23, 1908.

In order to give this court jurisdiction under § 709, Rev. Stat., to review the judgment of a state court, the Federal question must be distinctly raised in the state court, and a mere claim, which amounts to no more than a vague and inferential suggestion that a right under the Constitution of the United States had been denied, is not sufficient—and so *held* as to an exception taken as to certain parts of the charge to the jury because in effect they deprived the accused of his liberty without due process of law.

It is too late to raise the Federal question for the first time in the petition for writ of error from this court or in the assignment of errors here.
Writ of error to review 105 N. W. Rep. 1130, dismissed.

THE facts are stated in the opinion.

Mr. Chester C. Cole and *Mr. John T. Mulvaney* for plaintiff in error:

Federal questions arise upon the decision of the trial court, which was affirmed by the Supreme Court of Iowa, whereby the plaintiff in error was denied the right of trial by jury, contrary to the Fourteenth Amendment to the United States Constitution.

The guaranty of "due process of law" embraces a guaranty of the right of trial by jury, including the right to have the jury find every fact material or necessary to show the guilt and its degree of the crime charged against the accused. The crime charged against the plaintiff in error by the indictment was murder in the first degree, the penalty for which was more severe than for murder in the second degree or manslaughter, both of which were also included. The right to have the jury ascertain and determine the degree of the crime of which the plaintiff in error was guilty, if at all, is clear under the common law and the statute alike. The question of this right arose in the trial court, in connection with the instructions to the jury, and the trial court denied the right. On appeal to the Supreme Court of Iowa, the same questions were presented and argued and the ruling and judgment of the trial court were affirmed. *Crowell* v. *Randall*, 10 Pet. 368; *Armstrong* v. *Athens Co.*, 16 Pet. 281; *Murray* v. *Charleston*, 96 U. S. 750; *Roby* v. *Colehour*, 146 U. S. 153; *American Sugar Refining Co.* v. *Louisiana et al.*, 179 U. S. 89; *Columbia Water Power Co.* v. *Columbia Electric Street Ry., L. & P. Co.*, 172 U. S. 475.

The Iowa statute defining murder in the first degree has been rendered discriminatory and hence unconstitutional by reason of the interpretation and decisions as rendered thereon by the Supreme Court of Iowa; by virtue of such interpretation and

procedure, as based thereon, the plaintiff in error has been deprived of a fair and impartial hearing, due process of law and the equal protection of the laws as guaranteed by the Constitution of the United States and the constitution of Iowa.

Mr. Charles W. Lyon, with whom *Mr. H. W. Byers*, Attorney General of the State of Iowa, and *Mr. E. B. Evans* were on the brief, for defendant in error:

The Supreme Court of the United States will not review on writ of error the judgment or decree of the highest court of a State in respect to the construction of its own constitution and laws in a controversy not involving any Federal question, when the decision turned upon the construction, not the validity, of a state law, and the question of validity was not raised. Neither will it inquire into the grounds and reasons upon which the Supreme Court of a State proceeded in its construction of the statute and constitution of that State. *Commercial Bank* v. *Buckingham*, 5 How. 317; *Lloyd* v. *Matthews*, 155 U. S. 226 at 227; *McBride* v. *Hoey*, 11 Pet. 167; *Watts* v. *Washington*, 91 U. S. 586.

The instructions given were warranted by § 4728 of the Code, defining murder in the first degree. That being true, whatever objection plaintiff in error makes against the instructions would necessarily apply to the statute in question. This statute was in effect held by the opinion of the Supreme Court of Iowa in the case at bar, not to have been in contravention of the provisions of the state constitution.

It is nowhere set out in the bill of exceptions that the charge of the court was against and in conflict with the Constitution or laws of the United States, and even though such allegation did appear in the record in this case, it would not be sufficient for the reason that such an allegation would be too indefinite to determine what clause in the Constitution, or what law of Congress may have been relied upon.

The attention of the court must have been called to the particular clause or clauses of the Constitution upon which plain-

tiff in error relied and the right he claimed under it, and the question thus presented must have been decided against him. *Morrison* v. *Watson*, 154 U. S. 111, 115, and cases there cited.

MR. JUSTICE MOODY delivered the opinion of the court.

This is a writ of error by which it is sought to reëxamine a judgment of the Supreme Court of the State of Iowa. The judgment affirms the conviction of the plaintiff in error of the crime of murder in the first degree. The Code of Iowa contains the following provisions:

"(4727) Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder.

"(4728) All murder which is perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary, is murder in the first degree, and shall be punished with death, or imprisonment for life at hard labor in the penitentiary, as determined by the jury, or by the court, if the defendant pleads guilty.

"(4729) Whoever commits murder otherwise than as set forth in the preceding section is guilty of murder of the second degree, and shall be punished by imprisonment in the penitentiary for life, or for a term of not less than ten years.

"(4730) Upon the trial of an indictment for murder, the jury, if it finds the defendant guilty, must inquire, and by its verdict ascertain and determine the degree; but if the defendant is convicted upon a plea of guilty, the Court must, by the examination of witnesses, determine the degree, and in either case must enter judgment and pass sentence accordingly." Code of Iowa, 1897, Title XXIV, ch. 2, §§ 4727–30.

The count of the indictment upon which the verdict was returned alleged that the accused deliberately, premeditatively, and with malice aforethought murdered one Mabel Schofield by administering poison to her. The judge presiding at the

trial instructed the jury in substance that if they were satisfied that the accused administered poison to Mabel Schofield, unlawfully and with bad intent, and that she died from the poison thus administered, then they should find him guilty of murder in the first degree, although there was no specific intent to kill. This instruction was approved by the Supreme Court as a correct expression of the law of the State. With that aspect of the question we have nothing to do. But it is assigned as error and argued here that this instruction in effect withdrew from the jury the question of the degree of the murder, and to that extent denied the plaintiff in error a trial by jury, and therefore denied him due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. Without intimating that upon this statement any Federal question is presented, we must first consider whether the question was raised in the court below in such a manner as to give us jurisdiction to consider it. There is nothing in the record to show that it was so raised. The plaintiff in error duly and seasonably excepted to the instructions complained of, but in no way was it then indicated (except as hereafter appears) that he claimed that any right under the Federal Constitution was impaired by them.

The judgment of the state Supreme Court does not contain the slightest allusion to any Federal question.. The chief justice of the state Supreme Court, after the final judgment in that court, signed a bill of exceptions, which contains the following statement:

"Under the rules of practice in the Supreme Court of Iowa no assignment of errors is required or allowed; but the questions made and discussed by counsel on the hearing in the Supreme Court were such as arise upon the record, the exceptions and the motion in arrest, and for a new trial, as shown hereinbefore, and among them that the Court below erred in giving the jury each of the instructions set out in this bill of exceptions, and numbered, respectively, Two, Three, Four, Five and Six and Fourteen, and that by said instructions the said District Court

of Iowa in and for Polk County denied to this plaintiff in error the right of trial by jury, in that the Court, by said instructions, determined the degree of the crime of murder of which the jury should find the defendant guilty, if at all, whereas, by the common law and by the express statute of Iowa, the degree of the offense is a matter for the jury to determine, thereby in effect deprived the plaintiff in error of *his liberty without due process of law.*

"That upon the trial and hearing of the case in the Supreme Court of Iowa the parties, respectively, to wit, The State of Iowa, and also the defendant and appellant, Charles Thomas, by their respective counsel, submitted arguments, both in print and orally, wherein they discussed the question aforesaid, and all others arising upon the record."

The Federal question, if it can be found in the record at all, must be found in this statement. It is too late to raise it for the first time in the petition for writ of error from this court or in the assignments of error here. *Haire* v. *Rice*, 204 U. S. 291. All that appears in the statement is that exceptions were taken to certain parts of the charge to the jury, because they "in effect deprived the plaintiff in error of his liberty without due process of law"; and that the question thus raised was discussed before the Supreme Court of the State. But something more than this vague and inferential suggestion of a right under the Constitution of the United States must be presented to the state courts to give us the limited authority to review their judgments, which exists under the Constitution and is regulated by § 709 of the Revised Statutes. A mere claim in the court below, that there has been a denial of due process of law, does not of itself raise a Federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the Fourteenth Amendment of the Constitution. See *Clarke* v. *McDade*, 165 U. S. 168, 172; *Miller* v. *Cornwall Railroad Company*, 168 U. S. 131, 134; *Harding* v. *Illinois*, 196 U. S. 78, 88.

Writ of error dismissed.

LIPPHARD *v.* HUMPHREY.

ERROR TO AND APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 188. Argued March 20, 1908.—Decided April 6, 1908.

Inability to read does not create a presumption that a testator does not know the contents of a paper declared by him to be his last will and duly executed as such.

There is a presumption that the testator does know the contents of a will properly executed, which, while not conclusive, must prevail in the absence of proof of fraud, undue influence or want of testamentary capacity, even where testator's inability to read is proved.

In the absence of proof of want of testamentary capacity at the date of the will, declarations of the testator as to the contents thereof are inadmissible to prove lack of knowledge of such contents.

28 App. D. C. 355, affirmed.

LORAINE LIPPHARD, of the District of Columbia, died December 9, 1903, leaving a paper writing purporting to be her last will and testament, bearing date April 27, 1898, duly attested by three witnesses, and naming Rev. Mr. Meador as executor.

Decedent left surviving her as her next of kin and sole heirs at law her husband, Adolph F. Lipphard, Sr.; three sons, named John, William A. and Adolph F. Lipphard, Jr.; two daughters, named Sophia L. Hellen, born Lipphard, and Capitola L. Anderson, born Lipphard; sixteen grandchildren, four of whom were infants under the age of 21 years. All the other of her heirs and next of kin were of lawful age.

Decedent's property consisted of a small quantity of personal property valued at $350 and some real estate valued at $10,000.

The husband, Adolph F. Lipphard, Sr., and two of the sons, William A. and Adolph F. Lipphard, Jr., filed a caveat to the probate of the will. All of the other next of kin and heirs at law became parties in one way or another. Before the issues were framed on the caveat the Rev. Mr. Meador departed this life. Thereupon decedent's daughters, Capitola L. Anderson

and Sophia L. Hellen, beneficiaries under the writing, petitioned the court for leave to propound said paper writing as and for the last will of decedent, and an order was passed by the court below authorizing this to be done. Thereafter a decree was passed framing issues upon the caveat to be tried by a jury. The issues were five in number and were as follows:

"1. Was the paper writing dated April 27, 1898, the last will and testament of said Loraine Lipphard?

"2. Was the said writing executed and attested in due form, as required by law?

"3. At the time of the execution of said paper writing, was the said Loraine Lipphard of sound and disposing mind and capable of making a valid deed or contract?

"4. Was said writing procured by fraud or undue influence, practiced upon her by any person or persons?

"5. Was the signature of the said Loraine Lipphard procured by force exercised upon her by any person or persons?"

Barnard, J., presiding at the trial of the issues, directed the jury to find the third, fourth and fifth issues in favor of the caveatees, on the ground that the evidence was insufficient to warrant the jury in finding a verdict thereon in favor of the caveators. The first and second issues were submitted to the jury with instructions by the court to the effect that unless the jury believed that the contents of the paper were known to testatrix at the time of execution, they should find for the caveators. If, however, they should find from the evidence that testatrix did know the contents of the paper and did sign the same by her mark in the presence of witnesses, who signed the same as witnesses in her presence, the verdict should be in favor of the caveatees. The jury found the issues in favor of the caveatees, and the will was accordingly admitted to probate and record May 3, 1906.

From this decree the caveators appealed to the Court of Appeals of the District of Columbia, which affirmed the decree of the Supreme Court of the District (28 App. D. C. 355), and thereupon the case was brought to this court.

The paper writing in controversy was witnessed by three credible witnesses, all of whom testified as witnesses for the caveatees. From their testimony it appeared that on the twenty-seventh day of April, 1898, Mrs. Loraine Lipphard brought the writing to the office of Miss Parker, one of the attesting witnesses, with whom she had long been acquainted, and told her that it was her last will and testament, and that she wanted it attested by three witnesses. Two other witnesses with whom she was also acquainted, one of them for forty years, were procured, and all three being present, testatrix declared the paper writing to be her will and signed it by her mark thereto in the presence of all the witnesses, and they signed their names thereto as attesting witnesses in her presence. The testatrix was at the time of sound mind and capable of making a valid deed or will. The will was not read in the presence of the witnesses, and after the testatrix had subscribed her "mark" and the will had been witnessed, it was handed to her and she took it away with her. After Mrs. Lipphard's death the will was produced by Rev. Mr. Meador and given by him to an attorney, who lodged it in the office of the register of wills.

Evidence was adduced on the trial on behalf of the caveators that Mrs. Lipphard could not read or write; that she was a licensed midwife and had a great number of cases; that the title to the real estate devised by the will was originally in her husband; that in March, 1857, he put a trust on the property, and it was subsequently sold thereunder; that he afterward took title to the property and again it was sold, and then the title was taken in the wife's name. The husband's testimony tended to show that he was improvident. Testatrix was an energetic woman and a good wife. Part of the property when purchased was vacant land. In 1894 this land was improved by two houses. Testatrix made the contract for the erection of these houses and attended to the building of the same. The husband and wife had lived happily together for sixty-five years.

The will devised and bequeathed the entire estate of the testatrix to the Rev. Chastain C. Meador in trust: (1) To pay all funeral expenses and debts; (2) For the use of her husband, Adolph F. Lipphard, during his life; (3) To pay the expenses of said husband's last illness and funeral; (4) Upon the death of the husband to divide the same among children named, according to the directions therein contained; the trustee also being appointed executor. The real estate consisted of three lots, two of which were specifically devised to the two daughters.

Mr. Chapin Brown, with whom *Mr. Charles H. Bauman* and *Mr. J. P. Earnest* were on the brief, for plaintiffs in error and appellants:

When once the foundation has been laid by proving that the alleged testator was illiterate, and could not read or write or sign his name, or that it was doubtful from any other cause whether he knew the contents of the will, the declarations of the alleged testator are admissible in evidence to show whether he knew or did not know, the contents and provisions of the alleged will. *Harleston* v. *Corbett*, 12 Rich. (S. C.) 604; *Watterson* v. *Watterson*, 38 Tennessee (1 Head), 1; *Cox* v. *Cox*, 4 Sneed (Tenn.), 81; *Rollwagen* v. *Rollwagen*, 63 N. Y. 504; *Selden* v. *Myers*, 20 How. 506; *Adams* v. *Norris*, 23 How. 353; Jarman on Wills, 6th ed., Vol. 1, p. 47; Underhill on the Law of Wills, Vol. 1, p. 201.

The evidence which the caveators offered to produce tending to show that the alleged testatrix did not know the contents of the instrument alleged to be her will, is competent and should have been admitted. *Waterman* v. *Whitney*, 11 N. Y. 157; *Barbour* v. *Moore*, 4 App. D. C. 535; *Olmstead* v. *Webb*, 5 App. D. C. 30; *Adams* v. *Norris*, 23 How. 353; *Thompson* v. *Updegraff*, 3 W. Va. 629 (cited in the *Holt case*); *Couch* v. *Eastman*, 27 W. Va. 796 (cited in the *Holt case*); *Cranmer* v. *Anderson*, 11 W. Va. 582; *Jarretts* v. *Jarretts*, 11 W. Va. 584; *Mathews* v. *Warner*, 4 Ves. 186; *Pemberton* v. *Pemberton*, 13 Ves. 290; *Norris* v. *Sheppard*, 20 Pa. St. 275; *Neel* v. *Potter*, 40 Pa. St. 283; *Storrett* v. *Douglass*, 2 Yeates, 46; *Trumbull* v.

Gibbons, 2 Zab. 140; *Crispell* v. *Dubois*, 4 Barb. 399; *Stewart's Exr's* v. *Lispenard*, 26 Wend. 261; *Throckmorton* v. *Holt*, 180 U. S. 552, discussed and distinguished from the case at bar.

Mr. B. F. Leighton and *Mr. C. Clinton James* for defendants in error and appellees.

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

The contention of appellant is that as testatrix could not read, and as the will was not read to her at the time of its execution, it was therefore to be presumed that she did not know the contents of the will when she executed it, or that the jury ought not to have been allowed to presume from the evidence produced before them that the testatrix had knowledge of the contents of the will.

Mrs. Lipphard brought the will with her to the office of one of the attesting witnesses for the purpose of execution, and after its execution took it away with her, and at her death it appeared in the possession of the Rev. Mr. Meador, the executor named therein, and by whom it was propounded for probate and record. She declared to the witnesses that it was her will, and requested them to attest it as such; and its provisions were reasonable and natural. She was shown to be a woman of intelligence and business capacity; she was in bodily and mental health and vigor when the instrument was executed; and there was no suggestion of fraud or undue influence in the case.

In these circumstances the jury properly concluded that the testatrix knew the contents of the will at the time of its execution, and the court might well have directed such finding, unless the bare fact of the inability of testatrix to read raised a legal presumption that she did not possess that knowledge, and the absence of the reading of the will to her at that time was fatal. But we know of no such presumption as mat-

ter of law, and on the contrary, the presumption where a will is properly signed and executed is that the testator knows the contents. Where there is evidence of the practice of fraud or of undue influence, affirmative proof of knowledge of the contents may be necessary, but not so in any other case, simply because of a presumption arising from inability to read. *Taylor* v. *Creswell*, 45 Maryland, 422, 431; *Vernon* v. *Kirk*, 30 Pa. St. 224; *King* v. *Kinsey*, 74 N. C. 261; *Hoshauer* v. *Hoshauer*, 26 Pa. St. 404; *Clifton* v. *Murray*, 7 Georgia, 565; *Doran* v. *Mullen*, 78 Illinois, 342; *Walton* v. *Kendick*, 122 Missouri, 504; *Nickerson* v. *Buck*, 12 Cush. 341; *Guthrie* v. *Price*, 23 Arkansas, 407.

In the latter case testatrix's name was subscribed to the will, and between her Christian and surname was her mark in the form of a cross. The attesting witnesses signed the will at her request, in her presence, and in the presence of each other. She produced the paper writing for them to attest and declared that it was her will, and that she desired them to witness it as such. She did not write her name, but made her mark to the paper. It was not shown who did write her name to the will. It was not written by either of the witnesses, nor in their presence. Testatrix could not read, and the will was not read to her in the presence of or to the knowledge of the witnesses. The trial court instructed the jury, in effect, that notwithstanding the will was executed in accordance with the formalities prescribed by the statute, yet it being shown that the testatrix could not read, the will was invalid, unless it was proved that it was read to her and that she was informed as to its contents. After a review of the authorities, the Supreme Court of Arkansas held such instruction to be erroneous, and Chief Justice English, in the concluding part of his opinion, said:

"It was proven that she could not read, and it was not shown that the will was read to her at the time it was executed, but it may have been before. She produced the will herself, declared it to be her will, asked the witnesses to attest it as

such, signed it by making her mark. She was a woman of good sense, particular about her business transactions, and manifested her usual soundness of mind at the time. It is not shown that she was laboring under any feebleness of mind from disease, or approaching dissolution. The provisions of her will appear to be reasonable. It is not shown that any imposition was practiced upon her, or that her sons had any agency in the preparation of the will. It was erroneous for the court to tell the jury as a matter of law that it being shown that she could not read, it was necessary to prove that the will was read to her. They had the right to infer, from all of the circumstances, that she knew the contents of the will, though, as shown by the authorities above quoted, in determining whether there was fraud or imposition in the execution of the will, the fact that she could not read, and that the will was not read to her, at the time she signed it, were circumstances to be considered by the jury."

True, the presumption that a party signing a will by mark, or otherwise, knows its contents, is not a conclusive presumption, but it must prevail in the absence of proof of fraud, undue influence, or want of testamentary capacity attending the execution of the will. In the present case there was no attempt to show that the testatrix was not capable of making a valid deed or contract at the date of making the will; on the contrary, the evidence showed that she was a woman of energy, capacity and intelligence. Nor was any proof offered of fraud or undue influence in the production of the will. Mrs. Lipphard brought the will, as we have said, to Miss Parker's office for the purpose of having it executed; she declared to the attesting witnesses the paper to which she made her mark to be her last will and testament. She was a person of sound mind at the date of the will, and it was executed and attested in the manner required by statute.

It is obvious that the verdict of the jury ought not to be disturbed and a new trial allowed, unless some reversible error was committed in the course of the trial, and appellants insist

that such error existed in the exclusion of evidence of declarations alleged to have been made by the testatrix prior and subsequent to the date of her will as to how she intended to dispose, or had disposed, of her property.

Decedent's husband testified that his wife talked to him often, prior to the date of the will, as to what she intended to do with her property after her death, and that they talked the matter over after the date of the will. He was asked what she said, but objection to the question was sustained. Appellants did not state what they expected to prove by the husband.

Albert R. Humphrey, another witness, testified that he had a conversation with Mrs. Lipphard about two years before she died. He was asked the following questions:

"Did she tell you how she had left her property, or how she was going to leave it? A. Yes, sir.

"What did she say to you in reference to that matter?"

To which caveatees objected, and the court sustained the objection. Counsel for appellants stated that he desired to show by this witness that testatrix denied leaving the property as mentioned in the will, this being more than three years after the will was executed.

William A. Lipphard, one of the caveatees, was asked a similar question, and, upon objection, the court made a like ruling, excluding the evidence. He said that he had a conversation with her in reference to her will just before her death; that she told him how she had left her property.

Mrs. Sarah Lipphard, the wife of one of the caveatees, testified that eight or ten weeks before decedent died she asked her if she had made a will, and then she was asked the following question:

"What did she say in reference to what was in her will and what she had done with her property, if anything?"

On objection by the caveatees the evidence was excluded. Counsel for caveators stated to the court that he desired to show by this witness that testatrix had denied to the witness

that she had left her property as and in the manner stated in the will.

Appellants' brief asserts that the offer was made in support of the issue of want of mental capacity in the testatrix at the time she made her will.

In *Stevens* v. *Vancleve*, 4 Wash. C. C. 262, 265; *S. C.*, 23 Fed. Cases, 35, Mr. Justice Washington said that declarations of a deceased, prior or subsequent to the execution of a will, were nothing more than hearsay, and that there was nothing more dangerous than their admission, either to control the construction of the instrument or to support or destroy its validity.

In *Throckmorton* v. *Holt*, 180 U. S. 573, Mr. Justice Peckham, speaking for the court, expressed the opinion, after much consideration, that the principles upon which our law of evidence is founded necessitated the exclusion of such evidence, both before and after the execution, saying:

"The declarations are purely hearsay, being merely unsworn declarations, and when no part of the *res gestæ* are not within any of the recognized exceptions admitting evidence of that kind.

"Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental condition, yet they are generally stated in cases where the mental capacity of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact.

* * * * * * * *

"When such an issue (one of mental capacity) is made it is one which relates to a state of mind which was involuntary, and over which the deceased had not the control of the sane individual, and his declarations are admitted, not as any evi-

dence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity.

* * * * * * * *

"It is quite apparent, therefore, that declarations of the deceased are properly received upon the question of a state of mind, whether mentally strong and capable, or weak and incapable, and that from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy."

And see *In re Kennedy*, 167 N. Y. 163, 176. In *Shailer* v. *Bumstead*, 99 Massachusetts, 123, it was ruled:

"Where a foundation is laid by evidence tending to show a previous state of mind, and its continued existence past the time of the execution of the will is attempted to be proved by subsequent conduct and declarations, such declarations are admissible, provided they are significant of a condition sufficiently permanent, and are made so near the time as to afford a reasonable inference that such was the state at the time in question."

In the present case no foundation was laid for the admission of this evidence. Not a syllable of testimony was adduced by appellants to show want of testamentary capacity at the date of the will. For aught the record shows, she retained her mental powers up to the time of her death, which took place five years and eight months after making her will.

As we have said, appellants did not state what they expected to prove by decedent's husband, nor what they expected to prove by the evidence of William A. Lipphard. This witness testified on cross-examination that he did not know his mother had made a will until after her death. In his direct examination he stated that she told him, in a conversation had with her a week before she died, how she had disposed of her property by her will.

And so the offer to prove by Albert R. Humphrey, that the testatrix two years prior to her death, and more than

three years after the execution of the will, denied giving her property as provided by her will, or the similar offer made with respect to the witness Mrs. Sarah Lipphard, wife of Adolph Lipphard, as to alleged conversations with decedent eight or ten weeks before her death, were at a period too remote to throw any light upon the mental condition of the testatrix at the time the will was made.

There was no evidence whatever of mental incapacity and this particular evidence was too remote to justify any reasonable inference to that effect, and if there was no lack of mental capacity, then this evidence would have no tendency to show that she did not have knowledge of the contents of the will when she executed it and declared it to be her last will and testament. Because she may have resisted importunity for information in respect to what she had done, three years after she had made her will, it does not follow that she did not know the contents of the will when she made it. There must be some other proof, some suspicious circumstances, some evidence of fraud or undue influence before evidence of conversations years after the execution of the will should be admitted to show that she did not know what she was doing when she made it.

Decree affirmed.

McCABE & STEEN CONSTRUCTION COMPANY *v.* WILSON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 155. Argued March 5, 6, 1908.—Decided April 6, 1908.

Defendant who introduces testimony after the demurrer to plaintiff's evidence has been overruled waives any error to the ruling.

Where the cause of action is against the members of a copartnership who afterwards incorporate their business, themselves taking practically all the stock and continuing without changing their relations with employés, the fact that the suit is commenced against the corporation was held under the circumstances of this case, and in view of the fact that no testimony was offered, to be within the provisions of the Oklahoma statute, 146, art. 8, c. 66, Wilson's Ann. Stat., requiring the court to disregard, and not reverse for, defects of pleading or proceedings not affecting the substantial rights of the parties.

Where several instructions are asked and refused, exceptions must be taken separately and not as an entirety.

One employed as a fireman on an engine of a construction train *held*, under the circumstances of this case, not to be the fellow-servant of the foreman of the gang constructing the bridge which fell and caused the accident.

It is the duty of the employer to provide a suitable and safe place for the employés to work and they are not charged with any responsibility in regard thereto, and while the employer is relieved if he does everything that prudence requires in that respect, it is largely a question of fact and this court will not, in the absence of convincing testimony, set aside the verdict of a jury approved as was the verdict in this case by the trial and Supreme courts of the Territory, especially where the accident was the result of recurring conditions.

A fireman, who, under the circumstances of this case, remains at his regular post where his ordinary duty calls him, is not guilty of contributory negligence because he does not avail himself of permission to occupy a different and, perhaps, safer place.

17 Oklahoma, 355, affirmed.

On June 9, 1902, Wilson, the defendant in error, was injured by the giving way of a railroad bridge across the Canadian River in the Territory of Oklahoma. The bridge was on a new line of railroad, which was being constructed from Ok-

lahoma City to Quanah, Texas. The petition, filed October 18, 1902, in the District Court of the Third Judicial District, sitting in and for the county of Oklahoma, charged that the defendant, now plaintiff in error, was a subcontractor and constructing a portion of the railroad, including therein the crossing of the Canadian River; that Wilson was a locomotive fireman employed by the defendant. The circumstances of the injury were stated in the petition and negligence on the part of the defendant was averred. A trial resulted in a verdict and judgment in favor of the plaintiff for $5,500. This judgment was affirmed by the Supreme Court of the Territory (17 Oklahoma, 355), and thence brought here by writ of error.

Mr. Arthur G. Moseley, with whom *Mr. Louis B. Eppstein* was on the brief, for plaintiff in error.

Mr. James R. Keaton, with whom *Mr. John W. Shartel*, *Mr. Frank Wells* and *Mr. John H. Wright* were on the brief, for defendant in error.

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

When the plaintiff rested the court overruled a demurrer to the evidence. This ruling, however, cannot avail the defendant, whatever the defects then in the case, for thereafter it proceeded to introduce testimony in its own behalf, and this waived any supposed error. *Accident Insurance Company* v. *Crandal*, 120 U. S. 529, 530; *Robertson* v. *Perkins*, 129 U. S. 233, 236; *Bogk* v. *Gassert*, 149 U. S. 17, 23; *Campbell* v. *Haverhill*, 155 U. S. 610.

The petition averred that one Pratt was defendant's superintendent of construction and one Fallahey foreman of the gang engaged in work on the bridge, and that the plaintiff was employed by the defendant through its general superintendent. The answer, in addition to certain special defenses, was

an unverified general denial, and the court held that under the pleadings the defendant was estopped from showing that the foreman of the bridge gang and the superintendent of construction were not in its employ. This ruling was based upon par. 3986 of the Oklahoma General Statutes of 1893, c. 66, § 108, which provides that "in all actions allegations . . . of any appointment or authority . . . shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." Defendant also sought to prove that plaintiff was not in its employ; that it in fact did not exist at the time of the accident; that the contract for the construction work was taken by a partnership, McCabe & Steen. The answer of defendant alleged that the injury to plaintiff "was due to one of the risks assumed by the plaintiff in his contract of employment with this defendant."

The general denial in the answer as originally filed was in terms of "the allegations contained in the petition in manner and form as therein set forth." During the progress of the trial the defendant asked leave to amend by striking out the words "in manner and form as therein set forth," to which application the plaintiff objected, saying:

"As far as the general denial being sufficient to permit the defendant, admitting that it is the proper defendant, to raise further issues as far as it not being guilty of any negligence, admitting that it was the defendant and was doing the contracting work there, why we don't care anything about it; but we do object to their being permitted to amend their answer in any way so as to raise the issue that this defendant is not the defendant with whom the plaintiff contracted and who was doing this work."

The court thereupon announced its decision to neither permit nor deny the defendant leave to amend at that time, saying:

"The COURT: We will go ahead now and treat this answer as a general denial at this time, and will reserve my ruling on your motion until I see further; I will fix the terms later."

Thereafter the question came up again, and the record shows these facts:

"The COURT: The defendant will be permitted to amend the general denial by striking out those words (the words heretofore referred to) by the payment of half of the costs of court to this date, except the witnesses of the plaintiff—the fees; that is, provided, however, that if a continuance by reason of this amendment is taken by the plaintiff, the defendant shall be taxed with all the costs, unless the court should continue it on account of some showing made by the plaintiff, then of course the costs occasioned by the amendment would follow.

"Mr. KEATON: Counsel for plaintiff here states that if it is permitted to show by testimony that the McCabe & Steen Construction Company were not building this road and not building the bridge, then the plaintiff will have to make a showing and ask for a continuance of the case in order to reform the pleadings.

"Mr. MOSELEY: Well, we have not offered that testimony yet.

"The COURT: You gentlemen have heard my statement that if a continuance should be made necessary, then all the costs will follow.

"Whereupon the defendant amends its answer by striking out certain words, the same being 'in manner and form as therein set forth,' which appeared between the word 'petition' and the word 'and' in the third line of first paragraph of said answer."

It will be observed that counsel for the plaintiff stated that he had not yet offered testimony to show that the McCabe & Steen Construction Company was not building the road and the bridge, and the record shows that thereafter there was no testimony in any form offered to establish that fact. Now whatever might have been competent testimony under the answer as amended, it appears by the statement of counsel that no testimony respecting the matter had been offered, and the record shows that none was thereafter offered. It must

be stated, however, that prior to the ruling just quoted it had been shown that within six weeks after the injury, and while the work of construction was still in progress, the partnership conveyed all its interest to the corporation, the two members of the partnership of McCabe & Steen taking 96 per cent of the corporate stock. This transfer was of so little significance that it was unknown to its counsel at the time he filed the answer, and from his statement he evidently did not care to press any defense on that ground. The Oklahoma statute provides: "The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Section 146, art. 8, c. 66, Wilson's Ann. Stat.

With reference to these several matters thus grouped together we are of opinion that the Oklahoma statute we have just quoted sufficiently answers any claim of error. The litigation proceeded upon the theory that the corporation was the real party in interest, and while the partnership and the corporation were not identical, yet the partners were substantially the corporation, and the change in organization did not materially affect the rights of the plaintiff. Evidently, for business convenience, the partners concluded to organize as a corporation, and yet they took the bulk of the stock in their own names. They were practically the owners, and it does not appear that there was any change in the manner of doing business or in the relations of the employer to the employés. To hold, especially after this admission of counsel and his failure to offer any further testimony on the subject, that the substantial rights of the plaintiff were affected by any of these matters would be sacrificing substance to form. The objections were properly disregarded by the Oklahoma courts, both trial and supreme.

While the defendant asked several instructions the exception taken was not to the ruling on each instruction separately, but to them as an entirety. This plainly was insufficient.

Fullenwider v. *Ewing*, 25 Kansas, 69; *Bailey* v. *Dodge*, 28 Kansas, 72; *Fleming* v. *Latham*, 48 Kansas, 773.

There remain for consideration these matters: one, the contention that the plaintiff was a fellow-servant with the foreman of the gang at work on the bridge and the superintendent of construction; another, the question of negligence on the part of the defendant; and a third, contributory negligence. With reference to the first, it must be borne in mind that the plaintiff was a fireman employed on a locomotive, and his work was in a separate department from that of the employés engaged in the construction of the bridge. This is not a case for the application of the doctrine of fellow-servant. It would be carrying that doctrine too far to hold that one employed as a fireman and engaged in the movement of a train was a fellow-servant with the superintendent of construction and the foreman of a bridge gang, both of whom were present and engaged in supervising and directing the work on the bridge. These latter employés represented the principal in an entirely different line of employment from that in which the plaintiff was engaged, were discharging a positive duty of the master to provide a safe and suitable place and structures in and upon which its employés were to do their work—*Union Pacific Railway Co.* v. *O'Brien*, 161 U. S. 451, and cases cited in the opinion—and in discharging that positive duty they and not he were the representatives of the defendant. Their action, so far as that work was concerned, was the action of the defendant.

With reference to the second question, that of negligence on the part of the defendant, it must be premised that this is largely a question of fact, and a question of fact is submitted to the decision of a jury. Notwithstanding the able argument of counsel for defendant in endeavoring to show that the defendant did everything that prudence required for the purpose of making the bridge safe, we are not satisfied that the testimony is so convincing in this respect as to justify us in setting aside the verdict of the jury, approved as it was by the trial

and Supreme Courts of Oklahoma. There is, of course, resting upon the employer the duty of providing a suitable and safe place and structures in and upon which its employés are called to do their work, and this plaintiff was charged with no duty in respect thereto.

A full statement of the testimony would unnecessarily prolong this opinion, and a brief outline must suffice. The bridge was a pile bridge, the piles having been, as claimed, driven down to solid rock. This rock substratum sloped from the north to the south side of the river, the first bent striking the rock at eight or ten feet. At the place where the bridge sank the depth to the rock was eighteen feet. Above the rock was quicksand, and the piles were driven through it. The bridge was originally constructed some weeks before, but during high water a portion of it had washed out. It was rebuilt upon the same plan and with apparently no further protection than when originally constructed. At the time of the injury there was again high water, and that high water made a roaring torrent of the flowing stream. When the train upon which the plaintiff was fireman came to the river it was found that upon the bridge there had been placed a loaded flat car. Disengaging itself from the balance of the train, the locomotive moved on to the bridge and pulled that car off. As it did so there was a slight subsidence at the place where the bridge finally gave way. So the engine returned to the north bank of the river, while the gang of employés, under the direction of the foreman and the superintendent of construction, proceeded to place a false span underneath the bridge at the point of subsidence, and after awhile notified the train employés that the bridge was safe. Thereupon the engine moved slowly on to the bridge, and when it got to the place where there had been a prior subsidence the bridge sank so as to drop the engine into the river, and in that way the plaintiff was injured. Now it appears that by actual experience the bridge as originally constructed gave way in time of high water, and yet was rebuilt, without change of plan and without adding

further protection. When the high water returned, as it did at the time of the injury, there was again a giving way of the bridge. From this general outline of the case (filled, of course, more in detail by the testimony as to the circumstances of the work and the injury) it is apparent that there was a question whether the defendant had made suitable provision for securing a safe structure upon which the trains should pass; and upon a review of all the testimony we do not feel that we are justified in disturbing the verdict, approved as it was by the Oklahoma courts.

Thirdly, it is insisted that the plaintiff was guilty of contributory negligence, in that when the engine moved on to the bridge, at the time of the injury, the engineer said to him that he need not stay on the engine, but might go back on the train. But his place of work was in the engine, the same as that of the engineer, and because he did not avail himself of the suggestion and leave that place it can hardly be said that he was guilty of contributory negligence. He stayed at his regular place of work and where his ordinary duty called him to be, and it would be a harsh rule to hold that a man so doing was guilty of contributory negligence, because he did not avail himself of a permission to occupy a different and perhaps a safer place; especially as both the engineer and himself were advised by the construction force that the bridge was safe.

These are all the matters that call for notice. We find no error in the rulings of the Supreme Court of Oklahoma, and its judgment is

Affirmed.

GARZOT *v.* DE RUBIO.
BURSET *v.* SAME.
BURSET *v.* SAME.

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

Nos. 141, 142, 604. Argued February 27, 28, 1908.—Decided April 6, 1908.

The power of this court to review judgments of the District Court of the United States for Porto Rico given by § 35 of the act of April 12, 1900, 31 Stat. 85, is the same as that to review judgments of the Supreme Courts of the Territories and is controlled by § 2 of the act of April 7, 1874, 18 Stat. 27; on writ of error, therefore, this court is confined to such legal questions as necessarily arise on the face of the record, such as exceptions to rulings on the rejection and admission of testimony and the sufficiency of the findings to sustain the decree based thereon.

In this case the facts sustained the plaintiff's contention that she was a citizen of Spain and as to that point there was no ground for dismissal for want of jurisdiction.

A bill in equity to set aside an agreement adjusting a community between the widow and children, brought after the death of the widow who had also left children by a second marriage, held in this case, to be a liquidation of the community, and, although the property was derived solely from the first husband, the children of the second marriage were, as heirs of the mother, interested in her share and necessary parties to the bill.

In establishing a civil government for Porto Rico Congress by § 33 of the act of May 1, 1900, in scrupulous regard for local institutions and laws, preserved the local courts and recognized their jurisdiction over local affairs, including matters of probate jurisdiction.

By art. 62, par. 5, of the Porto Rican Code, power to administer estates is exclusively vested in the judge of the last place of residence of the deceased, and this includes all actions incidental to the liquidation of a community existing between husband and wife, and the District Court of the United States for Porto Rico has not jurisdiction of an action to set aside an agreement of liquidation of a community where the estates are still open in, and subject to the power and authority of, the local court.

THE facts are stated in the opinion.

Mr. N. B. K. Pettingill and *Mr. George H. Lamar* for appellants.

Mr. Francis H. Dexter and *Mr. Frederic D. McKenney* for appellee.

MR. JUSTICE WHITE delivered the opinion of the court.

These several appeals were taken by the various appellants from the same decree. We dispose of them together. The transcript is voluminous and confused. Following the order of the court below and the direction of the counsel for all the appellants, not objected to by the counsel for the appellee, the transcript contains all the proceedings, all the testimony offered at the hearing, together with the opinion as well as the elaborate findings of fact and conclusions of law by which the court below disposed of the case. The many assignments of error proceed upon the assumption that every question arising from the transcript is open for our consideration.

Our power to review is derived from § 35 of the act of April 12, 1900 (31 Stat. 85), which provides "that writs of error and appeals from the final decisions . . . of the District Court of the United States (for Porto Rico) shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations . . . as from the Supreme Courts of the territories of the United States." Our jurisdiction over causes coming from the Territories generally was thus stated in *Idaho & Oregon Land Co.* v. *Bradley*, 132 U. S. 509, 513:

"Congress has prescribed that the appellate jurisdiction of this court over 'judgments and decrees' of the Territorial courts, 'in cases of trial by jury, shall be exercised by writ of error, and in all other cases by appeal;' and 'on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below,' and transmitted to this court with the transcript of the record. Act of April 7, 1874, c. 80, sec. 2, 18 Stat. 27, 28."

And, as pointed out in the same case (p. 513), followed since in a long line of cases:

"The necessary effect of this enactment is that no judgment or decree of the highest court of a Territory can be reviewed by this court in matter of fact, but only in matter of law. As observed by Chief Justice Waite: 'We are not to consider the testimony in any case. Upon a writ of error, we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us.' *Hecht* v. *Boughton*, 105 U. S. 235, 236."

While the suggestion that because there is no intermediate reviewing court between this and the District Court of the United States for Porto Rico, differing from what is generally the case in the Territories of the United States, a wider scope of authority should exist in reviewing by appeal the decrees of the District Court of Porto Rico, may have cogency, it affords no ground for disregarding the plain command of the statute of 1874, which is here applicable, as expounded by many previous decisions of this court. It follows that the greater part of the transcript is superfluous, and we therefore disregard it and confine our attention to such legal questions as necessarily arise on the face of the record, viz., to rulings concerning the rejection or admission of testimony duly excepted to, and to the sufficiency of the findings to sustain the legal conclusion or decree based on them.

The sole complainant, Maria Rios de Rubio, a widow, was averred to be "a resident of San Juan, Porto Rico, and a loyal subject of the King of Spain." There was no specific traverse of this averment. The court expressly found "that the citizenship and residence of the parties was as alleged in the bill of complaint." After the findings of fact had been made and the decree entered, and after an appeal by one of the parties, other of the defendants who had initiated appeals, but had not perfected them, moved for an extension of time to perfect

their appeals and for an opening of the decree, on the ground that when the bill was filed complainant was not a citizen of Spain but of Porto Rico, and, therefore, the court never had jurisdiction of the case. This motion was entertained by the judge then presiding, who succeeded in office the judge by whom the cause was tried. After hearing the evidence offered by both parties and analyzing the same, it was found that the complainant was a citizen of Spain as alleged. The motion to reopen was therefore denied. Without stopping to review the elaborate discussion of the subject on behalf of the appellants, we content ourselves with saying that we think the facts upon which the court based its action sustain that conclusion, and therefore the contention as to want of jurisdiction, because of the alleged absence of Spanish citizenship of the complainant, is without merit.

In approaching the merits we put out of view for the moment the many assignments of error which are addressed to rulings of the court admitting or rejecting evidence, and reserve for ulterior determination whether in view of the state of the record such objections are open, and if they are, whether any of them are well taken.

In order to a clear understanding of the origin of the controversy, we state the facts out of which it arose, confining ourselves to those shown by the pleadings or documents made a part thereof or established by the findings below.

José Maria Rios and Manuela Gutman were married in Porto Rico in 1866. There being no marital contract to the contrary, a legal community of property, as defined in the Spanish law, supervened between the spouses.

The wife at the time of the marriage had eight thousand pesos of separate money and the husband about half that amount. During the nine years which intervened, between the marriage and September 8, 1875, the husband had become the owner of various pieces of real estate, seven or eight of which were situated in the district of Naguabo, and one, or maybe two or more, in the district of Humacao. On Septem-

ber 8, 1875, the husband, Rios, died leaving surviving him his widow, Manuela, and three minor children, the issue of the marriage, viz., two daughters, the one Petronila and the other Maria, and a son, José. On the night of his death the husband executed a power of attorney, authorizing his wife to make a last will on his behalf, and on September 12 following, in virtue of this power, the wife executed the will. As the document was in no respect dispositive, but purely declaratory of the rule of legal succession, its effect on this controversy may be put out of view. By the law of Spain the three children were the heirs of the estate of their father, less the mother's share of the community estate, if any, subject to the usufruct of the mother on her husband's estate and subject to a marital fourth in favor of the wife, if the circumstances justified such an allowance. The widow instituted the necessary preliminary probate proceedings in the proper court to open the estate, and became executrix and the tutrix of her minor children and usufructuary of their estate, and, in one or both capacities, went into possession and control of the entire property, including in such property her community estate, if any there was. Two years after the widow married Miguel Bustelo.

In November, 1887, José, the son by the first marriage, being yet a minor, died intestate, and his mother, Manuela, instituted in the proper court proceedings concerning the estate of her deceased son. It may be conceded that the mother, as the immediate ascendant, was the sole heir of the son, to the exclusion of the sisters, the estate taken by her, however, being only usufructuary in character since at her death, as the estate of the son had come to him as part of his paternal inheritance (the succession of his father), it reverted to the sisters, children of the father—because of the principle of the Spanish law which took into account the source whence the estate of the son had been derived, for the purpose of regulating its transmission by death.

In 1890 the daughter Maria married one Rubio, and in 1898 Petronila, the other daughter, married one Noyas. In the

meanwhile five children were born of the marriage between Manuela Gutman and Bustelo, and the latter died, leaving surviving him his widow and these five children. From the death of the first husband, in 1875, to January, 1901, Manuela Gutman possessed and controlled all the property which she entered into possession of at the date of the death of her first husband, without rendering accounts of her administration to the court in which the estate had been opened, although that court had full power to control and direct her administration.

The daughters, before their marriage, generally lived with their mother and were educated and supported by her, and after their marriage received some allowance for their support, the extent of which need not be considered. It is undoubted that after their marriage dissatisfaction on the part of the daughters and their husbands ensued because of the failure of the mother to account and finally settle the estate of the father. This dissatisfaction culminated a short while before January 1, 1901, by the bringing of a suit in the District Court of Porto Rico, in which the succession of the father was pending, seeking to compel the mother to account and distribute the estate. In this suit the daughters were both represented by their attorney, Mr. Cuadra. Shortly after the commencement of this proceeding an asserted understanding was had between the mother and her daughters for the entire settlement of all matters relative to the property which had come into her possession and under her control, as the result of the death of her husband and her minor son, the issue of the first marriage. The settlement was embodied in a writing dated the sixteenth day of January, 1901, and signed by the parties and witnesses, among these witnesses being Mr. Cuadra, the lawyer of the two daughters, and Mr. Landron, a lawyer who represented the mother in the negotiations which preceded the agreement. The agreement, which is in the margin,[1] pur-

[1] First. Dona Manuela Gutman, widow of Bustelo, in her own proper right shall deliver immediately to her daughters by her first marriage, named Dona Maria Gaudalupe Rios, widow of Rubio, and Dona Petronila Patricia

ported by way of transaction to adjust all controversies as to the property between the mother and daughters, and to accomplish this purpose transferred to the mother in full owner-

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Rios de Noya, all the lands and tenements comprised in the plantation known as "San José de las Mulas," situated in this jurisdiction, with the exception of a lot of land forty cuerdas in extent, belonging now to the succession of her second husband, Mr. Bustelo, and acquired by said succession at a public auction.

Second. In the same manner Senora Gutman shall immediately deliver to the above-named daughters of her first marriage the lands which form the estate called "Culo Prieto," in the jurisdiction of Naguabo.

Third. Dona Manuela Gutman shall retain for herself, and as sole and exclusive owner with all property rights, all the lands that may be found remaining in the jurisdiction of Naguabo, left at the death of her first husband, Don José Rios y Berrios, or, approximately nine hundred cuerdas.

Fourth. In view of the fact that by this instrument the co-ownership, existing until now, in the hereditary estate left at the death of the intestate Don José Rios y Berrios, becomes finally dissolved, it is by this settlement understood and agreed that each contracting party hereto becomes the exclusive owner of her share without reservation or limitation of any kind.

Fifth. As soon as this settlement shall be signed before witnesses by the contracting parties, without prejudice to its being converted into a public document within the space of forty-eight hours following the day of its date, or as soon as the notary of this town may return to his office, the lawyers of Mrs. Gutman and her daughters shall put a stop to all their mutual judicial proceedings, not only as to the voluntary suit touching the estate of Don José Rios y Berrios, but also as to all collateral and appellate matters.

Sixth. The lawyers, José Maria Cuadra and Rafael Lopez Landron, the first representing Dona Maria Guadalupe and Dona Petronila Patricia, and the second representing Dona Manuela Gutman, become hereby obliged to conclude this settlement in a manner which shall carry the same to conclusion without loss of time, so as to leave each interested party in full possession of what belongs to her by this agreement and furnished with their respective titles of property as inscribed in the books of the registry, free from every charge and lien.

Seventh. The expenses of this settlement, that is, the deeds, the expenses of registration, the means of ratifying this settlement before the courts, aside from the fees of the lawyers, shall be to the exclusive account of Dona Manuela Gutman.

Eighth. Moreover, on the occasion of this arrangement, which the interested parties esteem as highly convenient, Dona Maria and Dona Petronila find themselves satisfied with the correctness observed by their mother, in the very troublesome duty of preserving so large an estate for the term of so many years, in spite of the very serious difficulties overtaking the estate; the said Mrs. Gutman reserves to herself the right to present to her daughters

ship certain described properties, left by the first husband, situated in the district of Naguabo, and to the two daughters in joint equal undivided ownership a certain estate situated in Naguabo, and also a much larger estate situated in Humacao, both of which also at the death of the first husband stood in his name and had passed into the possession of his widow, in virtue of her administration or usufruct.

In April, 1901, Mr. Cuadra, as the attorney of the daughters Maria and Petronila, and Mr. Landron, as the attorney of the mother Manuela, instituted in the District Court of Humacao a proceeding under the Spanish mortgage law to have the legal title to the property referred to in the agreement put of record. The prayer was that the property referred to in the agreement and thereby transferred to the mother be placed of record in her name as the full owner thereof, and that the property referred to in such agreement, transferred to the two daughters, be placed in their names as the full owners. Conformably to

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solemn proof of the honesty with which she has acted up to this day, and a detailed and approved statement of the very grave misfortunes against which the estate has struggled during the long time in which she has administered it.

Ninth. Because of her being better acquainted than any other of the interested parties with the claims of all kinds which may now be pending or are to be established in favor of the estate left at the death of Don José Maria Rios y Berrios, Mrs. Manuela de Gutman is commissioned to continue or begin such reclamacions within the shortest time possible, it being well understood that the amounts obtained from these claims shall be considered into three equal parts for the advantage and use of Mrs. Gutman and her said two daughters by her first husband.

Thus the three contracting parties sign before the witnesses who are present and the lawyers, who likewise subscribe the same as parties thereto, in Humacao this 16th day of January, 1901.

(Signed) Manuela G., *Widow of Bustelo.*
Maria Rios, *Widow of Rubio.*
Petronila Patricia Rios De Noya.
Lawyer José Maria Cuadra.
Lawyer Rafael Lopez Landron.
Francisco Noya.
M. Argueso.
Jesus Almiroty.

the Spanish law, citation was issued to other vicinal owners, and publication in the official gazette of a notice of the application was made under the order of the court. Before the application was acted upon by the court Cuadra withdrew as the counsel of record for the daughter Maria, and Mr. Juan F. Vias appeared on the record as her attorney, and filed in her behalf what is styled "in opposition to the proceedings." The motion by which this was done prayed that the "said proceeding . . . be approved in its main part with the expressed declaration that the properties acquired by Dona Manuela Gutman are so acquired as heir ab-intestate of her son José Rios Gutman and those belonging to his client and to her sister . . . from the inheritance of their deceased father . . . and that in case that this decision should not be deemed proper then that the approval of the proceedings brought be absolutely denied, for the reason that in the petition the true title of the acquisition of the properties adjudicated to the petitioner Senora Gutman, widow of Bustelo, is not set forth therein." In addition, in the record of the proceeding it is recited that for the purpose of the decision of the opposition which he made to the application for the registry of the titles in accordance with the agreement, the lawyer of Maria, Mr. Vias, "accepted as his own the evidence proposed by Lawyers Lopez Landron y Cuadra, with the addition of such documentary evidence as was filed by him and is attached to the record, which said evidence was admitted." The court, on November 16, 1901, allowed the petition for the registry of title according to the agreement and overruled the opposition. The considerations which led the court to this conclusion were thus stated by it:

"Whereas, in accordance with the provisions of sections 1809 and 1816 of the Civil Code, a compromise agreed upon and adjusted between capable persons upon a licit matter is not only a valid and efficient contract, but it further has for the contracting parties the authority of *res judicata;* and

"Whereas, the opposition to proceedings of dominio au-

thorized by section 395 of the mortgage law is that of third persons cited for the proceeding and introduction of evidence and in no manner can such opposition be made by any of the parties soliciting the said dominio; and

"Whereas, Dona Manuel Rios, I mean Dona Maria Rios, widow of Rubio, is one of the solicitors of the said proceeding, she has signed the compromise which is the basis for instituting the said proceeding, she has agreed upon the adjudication to each of the interested parties according to the terms of the compromise (clauses 3 and 4) she has accepted as her own the corroborative evidence of the very facts of the compromise and she cannot exercise legally against her own acts such actions as could be exercised by strange persons to the institution of dominio proceedings; and

"Whereas, it is left to the court to consider the weight of the evidence introduced and the allegations made approving or disapproving the claims made and making the declarations that the dominio has been justified; and

"Whereas, the court after a consideration of the true value and extent of the evidence introduced it is of the opinion that a writ of approval of this proceeding should issue."

The daughter Maria prosecuted an appeal to the Supreme Court of Porto Rico, sitting as a court of cassation.

We do not refer to many matters discussed at bar concerning the relations between the mother and her daughter Maria which took place pending the appeal, because those subjects are not referred to in the findings. In April, 1902, while the appeal was pending, the mother Manuela sold the properties which had been transferred to her by virtue of the agreement, and had been recorded in her name as full owner, to Victor Burset, who had married one of her daughters by the second marriage. Burset in turn sold the properties to Palmer, and mortgages were put upon them. Palmer sold some of the property to Garzot and Fuertes, and a portion of the land was sold by him to Petronila, the sister of Maria. In June, 1902, Mrs. Manuela Gutman died, and in the same month of the

same year the appeal taken from the decree of the District Court, ordering the titles recorded in accordance with the agreement, was affirmed by the Supreme Court. The court in its opinion, after reciting the appearance and opposition of Maria to the application to register the titles, concluded by observing:

"Considering that even supposing that the construction given by the trial court to article 395 of the mortgage law was erroneous, in holding in one of its conclusions of law that Dona Maria Rios could not oppose the proceeding of dominion because she instituted it in conjunction with her mother Dona Manuela and her sister Dona Petronila, the reversal of the order appealed from would not be proper, as it would be always sustained by the essential and necessary foundation of the same, which is the declaration made by the District Court of Humacao of having been proven the dominion of the properties in question, without any limitation or reservation whatsoever, which declaration cannot be discussed in cassation, because the appeal of cassation was not founded upon paragraph 7 of article 1690 of the Law of Civil Procedure. Considering that the order appealed from conforms to all the claims made by the parties and does not grant more than was prayed for, as it is thereby granted the prayer made by Dona Manuela Gutman and her daughters Dona Maria and Dona Petronila in the petition instituting the *ex parte* proceeding of dominion, and the claim made by Dona Maria through her attorney Don Juan F. Vias is denied."

Again, we do not stop to consider many matters referred to by counsel which it is deemed conclusively show that the daughter Maria accepted the decision of the Supreme Court as final, and acted upon the assumption that she was the owner of the property allotted to her by the agreement, because the matters thus relied upon are also but a part of the evidence and not embraced in the findings below made. About one year after the death of the mother and the decision of the Supreme Court of Porto Rico, the bill by which this cause was

commenced was filed on behalf of the daughter Maria, alleging herself to be a citizen of Spain. The only defendants made to the bill were her sister Petronila, Burset and his wife, Palmer and his wife, Garzot and Fuertes, and several others, who it was alleged had acquired an interest in the property sold by the mother to Burset and by him transferred as above stated. Demurrers were filed by some of the defendants. The court allowed the bill to be amended, and ordered that as amended it be rewritten. In substance the bill, as rewritten, alleged the death of the father, the leaving of the three minor children, herself included, the death of the brother, and the taking by the mother of the preliminary probate steps to administer the property, and the death of the mother. It alleged that at the time of his death the father had left certain property, which was specifically described, the property thus described being only that which had been transferred to the mother by virtue of the agreement. It was alleged that the complainant was the owner of an undivided half of the property thus described as heir of her father and brother, and "that the said property was separate property of said José Maria Rios, theretofore derived by inheritance from his father and mother and by purchase from his sisters with his separate funds." The bill then with great amplitude alleged a conspiracy and combination between the mother and sister Petronila to defraud the complainant by obtaining a title to the property described in order to benefit the children of the second marriage, and charged that the lawyers Landron and Cuadra, as parties to this conspiracy, had united with the mother and sister by deceit and fraud to secure the agreement, concealed or had misrepresented its contents, and, in furtherance of the same conspiracy, prosecuted the proceedings in the courts of Porto Rico. It then alleged that in execution of the said conspiracy the mother had sold the property transferred to her after the decree putting the title in her name had been rendered by the District Court; that Burset, the purchaser from her, and all those holding under him, were cognizant of the fraud and held

fraudulent and simulated titles. No reference was made in the bill, except inferentially, to the property which had been transferred to the complainant by the agreement and which had been put in her name in virtue of the decree of registry. The bill contained an allegation that a copy of the agreement could not be produced because it had been concealed from the complainant, and also contained a charge that the mother had refused to deliver to the complainant the property which had been transferred to her by such agreement. The prayer of the bill was for a decree recognizing complainant as the absolute owner of one-half the property described in the bill, that is, that which had been transferred to the mother; the annulment of the decree of the District Court of Porto Rico, executing the agreement; the erasure of the inscriptions of title resulting therefrom, and for the annulment of the sale to Burset, and all the transfers of title by sale, mortgage or otherwise consequent thereon. Shortly afterwards the bill was amended by detailed averments, charging that the proceedings in the District Court of Porto Rico for the registry of the title were wholly void, that they were instituted by Cuadra in the name of the complainant without authority and with full knowledge on his part that she did not accept the agreement, and consequently not only that decree but the affirmance thereof by the Supreme Court of Porto Rico were without effect upon the rights of the complainant. In accordance with these averments a prayer was inserted, asking that the decrees of both the Porto Rican courts and the registry of title consequent thereon be held to be void. In addition it was prayed "that an account be taken of all the foregoing properties and assets [referring to the properties which had been allotted to the mother by the private agreement], and all other properties in which complainant may have an interest; that a master be appointed to take such accounting and ascertain all the property, real, personal and mixed, belonging to the estate of Don José Maria Rios and Dona Manuela Gutman and Don José Rios y Gutman, and the participation or interest therein which corresponds

to your oratrix, and upon the filing of this report this court shall decree a partition and division thereof in the proportion of one-half to your oratrix, and shall declare by its decree the right of your oratrix as aforesaid in and to the same." Finally, after all the testimony was closed, just prior to the submission of the cause, the court allowed an amendment concerning the value of the pieces of property described in the bill, and which had been allotted to the complainant by the private agreement, and permitted the striking out of the averment that some of those properties had been purchased by the father from his sisters with his separate funds.

The various defendants pleaded *res adjudicata*, based upon the decrees of the District and the Supreme Court putting the agreement of record. Petronila, moreover, pleaded a judgment asserted to have been rendered in a proceeding which it was alleged had been brought by the complainant Maria in an insular District Court to set aside the agreement. Although the judgment thus pleaded purported to be annexed to the plea, it was not so annexed, and no reference to such judgment, if any, or to the suit in which it was rendered, is contained in the findings of fact below. The pleas having been overruled, answers were filed traversing all the charges of fraud as to the agreement, as to the proceedings to enforce the same, and as to the sales or contracts concerning the property which that agreement had transferred to the mother.

The court decreed the agreement to be void for fraud. It decided that the judgment of the District Court, affirmed by the Supreme Court, was void for the same reason. It therefore directed the erasure from the public records of the registry of title which had arisen from the inscription of the judgment. The complainant was held to be the perfect owner, not only of an undivided half of the property which had been allotted to the mother by the agreement, and which was described in the bill, but also a like owner of an undivided half of the property which the agreement had allotted to her, and it was directed that the judgment be inscribed in order to constitute

a muniment of title to the property. Among the findings of fact upon which the decree was based was one finding that although a liquidation and settlement of the estates of the father, mother and son had been prayed, such settlement was not essential, as full relief could be afforded without an accounting.

Before coming to consider such of the assignments of error as are within our cognizance, we are admonished that we must first determine whether the necessary parties are before us to justify us in deciding the case on the merits. And this inquiry also involves determining whether the necessary parties were before the court below to authorize it to make the decree which it entered.

Our duty in the matter was thus stated in *Minnesota* v. *Northern Securities Company*, 184 U. S. 199, 235:

"The established practice of courts of equity to dismiss the plaintiff's bill, if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by the counsel. *Shields* v. *Barrow*, 17 How. 130; *Hipp* v. *Babin*, 19 How. 271, 278; *Parker* v. *Winnipiseogee Lake Cotton and Woolen Co.*, 2 Black, 545."

Again:

"The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the

court the whole case may be seen; but it may not where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story's Eq. Plds. sec. 72."

Whether the necessary parties are here or were before the court below involves a consideration of the case in a fourfold aspect: first, as to the agreement; second, as to the decrees of the District and Supreme Court; third, as to the contracts made by the mother or those holding under her in consequence of the agreement and the registry of the title which it created; fourth, as to the nature and character of the rights with which the agreement was concerned, and the effect of the relief sought in consequence of the prayer for the annulment of that agreement.

The agreement was made between the complainant, her sister Petronila and the mother. Now, although the bill was brought after the mother's death and alleged the existence of children of the second marriage, who were, of course, entitled to participate in their mother's estate, neither the estate of the mother nor such children of the second marriage were made parties to the cause. But either or both the estate and these children were necessary parties to the determination of the rights of the mother under the agreement. It is no answer to say they were not because the property with which the agreement was concerned came from the estate of the first husband, in which the mother and her children of the second marriage had no interest, since such an assumption but disregards the nature and character of the title created by the agreement, and therefore presupposes that its validity could be judicially determined in the absence of the parties whose rights were necessarily involved. And this is also true as to the judgments of the District and the Supreme Court of Porto Rico. The mother was not only a party to those judgments but a beneficiary thereof, and the presence of her estate or heirs was essentially necessary to a determination of whether those judgments were the result of fraud, and the nature and

extent of their operation upon the recorded title. Manifest also is it that the same reasoning is controlling as to the relief which the bill sought concerning the sale made by the mother to Burset of the property transferred to her by the agreement and held by others under or as a consequence of that sale. We say this because it is apparent that to determine the validity of the sale or sales in the absence of the estate of the mother or her heirs would be in effect to pass upon the rights of the estate or heirs without a hearing. Demonstrative as are the foregoing considerations as to the want of power in the absence of the estate of the mother or her heirs to annul the agreement and the title which apparently flowed therefrom, and to collaterally avoid the decrees of the Porto Rican courts concerning the same and to set aside as simulated and fraudulent the sales made in virtue of the title at least apparently vested by the agreement, they all become more controlling when the nature and character of the rights with which the agreement dealt are taken into view. Between the husband and wife, by virtue of the marriage, in the absence of a contract to the contrary, a legal community supervened. Porto Rican Civil Code, Art. 1315. And although the code was not in force in 1866, when the marriage took place, the same rule, as we have already said, was then controlling under the more ancient Spanish law. Partidas, 5 Ll. 57, 59. See also the statement of the ancient Spanish law on the subject in *Bruneau* v. *Bruneau*, 9 Martin (La.), 217. The community thus arising by operation of law embraced all "the earnings or profits indiscriminately obtained by either of the consorts during the marriage." Civil Code of Porto Rico, Article 1392. The community also embraced all "property acquired during the marriage by onerous title at the expense of the community property whether the acquisition is made for the community or for only one of the consorts." Article 1401. Besides it embraced in the joint ownership many other things which it is unnecessary to enumerate and which are fully set out in the articles of the code following those just cited. And the

code, for the purpose of protecting the community and securing a just liquidation of the respective interests in the same, expressly provides, Article 1407, that "All the property of a marriage shall be considered as community property until it is proven that it belongs exclusively to the husband or to the wife." Although the presumption thus created was not expressed in the text of the Partidas, it was from ancient times a part of the Spanish law, having been declared in Ley, 203, Del Estilo (A. D. 1566), and such presumption common to both the Code Napoleon and the Louisiana Code (Code Napoleon, Art. 1403; Louisiana Code, Art. 2405), was, in express terms, embodied in Law 5, title 4, book 10, of the Novisima Recopilacion. In speaking of the ancient Spanish law on the subject in *Savenat* v. *Le Breton*, 1 Louisiana, 520, 522, the court said:

"This question must be decided according to the Spanish laws relating to rights which subsist in the marriage state between the parties to the matrimonial contract. By these laws everything purchased during the marriage fell into the common stock of gains, and at the death of either of the parties was to be divided equally between the survivor and the heirs of the deceased. And this effect was produced whether purchases were made with the money or capital of the community or with that of either of the married parties, whether in the name of both, or that of one of them separately. See Febrero add. part 2, lib. 1, chap. 4, sec. 1, no. 6."

And the text of the Novisima concerning the presumption was expounded and applied by the Supreme Court of Spain on May 7, 1868, in a case which came before it from Havana. Jurisprudencia Civil, vol. 17, No. 124, pp. 435–439. It is undoubted that all the real estate to which the agreement related was acquired by the husband after the marriage, and therefore was controlled, generally speaking, by the presumption of community. True it is, that the bill, as originally drawn, alleged that some of the property which was transferred to the mother by the agreement was acquired by in-

heritance by the husband and others by purchase, and that just before the hearing the court permitted an amendment striking out the words "by purchase," so as in effect to cause the bill to allege that the property transferred to the mother by the private agreement had been acquired by the husband by inheritance. But no averment tending in any way to deflect the legal presumption of community as to property acquired during marriage was made concerning the property allotted to the daughters, by the agreement, and which the bill, as amended, sought to administer and distribute. This being the case, it follows that the necessary effect of the bill, as amended, was to assert that, notwithstanding the legal presumption of community, the interest of the deceased wife in the property could be determined without the presence of her estate or of her heirs who were directly interested.

It does not meet this difficulty to suggest that the effect of the agreement was to close the question of community, since the ground upon which the relief was sought was that the agreement was void. Nor is there merit in the suggestion that the presence of the estate of the mother or her heirs was not necessary because the court below found as a fact either that there was no community property, or if there was, that no accounting or liquidation was essential. But these findings could not be made in the absence of the estate of the mother or her heirs without in effect denying a hearing to those vitally interested.

While the considerations previously stated establish the impossibility of affirming, and the necessity for reversing and remanding, they also engender the inquiry whether, in view of the nature and character of the relief sought by the bill, it is our duty to remand for a new trial, or with directions to dismiss the bill because of an inherent want of jurisdiction to give the relief which the bill sought.

Putting out of view for a moment the averments and prayer of the bill relating to the nullity of the private agreement, and the sales made of the property which was transferred by that

agreement to the mother, we think it is patent on the face of the bill that it but invoked the authority of the court to exercise purely probate jurisdiction by administering and settling the estate of Rios, the estate of his son, and that of the mother, and, as an incident thereof, to liquidate the community which had existed between Rios and his wife. Indeed, such was exactly the substantive relief which the bill as finally amended prayed. As by the bill it is alleged that on the death of the father and brother probate proceedings concerning both estates had been commenced in the proper Porto Rican court, it results that not only did the bill seek to administer the estates through the court below, but it sought also to do so, although the estates were open in the local court and subject to the power and authority of such court. In establishing a civil government for Porto Rico, Congress, scrupulously regarding the local institutions and laws, by § 33 of the act of April 12, 1900, preserved the local courts, both original and appellate, and recognized their power and authority to deal generally with all matters of local concern. In creating by the thirty-fourth section of the same act the District Court of the United States for Porto Rico, the jurisdiction and power of that court, we think by the very terms of the act, were clearly fashioned upon and intended to be made, as far as applicable, like unto the jurisdiction exercised by the Circuit and District Courts of the United States within the several States of the Union. It is true that the jurisdiction of the District Court, resulting from citizenship, has been made broader than that conferred upon the Circuit and District Courts of the United States within the States. But this does not tend in any way to establish that it was the purpose of Congress, in creating the District Court of the United States for Porto Rico, to endow that court with an authority not possessed by the courts of the United States (*Farrell* v. *O'Brien*, 199 U. S. 89), to exercise purely probate jurisdiction to administer and settle estates in disregard of the authority of the local court as created and defined by law.

By the Porto Rican Code of Civil Procedure (article 62, paragraph 5), power to administer estates, both testamentary and intestate, is vested in the judge of the last place of residence of the deceased. That the power thus conferred is exclusive is shown by the text of the same article and by the comprehensive grant of authority embraced in the provisions of the code which follow, relating to the settlement of both testamentary and intestate successions. That it embraces authority to entertain and dispose of all actions, whether real or personal, necessarily incidental to the accomplishment of the powers granted over estates, is shown by the provisions of article 1001 of the same code. The similarity between the provisions of the Louisiana code as to the community and the analogy which obtains between the provisions of the Louisiana Code of Practice and the Code of Civil Procedure of Porto Rico, concerning the power of the judge or court charged with the administration of estates, whether testamentary or intestate, especially where questions concerning the liquidation of a community, which has existed between husband and wife, is concerned, make pertinent the observations of the Supreme Court of Louisiana in *Lawson et ux.* v. *Ripley*, 17 Louisiana, 238, 248, where it was said:

"The succession of the husband, is therefore so far connected with the community as to form together, at the time of his death, an entire mass called his estate, which is not only liable for the payment of the common debts, but also for the portion of the wife or her heirs to the residue, if they have not renounced. The widow or her representatives have consequently such an interest in the mass of the estate or succession of the husband, with regard to whom no distinction is made between his separate property and that of the community until the net proceeds or amount of the acquets and gains are ascertained, that their assistance at the inventory and their concurrence at all the proceedings relative thereto, which are to be carried on contradictorily with them, are generally required. All such proceedings take place before the court of probates who,

according to law, has exclusive jurisdiction of all the matters concerning the estate, particularly in those cases where it is in a course of administration; and it does not occur to us that separate proceedings can properly be had in relation to the community, until after the settlement of the husband's estate and the payment of the common debts, and division of the residue of the acquets and gains is to be made between the heirs of the deceased and the surviving spouse; and even then the affairs of the husband's estate, administered under the control and supervision of the court of probates, are to be inquired into and sometimes fully investigated."

True it is that by article 1046 of the Porto Rican Code of Civil Procedure the parties interested in an estate which is unsettled and under the dominion of the proper court are given power to terminate the estate by a voluntary agreement between them, and that such may have been the effect of the agreement between the parties here in question if the same was valid. But as the bill charged and the relief which it asked was based upon the conception that the agreement was void, it follows that the relief which the bill sought could only have proceeded upon the hypothesis that the estate had not been closed, and was yet subject to be administered in the proper court. And that this was the theory of the bill is shown by the prayer that the court appoint a master to liquidate and settle the estates.

Coming to consider the subject from the point of view of the averments as to the nullity of the agreement and the fraudulent simulation of the sales, it is clear that the relief sought in this regard was merely ancillary to the prayer for the liquidation and settlement of the estates. As we take judicial notice of the fact that the distinctions between law and equity in a technical sense do not obtain in the local law of Porto Rico, and as under that law a court charged with the administration of an estate is one of general as well as probate jurisdiction and has full power over all personal and real actions

concerning the estate, it follows that the local court had in the nature of things power to determine, as an incident to its general and probate authority, whether the estate had been closed by the agreement, and hence to decide whether that agreement was void, and had also jurisdiction and power to determine whether the property which had been transferred to the mother by the agreement yet remained a part of the estate, and as an incident to so doing to decide the questions of fraud and simulation which were alleged in the bill. Of course, the general scope of the authority which the court then possessed endowed it with the power to liquidate and settle the community which existed between the husband and wife, as that liquidation was of necessity involved in the settlement of the estate. Speaking on this latter subject in *Lawson et ux.* v. *Ripley, supra,* the Supreme Court of Louisiana said (p. 249):

"But it is contended that this would be giving to the court of probates the right of trying questions of title. Probate courts have certainly no power to try titles to real estate, and to decide directly on the validity of such titles; but as this court has said in the case of *Gill* v. *Phillips et al.,* 6 Martin N. S. 298, 'those courts possess all powers necessary to carry their jurisdiction into effect, and when in the exercise of that jurisdiction questions arise collaterally they must, of necessity, decide them, for if they could not no other court could.' And, 'any other construction would present a singular species of judicial power—the right to decree a partition, without the authority to inquire into the grounds on which it should be ordered, or the portions that each of the parties should take. The end would thus be conceded without the means.' *Baillo* v. *Wilson,* 5 Martin N. S. 217. We are satisfied that whenever a question of title to real property and slaves arises collaterally in a court of probates, and an examination of it becomes necessary in order to give the court the means of arriving at a correct conclusion on matters of which it has jurisdiction, it must take cognizance of such title at least for the purpose of

ascertaining which property belongs to either of the spouses respectively or to the community."

The decree is reversed and the case is remanded to the court below, with directions to dismiss the bill for want of jurisdiction over the subject matter.

UNITED STATES FIDELITY AND GUARANTY COMPANY *v.* UNITED STATES FOR THE USE AND BENEFIT OF STRUTHERS WELLS COMPANY.

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

No. 154. Argued March 5, 1908.—Decided April 6, 1908.

There is always a strong presumption that a statute was not meant to act retrospectively, and it should never receive such a construction if susceptible of any other, nor unless the words are so clear, strong and imperative as to have no other meaning.

The act of February 24, 1905, c. 778, 33 Stat. 811, amending the act of August 13, 1894, c. 280, 28 Stat. 278, is prospective and does not relate to or affect actions based on rights of material-men which had accrued prior to its passage, and such actions are properly brought under the act of 1894.

The absolute taking away of a present right to sue and suspending it until after certain events have happened, and the giving of preferences between creditors, are not mere matters of procedure but affect substantial rights, and as the act of February 24, 1905, consists of but a single section and deals with such subjects and only incidentally applies to procedure, the entire statute must be construed under the general rule that it is not retrospective in any respect.

151 Fed. Rep. 534, affirmed.

THIS is a writ of error to the Circuit Court of Appeals for the Second Circuit, which brings up for review the judgment of that court affirming that of the Circuit Court of the Eastern District of New York in favor of the defendant in error (plain-

tiff below) against the plaintiff in error for the sum of $2,054.23. The action was brought in the Circuit Court above mentioned, in the name of the United States for the use and benefit of Struthers Wells Company against the plaintiff in error, and against the individual defendant Flaherty, as well as one Lande, upon a bond dated December 10, 1903, executed by Flaherty as principal, and the above-mentioned plaintiff in error as surety, by which they were held bound in the sum of $40,000, to be paid the United States as liquidated damages, the condition of the obligation being that if Flaherty, his successors, heirs, etc., should well and truly execute the contract annexed to the bond, which he had entered into with Colonel W. A. Jones, U. S. A., Engineer, of the Fifth Lighthouse District, for and in behalf of the United States, by which Flaherty covenanted and agreed to completely construct and deliver the metal work for the Baltimore lighthouse, Maryland, according to all the conditions of the said contract, and should promptly make payments to all persons supplying said Flaherty labor and materials in the prosecution of the work provided for in such contract, then the obligation was to be void; otherwise to remain in full force and virtue.

It was averred in the complaint that the action was brought in the name of the United States by Struthers Wells Company, for its use and benefit, against the plaintiff in error and Flaherty (and also one Lande, who had been joined with Flaherty in the contract), pursuant to the act of Congress of August 13, 1894. See 28 Stat. 278. The section is set forth in the margin.[1]

[1] 28 Stat. Chapter 280, p. 278:

"*Be it enacted*, etc., 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,

The Struthers Wells Company, under an agreement with the defendants Flaherty and Lande, and in or about the month of March, 1904, supplied to them certain materials described in the complaint, for use by them in the prosecution of the work, which they had contracted with the United States to do in constructing the metal work for the Baltimore lighthouse, as mentioned in the bond. The material furnished by the company was of the value of $1,890.25. The company duly performed all the conditions of its contract with the defendants, which it had agreed to perform, and made delivery as provided for in its agreement, and by reason of the premises there became due and payable to the company from the defendants, including the plaintiff in error, the sum of $1,890.25, with interest from June 7, 1904, no part of which has been paid. Judgment was demanded for that sum, with interest, as stated.

The action was commenced on the twelfth of April, 1905. The plaintiff in error demurred to the complaint on the ground, first, that the court had no jurisdiction of the person of the defendant, the United States Fidelity and Guaranty Company; second, that the court had not jurisdiction of the subject of the action; and, third, that the complaint does not state facts sufficient to constitute a cause of action against the defendant, the United States Fidelity and Guaranty Company. This demurrer was overruled, with leave to the defendant to answer, which the defendant refused to do, and thereupon judgment was entered for the plaintiff against it, which was affirmed by the Circuit Court of Appeals.

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or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties, and to prosecute the same to final judgment and execution: *Provided*, That such action and its prosecution shall involve the United States in no expense."

Mr. Leonidas Dennis for plaintiff in error:

The question of jurisdiction depends upon the law as it was when the jurisdiction of the Circuit Court was invoked. Though plaintiff's cause of action arose before the passage of chapter 778, this action was not started until after the enactment of this law and the provisions therein contained regulating the enforcement of such cause of action apply to this action as they do not affect the cause of action itself, but only the method of enforcing the same. *Larkins* v. *Saffarans*, 15 Fed. Rep. 147; 26 Am. & Eng. Enc. of Law, 695; Endlich on Interpretation of Statutes, § 287; *United States Fidelity & Guaranty Co.* v. *Kenyon*, 204 U. S. 359.

The court has no jurisdiction over the subject of this action.

The Circuit Courts of the United States are of statutory and not constitutional creation and jurisdiction. Whatever jurisdiction they might have had over such an action prior to February 24, 1905, that jurisdiction was repealed by the passage of the act of that date. The only court which has jurisdiction over a cause of action upon a bond like that involved in this cause is the Circuit Court in the district in which the contract was to be performed and executed. The prohibition against other courts exercising jurisdiction, is equivalent to a repeal. *Insurance Company* v. *Ritchie*, 5 Wall. 541, 544.

When a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall within the law. *Railroad Co.* v. *Grant*, 98 U. S. 398; *Assessors* v. *Osborne*, 9 Wall. 567; *Sherman* v. *Grinnell*, 123 U. S. 679; *Gurnee* v. *Patrick County*, 137 U. S. 141; *McNulty* v. *Batty*, 10 How. 71; *Insurance Co.* v. *Ritchie*, 5 Wall. 541; *Ex parte McCardle*, 7 Wall. 506, 514; *National Exchange Bank* v. *Peters*, 144 U. S. 570; *Fairchild* v. *United States*, 91 Fed. Rep. 297.

The only vested right conferred on defendant in error by the statute of 1894, is the right to a *pro rata* share in the amount of the bond after the contract has been completed, and the statute of 1905 does not take away this right. *Larkins* v.

Saffarans, 15 Fed. Rep. 147; *American Surety Co.* v. *Lawrenceville Cement Co.*, 96 Fed. Rep. 25.

The legislature may change, as well as create, a limitation, provided adequate means of enforcing the right remain, and the material-man here has no vested interest in the form of the action to be commenced, or the mode or remedy to be applied.

Statutes prescribing a new or different limitation take effect immediately. *Sohn* v. *Waterson*, 17 Wall. 596; *Terry* v. *Anderson*, 95 U. S. 628; *Wilson* v. *Kreminger*, 185 U. S. 63.

The complaint does not state that the contract, for the performance of which the bond was given, has been fully completed, and that six months had expired since such completion and before the commencement of this action without the United States starting suit on said bond, all of which elements are conditions precedent to maintaining the suit.

Although the material-man under the statute of February 24, 1905, has not an unconditional right of action, but must wait until after the completion of the contract, this provision is not a material change in the right of the material-man as, under the former statute, their right to a *pro rata* share could only be determined after the contract had been completed. *Lawrenceville Cement Co.* v. *American Surety Co.*, *supra*.

Mr. Herbert A. Heyn for defendant in error:

The act of 1905, was not intended by Congress to apply to or have effect upon causes of action which had accrued before its passage. Plaintiff's cause of action is therefore exclusively governed by the material-men's act of 1894, under which the bond in suit was given and under which all rights against the surety became fully vested long prior to the enactment of the new statute.

A statute shall never be given retrospective effect unless the legislature in most unambiguous and unmistakable language has directed that such should be its operation. Laws are to operate prospectively. *Jackson* v. *Van Zandt*, 12 Johns. R.

168; Sutherland, Statutory Construction, 1158, 1161; Wade, Retroactive Law, § 34; *United States* v. *American Sugar Co.*, 202 U. S. 563, 577; *United States* v. *Heth*, 3 Cranch, 413.

While the general principles above considered have not always been applied with the same strictness to statutes relating to procedure and practice, even in respect to such statutes the intention of the legislature is just as important and binding upon the courts as in reference to any others. Wade on Retroactive Law, §§ 38, 39.

See also to the same effect: *Pierce* v. *Cabot*, 159 Massachusetts, 202; *Shallow* v. *Salem*, 136 Massachusetts, 136; *Eddy* v. *Morgan*, 216 Illinois, 437; *Auditor Gen.* v. *Chandler*, 108 Michigan, 569; *Bedier* v. *Fuller*, 116 Michigan, 126.

There is nothing in the act itself that indicates the intention that the provisions in reference to practice and remedy were intended by Congress to operate retrospectively.

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

The demurrer put in by the plaintiff in error is founded upon an amendment of the above mentioned act, which, it is contended, applies to the case before us. The amendment is set forth in the margin.[1]

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[1] Chapter 778, 33 Stat., p. 811:

"*Be it enacted*, etc., That the act entitled 'An Act for the protection of persons furnishing materials and labor for the construction of public works,' approved August thirteenth, eighteen hundred and ninety-four, is hereby amended so as to read as follows:

" '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 obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company or corporation who has furnished labor or materials used in the construction or repair of any public building or public work,

The record shows that the contract between Flaherty and the United States was entered into December 10, 1903, and the material was furnished to Flaherty by the Struthers Wells Company in March, 1904. It thus appears that the bond was executed under the provisions of the original act of Congress, and the materials were furnished Flaherty while that act was in force and before its amendment. The legal rights of the Struthers Wells Company had become vested before the enactment of the amendment. It is contended on the part of the plaintiff in error that the passage of the amendment (February 24, 1905) made it necessary for the defendant in error to follow its provisions when it commenced this action on the twelfth of April, 1905. It is argued that the amendment prescribes the procedure to be followed by material-men in enforcing claims against a surety on a bond of the nature of the one in suit; that, as amended, the law prohibited a material-man from commencing any action in any district other than that in which the contract was to be performed (in this case

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and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due to the United States, the remainder shall be distributed *pro rata* among said intervenors. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials . . . shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work 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, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be and are hereby authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided*, That where suit is instituted by any of

the Maryland District of the Fourth Circuit), and also not until after the complete performance of the contract, for the performance of which the bond was given, and until the expiration of six months after such completion, during which time the United States alone has the right to commence an action. The plaintiff in error insists that, although the cause of action herein arose before the passage of the amendment, the action itself not having been commenced until after that time, all the provisions of the amendment regulating the enforcement of such cause of action apply to the action before us, as they do not affect the cause of action itself, but only the method of enforcing the same. In other words, it is contended that the amendment is to have retroactive effect in all matters relative to procedure, and that, as so construed, this action was improperly brought in the Circuit Court of the United States for the Eastern District of New York, and that it was prematurely brought because it does not appear that at the time of the commencement of this action the contract had

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such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof; and shall be commenced within one year after the performance and final settlement of said contract and not later: *And provided further*, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further*, That in all suits instituted under the provisions of this act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.' "

been completed or that six months had expired since its completion, or that the United States had not itself sued on the bond.

The act which is amended consists of but one material section, the second section providing only for the comparatively unimportant matter of security for costs. The act amending the section also consists of but one section. The question is whether the amended act applies to this case.

There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied. *Dash* v. *Van Kleeck*, 7 Johns. 499; *Jackson* v. *Van Zandt*, 12 Johns. 168; *United States* v. *Heth*, 3 Cranch, 399, 414; *Southwestern Coal Co.* v. *McBride*, 185 U. S. 499, 503; *United States* v. *American Sugar Co.*, 202 U. S. 563, 577.

The language of the amended act is prospective, as it provides "that hereafter any person or persons entering into a formal contract with the United States," etc. That language standing alone would leave little doubt as to the intention of Congress in the matter of the taking effect of the amendment.

It is urged, however, that as the amendment in this respect but reiterates the language of the original act, the use of the word "hereafter" in the commencement of the amendment ought not to have the significance which would otherwise attach to it, because it is simply in this particular reënacting the law as it already stood.

There is considerable force in the suggestion that the word "hereafter" is not to receive the weight which in other circumstances it ought to have. The question is, however, one

as to the intention of Congress, and when we come to look at the provisions of the statute, as amended, we are convinced that Congress did not intend that the amendment should apply to cases where the bond had already been executed, the work done, the respective rights of the parties settled, and the cause of action already in existence. If Congress had intended otherwise, we think it would have still further amended the original act by providing in plain language that the amendment should apply to all cases, and not be confined to the future.

The plaintiff in error contends that where an amendment to an act relates only to procedure, it takes effect upon causes of action existing when the amendment was passed, and hence that part of the amendment in question applies and prevents the taking of jurisdiction by the Circuit Court for the Eastern District of New York. It is admitted by the plaintiff in error that the act is not confined to procedure but deals with substantive rights in some instances, one of which is the provision granting a preference to the United States over all other creditors. In such case counsel admits that the provision must be construed and held to apply to bonds executed subsequent to the enactment of the statute, and to such bonds alone. Under the statute of 1894 no such preference could be obtained. *American Surety Co. of New York* v. *Lawrenceville Cement Co.*, 96 Fed. Rep. 25; *United States* v. *Heaton*, 128 Fed. Rep. 414.

It would follow necessarily that if the full amount of the liability of the surety on the bond were insufficient to pay all the claims and demands, the provision that, after paying the full amount due the United States, the remainder only should be distributed *pro rata* among the intervenors, would also be a substantive amendment and not one of procedure. Hence counsel admits that the full amount which may be due the United States depends upon whether the bond was executed prior or subsequent to the amendment of the statute; that if the bond were executed prior thereto, the Government is only en-

titled to its *pro rata* share, while if executed subsequently the full amount of its claim, regardless of the claims of the other creditors, would be the amount due. In other words, these provisions, contained in the single section of the act, are to be considered as prospective only and as applicable to bonds executed subsequently to the passage of the amendment.

There is another most important amendment, by which the material-man's right to sue is suspended until after the completion of the work and final settlement and for six months thereafter, during which the United States can alone sue upon the bond. Instead of a right to sue at once upon the nonpayment of his claim, he is precluded from doing so, perhaps for years.

Although the time in which to commence action may be shortened and made applicable to causes of action already accrued, provided a reasonable time is left in which such actions may be commenced (*Terry* v. *Anderson*, 95 U. S. 628; *Wilson* v. *Iseminger*, 185 U. S. 55), yet that is a different principle from taking away absolutely a present right to sue until a period of time, measured possibly by years, shall have elapsed.

These various provisions are all contained in the same section of the statute, and there is not much of it left to be made retrospective, as matter of procedure, after these other provisions have been held to be prospective only. If the limitation as to the district in which the suit upon the bond could be brought were to be regarded as simply matter of procedure (which we do not assert), we still think it is not to be construed as applying retrospectively. As it is only a question of intention we are not prepared to hold that the section is prospective in its operation in regard to all its other provisions, but retrospective in the one instance, as to the district in which the suit is to be commenced. Even matters of procedure are not necessarily retrospective in their operation in a statute, and we see no reason for holding that this statute, of but one section, should be split up in its construction, and one por-

tion of it made applicable to cases already existing and other portions applicable only to the future. We are convinced Congress did not intend such separation. Viewing the whole section, we think Congress meant that only in future cases should the provisions of the amendment apply, although some trifling portion of those provisions might be regarded, technically, as in the nature of procedure. It is therefore wiser to hold the entire section governed by the usual rule and as applying only to the future.

The judgment of the Circuit Court of Appeals was right, and is

Affirmed.

NATIONAL LIFE INSURANCE COMPANY OF THE UNITED STATES OF AMERICA *v.* NATIONAL LIFE INSURANCE COMPANY.

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

No. 162. Argued March 9, 1908.—Decided April 6, 1908.

Even if the power to review the determination of an executive department exists, where the complainant is merely appealing from the discretion of the department to the discretion of the court, the court should not interfere by injunction where the complainant has no clear legal right to the relief sought.

Where a corporation has taken the same name as that of an older corporation the fact that it has a greater quantity of mail matter does not justify the court in interfering with a special order of the Post Office Department directing the delivery of matter not addressed by street and number in accordance with Par. 4 of § 645 of the General Regulations of 1902 to the one first adopting the name in the place of address.

THE appellant commenced this suit in equity against the defendants on the eighteenth day of July, 1905, in the Circuit Court of the United States for the Northern District of Illinois,

Eastern Division, for the purpose of obtaining an injunction against the corporation defendant, restraining it and its manager, the defendant D. G. Drake, at Chicago, Illinois, from receiving, and the Chicago postmaster and the letter carriers named as defendants from delivering, mail-matter directed to "National Life Insurance Company, Chicago, Illinois," to the company so designated, on the ground that, in fact, such mail-matter was intended for the complainant, even though not addressed to it. An answer of the corporation defendant and that of its manager was duly filed and served, to which the complainant filed a replication. After a hearing it was adjudged by the Circuit Court "that the defendant, National Life Insurance Company, is entitled to have delivered to it such mail as may come to the post-office at Chicago addressed 'National Life Insurance Company, Chicago, Illinois,' unless such mail shall also bear the street number of the office of the National Life Insurance Company of the United States of America, or shall be in some other way designated, upon the exterior of the envelope or wrapper containing such mail-matter, or otherwise, as designed for the National Life Insurance Company of the United States of America, and not for the National Life Insurance Company. Wherefore, it is further ordered, adjudged and decreed that the bill of complaint herein, as amended, be and the same is dismissed for want of equity." This judgment was affirmed by the Circuit Court of Appeals.

Upon the trial, among others, the following facts were agreed upon:

An insurance company known as the National Life Insurance Company of the United States of America was duly incorporated by special act of Congress in the year 1868. Its chief office and place of business was, by its charter, located in the city of Washington, District of Columbia. The corporation thereupon entered upon the life insurance business and continued to transact that business and to seek new business of that kind until 1881.

The company was duly admitted to do business in the State of Illinois on or about August 16, 1868, and in the year 1874 it established in the city of Chicago, Illinois, what is denominated its principal branch office, and thereafter continuously transacted in the city of Chicago nearly all of the business usually transacted at the home office of an insurance company.

In 1881 the company ceased to solicit or to write any new business, and such omission continued until 1900, and during that period the business transacted by it at its principal branch office in Chicago was such as was incident to the care and preservation of the business written prior to 1881. Between those years the company was suffering a natural liquidation, its outstanding policies decreasing from 5,966 in number to 1,317, while its policies in Illinois had decreased from 394 to 100. In the year 1900 the company again began to solicit new business, and up to March, 1904, transacted at its principal branch office in Chicago all of the business usually transacted at the chief or national office of an insurance company.

In March, 1904, the complainant was incorporated under the laws of the State of Illinois, with its principal office and place of business in the National Life building, at 159 La Salle street, in the city of Chicago, and the complainant forthwith took over all the property and business of the Washington, District of Columbia, corporation, and continued thereafter to transact the business theretofore transacted by the latter corporation. Prior to this time (March, 1904) the Washington company had taken over the business of two other life insurance companies and one trust company, all of which had become merged in the Washington company when the complainant took over its business. The Washington corporation still preserves its corporate entity, but since March, 1904, has transacted no business except such as was incident to carrying out the contracts by which the complainant took over its property and business.

The average number of pieces of mail received by the complainant at its chief office in Chicago, intended for it, during

the year 1905 and up to May 1, 1906, was about 200 per day for each business day.

The defendant F. E. Coyne was the postmaster at Chicago up to the eighth of January, 1906, since the commencement of this suit, and on that date Fred A. Busse was appointed and has since acted as such postmaster. The other individual defendants are the mail carriers in that city for the territory in which the complainant's place of business is situated.

The corporation defendant was organized and incorporated by an act of the legislature of Vermont on the thirteenth day of November, 1848, under the name of "National Life Insurance Company of the United States." By another act of the legislature, approved October 7, 1858, the name of the company was changed to "National Life Insurance Company," and since that time its name has been continuously and is now "National Life Insurance Company."

The company was duly admitted to do business in the State of Illinois on the fifth of October, 1860, and has done business in that State continuously from that time to the present. It has maintained since some time prior to 1868 a branch office in the city of Chicago, and has done business continuously at that branch office since its establishment up to the present time. That office since March 1, 1895, has been in charge of the defendant D. G. Drake, as its manager. During the period from 1881 to 1900 the business of this corporation in the State of Illinois increased from 190 policies to 3,846 policies. It has in all more than 70,000 policyholders, and the average number of pieces of mail-matter received by it and D. G. Drake, its manager, at the office of the company in the Marquette Building, in Chicago, and intended for them, or one of them, during the year 1905 and up to May 1, 1906, was about 23 pieces per day for each business day.

There had been received for some years prior to 1905, at the Chicago post-office, numerous pieces of mail-matter every day, addressed simply "National Life Insurance Company, Chicago, Illinois." During the year 1905 the average number

of such pieces of mail-matter was about five per day. Prior to the nineteenth of January, 1905, substantially all such mail-matter thus addressed had been delivered to D. G. Drake, as manager for the defendant National Life Insurance Company, and from day to day Drake opened or caused to be opened the pieces of mail-matter thus addressed, and those not found to be intended for the defendant company would be marked by him "Not for National Life Insurance Company," would then be redeposited in the United States mail and subsequently delivered to the National Life Insurance Company of the United States of America.

The complainant was dissatisfied with this condition of things and contended that all the mail thus addressed should be delivered to the complainant. Various letters passed upon the subject between the complainant and the postmaster at Chicago, and the manager of the defendant corporation, and also the authorities of the Post Office Department, at Washington. For the purpose of settling the question it was suggested from Washington that the postmaster at Chicago should direct a representative of the two companies to appear at his office daily for a period of ten days and open the mail in the presence of an employé of the office, designated by the postmaster, and that a record should be kept of the mail received, and the proportion thereof intended for each company. If it then appeared that a great majority of the mail was really intended for the complainant, delivery should be made to that company. On the other hand, if the contention that the greater part of the mail so addressed belonged to the complainant was not supported by the facts, the existing conditions should be continued; and should either party decline to assent to these conditions, delivery should then be made to the other. The defendant corporation did not agree to this examination of the mail, and asked (January 17) for delay for further communications, but the postmaster at Chicago, on account of this refusal, and also acting under advices from the Postmaster General's Department, at Washington, directed, under date

of January 18, 1905, that thereafter the mail should, until otherwise directed, be delivered to the complainant. Under this order the mail was so delivered from January 19, 1905, until July 12, 1905. During that time the complainant received 794 letters addressed "National Life Insurance Company, Chicago, Illinois," and of that number 778 were found to be intended for the complainant and related to its business; 2 letters were intended for the defendant and related to its business; and the remaining 14 pieces consisted of circular letters relating to bonds, mortgages and other securities and investments, advertising, catalogues and statistics, in regard to which it was impossible to tell from the inspection of the envelope and contents whether they were intended for the complainant or the defendant.

On the twenty-first of June, 1905, the Post Office Department altered its directions, and directed the Chicago postmaster to thereafter deliver mail addressed "National Life Insurance Company, Chicago, Illinois," to the National Life Insurance Company, a Vermont corporation, at its offices in the Marquette Building, Chicago, Illinois.

This order has ever since been obeyed by the Chicago postmaster, and for the purpose of obtaining relief therefrom the present suit was commenced.

Mr. L. A. Stebbins, with whom *Mr. W. H. Sears* was on the brief, for appellant.

Mr. Henry Russell Platt for appellee National Life Insurance Company.

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

The record shows that the defendant company was first incorporated in Vermont in 1848 by act of the legislature, under the name "National Life Insurance Company of the United

States," but in 1858 the legislature of that State altered the name to "National Life Insurance Company," and this was ten years prior to the incorporation of the Washington, D. C., corporation. The defendant company has ever since that time maintained the name given it in 1858, and it was in use by it when, in 1860, it was admitted to do business in Illinois. It established a business office in Chicago prior to 1868, and has since that time continuously made use of the mails of the United States, under its corporate name.

After the Washington company was incorporated in August, 1868, it was admitted to do business in the State of Illinois, but it was not until 1874 that it established in the city of Chicago what it denominated its principal branch office.

The defendant company, under the law of Illinois, places on its signs in the building where it does business a statement that it was incorporated in Vermont, but its corporate name has no such addition.

Both companies being engaged in the life insurance business in various States, and, after 1874, both having business offices in Chicago, are constantly receiving letters through the mails. Large numbers of them are properly addressed, those intended for the complainant being addressed to it by its own name, to which is usually added the street number of the building in which it has its office, 159 La Salle street, while those intended for the defendant company are addressed to it by name, with the addition of Marquette Building, where its office is, or they are addressed to D. G. Drake, its manager. The difficulty has arisen over letters which were simply addressed "National Life Insurance Company, Chicago, Illinois," and these have, with the exception of a brief time between January and July, 1905, been delivered to the defendant company, in the Marquette Building. After they have been there opened such of them as have been intended for the complainant have been returned to the post-office at Chicago, from which they have been then delivered to the complainant. A very large proportion of the letters thus addressed have proved, upon

being opened, to have been intended for the complainant. The letters that are addressed to the defendant by its corporate name cannot be known to have been intended for the complainant until they have been opened. In other words, there is nothing on the outside of the letters from which it could be determined that they were not intended for the company to which they were addressed by its corporate name, but for the complainant. Some of the letters thus addressed have been, in fact, intended for the defendant company, although a very small proportion of them.

As the defendant company used its name long prior to the adoption of a somewhat similar name by the complainant, it is apparent that the confusion which has arisen therefrom in regard to the mail delivered at Chicago is not at all the fault of the defendant company. The whole claim of the complainant rests upon the averment that a very large majority of the letters that are addressed to the defendant company by its own name alone are in reality intended for the complainant. This fact does not clothe the complainant with the legal right to insist that the Chicago postmaster shall be directed to deliver all mail of the character in question to a corporation other than that to which the mail is addressed. It is a matter of confusion arising from a similarity of names, wherein the greater proportion of the total amount of the mail thus addressed belongs to the complainant, although not addressed to it, and yet some portion of the mail thus addressed actually belongs to the company to which the mail is in fact addressed. There are no means of discovering to which company the letters belong short of opening them. The complainant by adopting greater caution in the matter of directions to its correspondents as to the proper address might probably be able to secure more correctness in the direction of letters intended for it.

In the endeavor to discharge its duty the department has provided, in paragraph 4 of § 645 of its Postal Laws and Regulations of 1902, the following general regulation:

"Attempts to secure the mail of an established house, firm, or corporation through the adoption of a similar name should not be recognized. Where disputes arise between individuals, firms, or corporations as to the use of a name or designation, matter addressed to a street, number, or building should be delivered according to such address. When not so addressed, *the mail will be delivered to the firm or corporation which first adopted the name of the address at that place.*"

The Post Office Department made a special order herein, following substantially that rule. The appeal made by the complainant to the department was really nothing but an appeal to its discretion; complainant could only have asked for the order because, upon the whole, it was thought but fair and equitable that the corporation for which, in a great majority of cases, the letters were probably intended, should have them, although letters so addressed were in a number of cases intended for the corporation named on them. The court is now asked, in effect, to review and reverse that order, not because the complainant has a legal right to the delivery of all these letters, but only because, judging from the past, the numbers intended for complainant are many more than those intended for defendant, even though all are addressed to the latter. The court is therefore asked to judge by the experience of the past, although in making the order asked for it inevitably directs the delivery of some letters to the wrong party, and in opposition to the address upon the letters. Assuming that the court in some cases has the power to, in effect, review the determination of the department, we do not think this is an occasion for its exercise. The complainant is really appealing from the discretion of the department to the discretion of the court, and the complainant has no clear legal right to obtain the order sought. See *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 108.

A court in such case ought not to interfere in the administration of a great department like that of the Post Office by an injunction, which directs the department how to conduct

the business thereof, where the party asking for the injunction has no clear right to it.

This case has nothing in common with *American School &c.* v. *McAnnulty*, 187 U. S. 94. There the Post Office Department was assuming to act under a statute giving it the power to refuse to deliver mail-matter to an individual guilty of fraud in his business, and this court held that the case made did not show that the plaintiff in error had been guilty of any conduct that could be held to be a fraud under the statute under which the Post Office Department was acting. The department was, therefore, without jurisdiction to make the order, which was reversed in this court.

The judgment of the Circuit Court of Appeals must be

Affirmed.

ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG *v.* FIREMEN'S INSURANCE COMPANY OF BALTIMORE, TO THE USE OF WOLFE, RECEIVER.

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

No. 180. Argued March 17, 18, 1908.—Decided April 6, 1908.

Reinsurance has a well known meaning, and, as the usual compact of reinsurance has been understood in the commercial world for many years, the liability of the reinsurer is not affected by the insolvency of the reinsured company or by the inability of the latter to fulfill its own contracts with the original insured; and in this case the compact, notwithstanding it refers to losses paid, will be construed to cover losses payable by the reinsured company; and, in a suit by the receiver of that company on the compact, the fact of its insolvency and non-payment of the risks reinsured does not constitute a defense.

28 App. D. C. 330, affirmed.

THIS action was brought by plaintiff, who is the defendant in error, in the Supreme Court of the District of Columbia for the purpose of recovering an amount alleged to be due the plaintiff from the defendant (plaintiff in error) on a policy of reinsurance. The plaintiff obtained judgment in the trial court, which was affirmed in the Court of Appeals of the District.

The plaintiff had originally insured the property which was destroyed, and had prior to the loss reinsured a proportion of the original insurance with the defendant company. After such reinsurance the plaintiff suffered heavy losses by reason of the great fire in the city of Baltimore in the month of February, 1904, for which losses it became liable, and was rendered thereby insolvent, and is unable to pay the same, unless the plaintiff is able to collect the amount due it from the defendant by virtue of its reinsurance policies, and from other corporate fire insurance companies with which plaintiff had contracts of reinsurance. By reason of the insolvency of the corporation a receiver was appointed, by a decree of the Circuit Court of Baltimore city, prior to the commencement of this action.

Upon the trial the plaintiff proved a cause of action against the defendant, unless the facts, which it also proved, that it had become insolvent by reason of the losses sustained by it incident to the Baltimore fire in 1904, and that a receiver had been appointed for it by the court in Maryland, and that the receiver had paid to its creditors, after this suit was brought, but fifty-five per cent of the amount of its liability, amounted to a defense.

The contract between the plaintiff and defendant was described therein as a "reinsurance compact," and in it the defendant agreed to "reinsure the Firemen's Insurance Company" in the amounts and manner therein stated.

There were contained in the compact, and forming part thereof, the following subdivisions:

"10. Upon receiving notice of any loss or claim under any

contract hereunder reinsured the said reinsured company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pa., of the same, and of the date and probable amount of loss or damage, and after said reinsured company shall have adjusted, accepted proofs of, or paid such loss or damage, it shall forward to the said Allemannia Fire Insurance Company, at Pittsburg, Pa., a proof of its loss and claim against this company, upon blanks furnished for that purpose, by said Firemen's Insurance Company, together with a copy of the original proofs and claim under its contract reinsured, and a copy of the original receipt taken upon the payment of such loss; and upon request, shall exhibit and permit copies to be made of all other papers connected therewith, which may be in its possession.

"11. Each entry under this compact, unless otherwise provided in this compact, shall be subject to the same conditions, stipulations, risks and valuation as may be assumed by the said reinsured company under its original contracts hereunder reinsured, and losses, if any, shall be payable *pro rata* with, in the same manner, and upon the same terms and conditions as paid by the said reinsured company under its contracts hereunder reinsured, and in no event shall this company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured company under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof."

The defendant gave no evidence, but requested the court to instruct the jury as follows:

"No. 2. The jury are instructed that proof of mere liability on the part of the plaintiff under the original contracts or policies, involved in this suit, is not sufficient to entitle it to a verdict against the defendant; and the jury are therefore further instructed that they must return a verdict in favor of the defendant, unless they shall find from the evidence that the plaintiff has actually paid the whole or some

part of one or more of the claims against it enumerated in the schedule annexed to the contract of reinsurance here sued upon.

"No. 3. The jury are instructed that if they find for the plaintiff, their verdict must not be for an amount in excess of a ratable proportion of the various sums actually paid by it to its policyholders under the original contracts or policies enumerated in the schedule attached to the declaration filed herein."

These instructions were refused and the refusal duly excepted to. Thereupon the jury, under instructions, returned a verdict in favor of the plaintiff for $12,613.24, being the amount which it was conceded was due under the reinsurance compact, provided the fact of insolvency and non-payment by the reinsured did not constitute a defense.

Mr. Andrew Y. Bradley and *Mr. H. Prescott Gatley,* with whom *Mr. Charles H. Bradley* was on the brief, for plaintiff in error:

Under the contract of reinsurance sued upon the reinsured must have paid the losses on risks carried by it before it can recover from the reinsuring company.

The provisions found in §§ 10 and 11 of the contract are absolutely controlling in this case.

There is nothing unreasonable in the provisions nor do they contravene any rule of public policy. The contract of reinsurance is made not for the benefit of the policyholders under the reinsured company, but for the protection of the reinsured, and the language of it clearly demonstrates that it was intended, not as protection against mere liability to pay, but against actual payment of losses.

"Contracts of insurance, like other contracts are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense." *Imperial Fire Ins. Co.* v. *Coos*

County, 151 U. S. 462, 463; 2 Parsons on Contracts (7th ed.), 626, 632.

The language of paragraph 11 of this contract is neither technical nor ambiguous nor have any of the terms therein used "acquired a meaning district from the popular sense of the same terms." They must, therefore, be taken and understood in their plain, ordinary and popular sense. The words "and in no event," in their plain, ordinary and popular sense, include and refer to insolvency as clearly as though that word were visibly written in the contract.

This contract provides that "in no event shall this company be liable for an amount in excess of a ratable proportion of the sum, actually paid," not a ratable proportion of the loss. The liability of the reinsuring company being clearly and expressly fixed by the terms of the contract, the court will not enlarge it. Kerr on Ins., 729, 735; *Imperial Ins. Co.* v. *Coos County* (*supra*).

The moment the reinsured accepted the contract in this case it assumed and took upon itself the duty of performing a certain definite act by which, and by which alone, the extent and measure of the liability of the reinsuring company could be ascertained in the event of a loss. The reinsured, by its acceptance of this contract, agreed that "actual payment" by it of its losses should be a condition precedent to its right of recovery against the reinsuring company. Langdell on Contracts, § 33; Ostrander on Insurance, § 334; Kerr on Insurance, 740; *Braunstein* v. *Ins. Co.*, 1 Best & S. 728.

The insolvency of the reinsured was an event the happening of which could have been provided against by the terms of the contract. There being no such provision in the contract, it must be conclusively presumed that the parties had that event, as well as all others, in mind when they agreed that "in no event" should the reinsuring company be liable for an amount in excess of ratable proportion of the sum actually paid, etc.

The fact that performance of this condition precedent is

now impossible does not invalidate it, nor is the reinsured relieved or discharged from its obligation.

Mr. William F. Mattingly and *Mr. T. Wallis Blakistone* for defendant in error:

The contract did not contemplate insolvency. It was a contract of indemnity and the legal construction of § 11, in connection with the entire contract, following the strict intent of both parties to it, is that in no event should the defendant be required to pay under its contract more than its ratable proportion of the actual liability of the plaintiff. May on Ins., §§ 11, 11*a;* 2 Clement on Fire Ins., 551, 557; *Consolidated R. E. & F. Ins. Co.* v. *Cashow,* 41 Maryland, 59, 74, 75; *Blackstone, Rec'r,* v. *Allemannia Ins. Co.,* 56 N. Y. 104; *In re Insurance Company's Appeal,* 83 Pa. St. 396; *Cashau* v. *Northwestern Nat. Ins. Co.,* 5 Fed. Cas. No. 2,499; *Ex parte Norwood,* 18 Fed. Cas. No. 10,364; *In re Republic Ins. Co.,* 20 Fed. Cas. No. 11,705.

The construction of these reinsuring contracts, as shown by authorities cited, is in conformity with the general principles, relating not only to indemnity contracts, but all contracts. The fundamental rule of construction is that the consideration of the situation of the parties when the contract was made, its subject matter and the purpose of its execution, are material to determine the intention of the parties and the meaning of the terms they used, and that when these are ascertained they must prevail over the words of the stipulations. *Kauffman* v. *Ræder,* 54 L. R. A. 247, 250; *S. C.,* 47 C. C. A. 278; *Canal Co.* v. *Hill,* 18 Wall. 94; *O'Brien* v. *Miller,* 168 U. S. 287; *Insurance Co.* v. *Duval,* 8 S. & R. 147; *Illinois Ins. Co.* v. *Andes Ins. Co.,* 67 Illinois, 362; *Eagle Ins. Co.* v. *Lafayette Ins. Co.,* 9 Indiana, 443; *Gantt* v. *American Ins. Co.,* 68 Missouri, 503; 24 A. & E. Enc. (2d ed.), 265*f,* 267 (2), 270, VIII.

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

The only question before the court is as to the construction

of the language of the reinsurance compact. The term "reinsurance" has a well-known meaning. That kind of a contract has been in force in the commercial world for a long number of years, and it is entirely different from what is termed "double insurance," *i. e.*, an insurance of the same interest. The contract is one of indemnity to the person or corporation reinsured and it binds the reinsurer to pay to the reinsured the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured. It is not necessary that the reinsured should first pay the loss to the party first insured before proceeding against the reinsurer upon his contract. The liability of the latter is not affected by the insolvency of the insured or by its inability to fulfill its own contract with the original insured. The claim of the reinsured rests upon its liability to pay its loss to the original insured and is not based upon the greater or less ability to pay by the reinsured. If the reinsured commenced his action against the reinsurer before he had himself paid the loss the reinsured took upon himself the burden of making out his claim with the same precision that the first insured would be required to do in an action against him. But there is no authority for saying that he must pay the loss before enforcing his claim against the reinsurer. These propositions are adverted to and enforced in *Hone &c.* v. *The Mutual Safety Insurance Company,* 1 Sandf. Superior Court Reports, 137, where the authorities upon the subject are gathered and reviewed at some length. The case itself was subsequently affirmed in the Court of Appeals in 2 N. Y. 235. See also *Blackstone* v. *Allemannia Fire Insurance Company,* 56 N. Y. 104. The same doctrine is held in *Consolidated Real Estate &c.* v. *Cashow,* 41 Maryland, 59.

Counsel for plaintiff in error frankly concedes that the legal propositions above stated are correct, and unless there is something in the special provisions of this reinsurance contract which changes the ordinary rule on that subject the judgment herein must be affirmed. Reference is made to the eleventh subdivision of the policy in question. Under the language of

that clause the plaintiff in error contends that the general rule is altered, and that unless the reinsured has paid over the money on account of the loss, to the original insured, the reinsurer is not bound to pay under this particular contract of reinsurance. Language somewhat like that used in the eleventh subdivision has been construed in other cases. In *Blackstone* v. *Allemannia Fire Insurance Company, supra,* the language used was "loss, if any, payable *pro rata,* and at the same time with the reinsured." The Court of Appeals of New York held that the first part of the clause relieved the defendant from paying the full amount of the loss and made it liable only for its *pro rata* share, so that the defendant's reinsurance being for half the loss, the defendant was only held liable to pay half the loss. Continuing, the court said (p. 107): "In regard to the latter branch of the clause in question, which says that the loss is payable 'at the same time with the reinsured,' it is not possible to conclude from it that actual payment by the reinsured is, in fact, to precede or to accompany payment by the reinsurer. It looks to the time of payability and not to the fact of payment. It has its operation in fixing the same period for the duty of payment by the reinsurer as was fixed for payment by the reinsured. To give it the construction contended for by the defendant would, in substance, subvert the whole contract of reinsurance as hitherto understood in this State."

In *Ex parte Norwood,* 3 Biss. 504, a clause in the reinsurance policy stated that "loss, if any, payable at the same time and *pro rata* with the insured," and it was held that such language simply gives to the company the benefit of any defense, deduction or equity which the first insurer may have, making the liability of the reinsured the same as the original insured. It does not limit such liability to what the original insurer may have paid or be able to pay. Speaking of this clause, Judge Blodgett said:

"The reinsuring company is to have the benefit of any deduction by reason of other insurance or salvage, that the

original company would have, and also to have the benefit of any time for delay or examination which the original company might claim, so that the liability of the reinsuring company shall be co-extensive only with the liability and not with the ability, so to speak, of the original company.

"The original company may have reinsured for the purpose for which reinsurance is usually, if not universally, accomplished—for the purpose of supplying itself with a fund with which to meet its obligations. It may have placed its own funds entirely out of its control; it may have divided its capital among its stockholders, and may depend solely upon the reinsurance to make good its liability to policyholders.

"The intention of this clause was to make the reinsuring company's liability co-extensive, and only co-extensive, with the liability of the original insurance company.

"For instance, suppose an insurance company in the city of Chicago wishes to go out of business. It has money enough to reinsure all its risks, and does so, and goes out of the insurance business. That company does not keep a fund on hand any longer for the purpose of meeting losses as they fall in, but depends upon its reinsurance.

"Now, it is to my mind absurd to say, if a loss occurs on one of those reinsured policies, that the company primarily liable is to have its claim against the reinsuring company limited by its ability to meet its obligations to its original policyholders. The very object of making the policy of reinsurance was to place the company in funds with which to make its policyholders whole, and that is defeated if the construction which is insisted upon by the assignee is the true one.

"The fair, liberal construction, it seems to me, of this clause, and the salutory one, is to assume that the true intent of it—the judicial meaning—is that the liability of the reinsurance company is to be no greater than that of the original company; that they are not to be compelled to pay any faster than the original company would be compelled to pay; that they are to have the benefit of any defense which the original company

would have had. Any deduction—any equity—which the original company would have had against the original insured is to inure to the benefit of the reinsuring company.

"I am of opinion that the Republic is liable on these policies to the extent of the adjusted losses, even if the Lorillard had not paid a cent."

In *Cashau* v. *The Northwestern &c. Insurance Co.*, 5 Biss. 476, in the reinsurance policy there was a clause that the reinsurer shall "pay *pro rata* at and in the time and manner as the reinsured." It was held that the reinsurer was to have all the advantages of the time and manner of payment specified in the policy of the reinsured, but that it had no reference to the insolvency of the reinsured. The court in that case said:

"The insolvency of the original insurer is no defense, in whole or in part, to a suit against the reinsurer. It is claimed on the part of the defendant that the condition in its policy is an exception to this position of the law. . . . The condition in that policy that 'in case of loss the company shall pay *pro rata* at and in the same time and manner as the reinsured,' cannot mean that in case of the insolvency of the Fulton company the defendant shall only be obliged to pay the *pro rata* of the dividends of the assets of said company, upon the claim of the first insured. It cannot have such application. The condition means that the defendant shall pay at and in the same time and manner as the reinsured company shall pay or be bound to pay according to its policy, and the defendant shall have all the advantages of the time and manner of payment specified in the policy of the Fulton company, otherwise the defendant's policy would not be the contract of indemnity intended, and endless litigation might ensue."

Bearing in mind what the contract of reinsurance, pure and simple, means, and how these contracts have been enforced in the past when some special language has been introduced in regard to the payment under a reinsurance policy, the question arises whether, by the use of the language of the eleventh subdivision, the contract of reinsurance, while still

bearing that name, has been so changed as to deprive it of its chief value. As is stated by Judge Johnson, in regard to the language used in 56 N. Y., *supra*, to give this language this construction will, in substance, subvert the whole contract of reinsurance as hitherto understood. We agree with the court below, that the language of the eleventh subdivision, taken in connection with the fact that it is used in a contract designated by the parties as one of reinsurance, means that the reinsuring company shall not pay more than its ratable proportion of the actual liability payable on the part of the reinsured, after deducting all liability of other reinsurers.

To hold otherwise is to utterly subvert the original meaning of the term reinsurance and to deprive the contract of its chief value. The losses are to be payable *pro rata* with, in the same manner and upon the same terms and conditions as paid by the reinsured company under its contracts. This means that such losses, payable *pro rata*, are to be paid upon the same condition as are the losses of the insurer payable under its contract. And the liability of the reinsurer shall not be in excess of the liability of the insurer under its original contracts, after deducting therefrom any and all liability of other reinsurers of the contract of the insurer or of any part thereof. It is the ratable proportion for which the other reinsurers are liable, that provision is made for deducting, and the liability of the insurer means such liability after that deduction, and does not mean there must be an actual payment of such liability by the insurer before it can have any benefit of the contract of reinsurance which is made with defendant.

Subdivision 10 of the contract does not result in any different conclusion.

This subdivision does not and cannot mean that there is to be no liability unless the reinsured should pay the loss sustained. The reinsured company under its provisions is bound to forward to the reinsuring company a statement of the date and the probable amount of loss or damage, and it is provided that after the reinsured company shall have adjusted, accepted

proofs of, *or* paid such loss or damage, it shall forward the proof of its loss and claim and a copy of the receipt taken for payment. It means that if the loss or claim has been in fact paid, then a copy of the receipt is to be sent, but it does not mean that there must be payment before any liability on the part of the reinsuring company exists.

We do not think that the language of these two subdivisions was intended to entirely nullify and tear up by the roots the construction given to the contract of reinsurance for so many years throughout the civilized world and upon which its chief value is based. The nature of the contract is accurately described in its commencement. It is described as a "compact of reinsurance," and there has been no doubt as to the meaning of such contract for the last two centuries. The judgment of the Court of Appeals is right, and is

Affirmed.

UNITED STATES *v.* CERECEDO HERMANOS Y COMPAÑIA.

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

No. 152. Submitted March 5, 1908.—Decided April 6, 1908.

When the meaning of a statute is doubtful the construction given by the department charged with its execution should be given great weight. *Robertson* v. *Downing*, 127 U. S. 607; *United States* v. *Healy*, 160 U. S. 136.

The reënactment by Congress, without change, of a statute which had previously received long continued executive construction, is an adoption by Congress of such construction. *United States* v. *Falk*, 204 U. S. 143.

Par. 296 of the Tariff Act of July 11, 1897, construed in accordance with Treasury decisions.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Sanford for appellant, submitted.

No counsel appeared for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The appellee imported into Porto Rico from France thirty cases of red wine, twenty-four bottles to the case, and each bottle containing more than one pint and less than a quart of wine.

The wine was classified by appraisers at the port of San Juan under paragraph 296 of the present tariff act and the reciprocity treaty with France of May 30, 1898, as being dutiable at $1.25 per dozen bottles, making a total of $75. Upon this classification the entry was liquidated and the duty paid.

The appellee in due time protested against the classification and the decision of the collector, stating that "the wine in question has been assessed at $1.25 per dozen bottles, when it should be by cases of 24/2 bottles."

The board of appraisers decided against the collector and in favor of the protest, saying:

"The wine in question being contained in cases of 24 bottles, and each bottle containing over a pint, was clearly subject to duty at $1.60 per case, and any excess beyond this quantity found in such bottles would be subject to a duty only of 5 cents per pint or fractional part thereof."

The District Court affirmed the decision of the board of appraisers.

The only question in the case is the construction of paragraph 296, the material portions of which are as follows:

"In bottles or jugs, per case of 1 dozen bottles or jugs, containing each not more than 1 quart and more than 1 pint, or 24 bottles or jugs containing each not more than 1 pint, $1.60 per case; and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of 5 cents per pint or fractional part thereof. . . ."

It is the contention of the Government that the paragraph separates still wines in bottles into three classes and fixes a specific rate of duty on each, as follows:

"(*a*) Bottles 'containing each not more than one pint,' which are to be assessed as full pints at $1.60 per 24 bottles, or at the rate of $6\frac{2}{3}$ cents per pint; (*b*) bottles 'containing each not more than one quart and more than one pint,' which are to be assessed as full quarts at $1.60 per dozen bottles, that is, at the same rate of $6\frac{2}{3}$ cents per pint; and (*c*) bottles containing 'any excess beyond these quantities,' which are to be assessed at the rate of $1.60 per dozen, plus 5 cents per pint or fractional pint on the excess over a quart contained in each bottle."

We think the contention is right, and needs no comment to make it clear.

Counsel for the Government also points out that the provisions of the tariff act of 1875 and subsequent acts were substantially similar to paragraph 296, and that the Treasury decisions thereunder were in accordance with the interpretation for which the Government now contends. The first of these decisions was made in 1879. *In re De Luze*, T. D. 4060. The ruling was repeated in 1893. *In re G. W. Sheldon & Co.*, T. D. 14,461. And again in 1899. *In re Wyman*, T. D. 20843.

We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution. *Robertson* v. *Downing*, 127 U. S. 607; *United States* v. *Healey*, 160 U. S. 136. And we have decided that the reënactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction. *United States* v. *Falk*, 204 U. S. 143, 152.

Judgment reversed.

MR. JUSTICE WHITE and MR. JUSTICE PECKHAM concur solely because of the prior administrative construction.

THOMPSON *v.* COMMONWEALTH OF KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 160. Argued March 9, 1908.—Decided April 6, 1908.

Due process of law does not assure to taxpayers that the court will sustain the interpretation given to a statute by executive officers or relief from the consequences of misinterpretation by either such officers or the court; one acting under a statute must take his chances that such action will be in accord with the final decision as to its proper interpretation; this is a hazard under every law from which there is no security.

It is within the power of the State to tax spirits in bonded warehouses and require the warehouseman to pay the same with interest after the taxes due to the United States Government have been paid; and if the warehouseman is given a lien on the spirits for the taxes and interest paid by him he is not deprived of his property without due process of law.

The fact that a warehouseman paid taxes without interest on spirits in bond under a mistaken interpretation of the statute by the state officers and subsequently permitted the spirits to be withdrawn does not estop the State to recover from the warehouseman interest due on such taxes under the statute, and a judgment therefor does not deprive the warehouseman of his property without due process of law within the meaning of the Fourteenth Amendment, and so *held* as to the tax statutes of Kentucky.

A classification of distilled spirits in bond, as distinct from other property in regard to payment of interest on taxes does not constitute a discrimination amounting to a denial of equal protection of the laws within the meaning of the Fourteenth Amendment.

94 S. W. Rep. 654, affirmed.

THIS is an action to collect interest on deferred taxes assessed for the years 1898 to 1902, both inclusive, on distilled spirits, which were stored in the warehouse of plaintiff in error.

The petition of the Commonwealth contains a cause of action for each year, and it is alleged in each that plaintiff in error was the owner or proprietor of a bonded warehouse in which distilled spirits were stored, and, as required by law, reported the quantity of spirits on which the Government tax had been paid or was then due, and the amount of spirits theretofore removed since the preceding report, showing the years in which

such spirits were assessed for taxation and the number of packages and their value as assessed. And it is alleged that by such reports, which were verified as the law directs, there was shown to be due the Commonwealth of Kentucky, "as taxes, exclusive of any interest, the sum of —— dollars" for the particular year. It is further alleged that "the sum reported as taxes due was incorrect, in that there was not included accumulated interest on the taxes due while the spirits remained in the bonded warehouse." The amount for each year is alleged. The petition was amended by order of the court and made specific as to the tax rate assessed by the Commonwealth for the period of years covered by the petition. The amendment also stated the valuation fixed by the state board of valuation on distilled spirits and the time when the spirits were placed in bond, when withdrawn, and the amount of taxes paid thereon by plaintiff in error.

The answer of the defendant, plaintiff in error here, is very voluminous. It denies that plaintiff in error was indebted to the Commonwealth for taxes and interest for any of the years mentioned in the petition, beyond that which was duly paid to the Commonwealth and duly credited by it, "as set out in the petition," denies that there is due any interest "from any date whatever," or any penalty or penalties. It is alleged with much circumstantiality that plaintiff in error made reports required of him by the law of the State upon blank forms furnished by the auditor of public accounts, who was charged with the duty of supervising the collection of all taxes on distilled spirits, and adjusting and settling the claims and accounts therefor, and that that officer verified and approved the reports and accepted the amounts of taxes paid, with the reports and issued receipts for and on behalf of the Commonwealth. And it is alleged that the auditor and treasurer having accepted the principal sum of taxes without any interest or penalty, in full satisfaction of the Commonwealth's claim, to permit it to recover any other or further sum "would be inequitable, unconscionable and unjust," and that any re-

covery would be a total loss to plaintiff in error. That the law was construed by all the officers of the state government since its enactment in 1892 to only require the payment of the principal sum of the taxes. And that such officers have so construed the law and the subsequent act, known as the revenue law, which was enacted March 29, 1902, in such manner that no interest or penalties were exacted of plaintiff in error, or any other owner or proprietor of a bonded warehouse. It is also alleged that plaintiff in error was not the owner of said spirits, but that they were owned by non-residents of the State; that under the law the person who paid the taxes thereon was entitled to a lien to secure the amount so paid, and would have been entitled to a lien for the payment of interest and penalties if any had been exacted, and to enforce the same possession could have been taken, but relying upon the construction placed upon the law as aforesaid, and believing that all claims of the State had been fully satisfied, plaintiff in error permitted the owner thereof to withdraw the same and ship it out of the State of Kentucky without the payment of any interest or penalties; that such spirits have long since been consumed and the lien thereon lost. And it is alleged that some of the owners are insolvent and others dead, and hence any recovery against plaintiff in error will be a total loss to him.

There are a number of argumentative allegations that the spirits while in the bonded warehouse were in the possession of the United States, and not therefore in the possession of plaintiff in error or within the jurisdiction of the State of Kentucky, or subject to taxation by that State or any of the municipalities, or subject to any process of the courts of the State. And it is further alleged or argued that if the law be construed, as the State in this action seeks to construe it, such law would be an "unwarranted interference with the scheme and plan of the United States Government, which has been in force for forty years," and would deprive plaintiff in error and all owners of distilled spirits "of the rights and privileges secured and guaranteed by the Constitution of the United

States," and rights secured by the Fourteenth Amendment, "which provides that no State shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Mr. J. B. Thompson, with whom *Mr. Phil B. Thompson, Junior*, was on the brief, for plaintiff in error.

Mr. John W. Ray, with whom *Mr. N. B. Hays* was on the brief, for defendant in error.

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

The Court of Appeals of Kentucky opened its opinion in this case by saying that the whole question presented was whether the statute of the State, "imposing a tax on distilled spirits in bonded warehouses," violated the Federal Constitution, and particularly the Fourteenth Amendment thereof. It was also said that the validity of the statutes under the constitution of the State had been construed and decided in *Commonwealth* v. *E. H. Taylor, Jr., Co.*, 101 Kentucky, 325; *Commonwealth* v. *Walker*, 25 Ky. Law Rep. 2122; *Commonwealth* v. *Rosenfield Bros.*, 118 Kentucky, 374. And the court quoted from appellant's brief (plaintiff in error here) as follows:

"It is not necessary on this appeal that the court shall either overrule, modify or change in any manner its opinion rendered in the case of *Commonwealth* v. *Rosenfield*. In accordance with the previous opinion of the court in the case of *Commonwealth* v. *E. H. Taylor, Jr.*, 101 Kentucky, 325, it was held in the *Rosenfield case* that the law which imposed the tax and interest—the matter in controversy in this action —is not in conflict with the constitution of the State of Kentucky. It has never been held that this law is not in conflict

with the Constitution and laws of the United States, and this is the question we now present."

Plaintiff in error, however, seems to broaden his contentions here, and attacks the construction of the state statutes made in *Commonwealth* v. *Rosenfield Brothers*, and urges either a different construction than there made, or a disregard of that construction, as constituting extortion against him, or as depriving him of his property without due process of law. The basis of the contention is that he had paid taxes demanded of him under a different construction and received the receipt therefor, and that the State is estopped to make further demands upon him. The hardship of his situation is strongly presented. He was required, he urges, to report for assessment and pay taxes on property belonging to another. He made the report and paid all the taxes demanded of him. Having completely discharged his legal obligations, as he supposed, he delivered the property to its owner and lost the lien which the statute gave him, and which constituted the legal justification, as he contends, of the charge upon him, and he is now subjected to liability for interest and penalties for which he has no security or power to enforce reimbursement. A new demand is made upon him, he says, "special in its character and retroactive in its effect, in violation of the constitution of the State of Kentucky and of the Fourteenth Amendment of the Constitution of the United States." But these contentions, so far as they rest upon a supposed change in the law, were rejected in *Commonwealth* v. *Rosenfield Brothers*, *supra*, the court deciding that interest was due under the law of 1892, under which the taxes were demanded and paid, and as well as under the law of 1902.

A summary of the statutory provisions will make clear the decision. § 4105 of the Compiled Statutes of 1894 requires "every owner or proprietor of a bonded warehouse" to make a report between certain dates to the auditor of public accounts of the kind and quantity of spirits in such warehouse on the fifteenth day of September. The auditor of public accounts is required

to submit the same to the board of valuation and assessment, which board is to fix the value of the spirits for the purpose of taxation under the act and to assess the same accordingly. Notice is required to be given to the owner or proprietor of the warehouse of the amount so fixed, and certify the value of the spirits assessed for said taxes to the auditor of public accounts, and that officer certifies to the county clerks of the respective counties the amount liable for county, city, town or district taxation, and the date when the bonded period will expire. The report is filed in the office of the county clerk and certified to the proper collecting officer. The person or corporation having custody of the spirits on the fifteenth of September in the year the assessment is made is made liable for the taxes "due thereon, together with all interest and penalties which may accrue; and any warehouseman or custodian of such spirits, who shall pay the taxes, interest or penalties on such spirits, shall have a lien thereon for the amount so paid, with legal interest from date of payment." § 1, Art. V, ch. 103, p. 310, Acts 1892. § 4110, § 6, Art. V, provides as follows:

"Taxes on distilled spirits which may be assessed while in a bonded warehouse, and on which the United States Government tax has not been paid or will not become due before the first day of March after assessment, shall be due on the first day of January, May and September next after the said Government tax becomes due or be paid, or when the spirits are removed from the warehouse; and the taxes on each year's assessment shall bear legal interest as other taxes."

The statute of 1902 strikes out the words "as other taxes" and inserts the words "until paid." Upon this change the controversy turns. The Court of Appeals in *Commonwealth* v. *Rosenfield Brothers*, *supra*, said there was a change in words only, not one in substance or meaning, and unless this be so, it was said, the legislature had taken "great pains to insert into every section relating to the subject-matter words which meant nothing." And again: "We do not know how the legislature could have made it plainer that state taxes on whiskey

in bond should bear interest than by the language used in the section aforesaid." The section had been quoted. This was the court's conclusion "as an original proposition." But it cited as "direct authority" *Commonwealth* v. *Taylor*, 101 Kentucky, 327, where the "very question arose." To the contention that the warehouseman has lost his lien through the construction put upon the act by the State's fiscal officers, and that the State was therefore estopped from collecting the interest, the court replied: "It may be true that this will work a hardship upon the distiller, but it was his duty, under the law, to pay the taxes and the accrued interest, and we cannot, in his behalf, waive the time-honored and conclusive presumption that he knew the law; and especially is this true since 1897, when the case of *Commonwealth* v. *Taylor* was decided, thus establishing beyond all question that taxes on whiskey in bond bore interest on the assessments made during the bonded period. Saying this, however, it is elementary that the State is not estopped by the laches of its officers."

But from this situation this court cannot give relief. Due process of law does not assure to a taxpayer the interpretation of laws by the executive officers of a State as against their interpretation by the courts of the State or relief from the consequences of a misinterpretation by either. We do not mean to indicate that the decision of the court was wrong. It would, indeed, be difficult to resist the force of its reasoning. At any rate, it is the province of the courts to interpret the laws of the State, and he who acts under them must take his chance of being in accord with the final decision. And this is a hazard under every law and from which or the consequences of which we know of no security.

The assignments of error repeat frequently and dwell upon the fact of the power of the Federal Government over the spirits and the distillery and its custody of them, and, it is urged, that such power is exclusive of the exercise of any other power whatever, and such custody has the effect to withdraw in legal contemplation the property from the jurisdiction of

the State, though it is actually present in the State, making it, indeed, as though it were outside of the territorial limits of the State. And it is hence concluded that plaintiff in error by the law of Kentucky is made to pay taxes on property belonging to another person outside of the jurisdiction of the State, and, it is contended, the decision of the court giving the laws these effects denies plaintiff in error the equal protection of the laws and deprives him of his property without due process of law.

There are many elements involved in the contention, and it is not easy, without extending this opinion to a great length, to give them separate and individual discussion. We will therefore consider only the main one, to wit, the power of the Federal Government over the spirits and the warehouse and the absolute want of power in the State to tax them or subject them to its process. This is the basic principle of the contentions of plaintiff in error, "for," he says, "the warehouseman cannot be made liable for the tax on the property if the property itself is not liable for the tax." There is further argument, to the effect that by reason of the control of the Federal Government the State cannot give, in all events and against all possibilty of the exercise of that control, to the warehouseman the means to enforce the lien conferred by the statute to reimburse himself, and he should therefore "be by that fact discharged from all liability on account of such assessment." But these contentions rest upon an exaggerated view of the control of the Federal Government and the effect of the Kentucky statute. The scheme of the statute is simple, and it is an exercise of the power which, we said in *Carstairs* v. *Cochran,* 193 U. S. 10, 16, the State undoubtedly possessed "to tax private property having a situs within its territorial limits." And this was said in response to contentions having the same ultimate foundation as those urged in the case at bar. The proposition was indeed considered as elemental, and as requiring nothing more than the illustration of cases. There may be instances where property, though within the territorial

limits of a State, is not subject completely to the jurisdiction of the State, and counsel has cited a number of such instances. Where their example applies they will be followed. It does not apply in the present case. There is no conflict between the state and Federal purpose. There is no question of the supremacy of the latter and its complete fulfillment. "The State does not propose," the Court of Appeals said, "to collect the taxes so long as the spirits are in the custody or under the lien of the Federal Government." There is actual accommodation, therefore, of the power of the State to the rights of the Federal Government, and a harmonious exercise of the respective sovereignties of each, preserving to each necessary power. This is what *Carstairs* v. *Cochran* decides. See also *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore*, 195 U. S. 375.

A word more may be necessary as to the contention that the statutes in controversy, as interpreted by the Court of Appeals of the State, deny to plaintiff in error the equal protection of the laws. The ground of this contention is not explicitly distinguished in the assignments of errors from the grounds of the other contentions, and in the brief of counsel the contention is made to depend upon the view, rejected by the Court of Appeals of the State, that the act of 1902 made a change in the law, and that only the owners of distilled spirits in bond are required to pay interest "upon taxes settled at the time they were due." The effect of the act of 1902 has been considered and it is only necessary to add that the distinction made by the taxing statutes of the State between distilled spirits in bond and other property does not constitute a discrimination condemned by the Fourteenth Amendment. The power of the State to classify persons and property in its legislation is well established, and the power is not transcended by the statutes under review. *Billings* v. *Illinois*, 188 U. S. 97.

Judgment affirmed.

HUDSON COUNTY WATER COMPANY *v.* McCARTER, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY.

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

No. 184. Argued March 18, 19, 1908.—Decided April 6, 1908.

The boundary line between private rights of property which can only be limited on compensation by the exercise of eminent domain, and the police power of the State which can limit such rights for the public interest, cannot be determined by any formula in advance, but points in that line helping to establish it have been fixed by decisions of the court that concrete cases fall on the nearer or farther side thereof.

The State, as *quasi*-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners immediately concerned. *Kansas* v. *Colorado*, 185 U. S. 125; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230.

The public interest is omnipresent wherever there is a State, and grows more pressing as population grows, and is paramount to private property of riparian proprietors whose rights of appropriation are subject not only to rights of lower owners but also to the limitations that great foundations of public health and welfare shall not be diminished.

A State has a constitutional power to insist that its natural advantages remain unimpaired by its citizens and is not dependent upon any reason for its will so to do. In the exercise of this power it may prohibit the diversion of the waters of its important streams to points outside of its boundaries.

One whose rights are subject to state restriction cannot remove them from the power of the State by making a contract about them, and a contract illegal when made—such as one for diverting water from the State—is not within the protection of the contract clause of the Constitution.

One cannot acquire a right to property by his desire to use it in commerce among the States.

Citizens of other States are not denied equal privileges within the meaning of the immunity clause of the Constitution by a statute forbidding the diversion of waters of the State if they are as free as the citizens of the State to purchase water within the boundaries of the State, nor can such a question be raised by a citizen of the State itself.

Chap. 238, Laws of New Jersey of 1905, prohibiting the transportation of

water of the State into any other State is not unconstitutional either as depriving riparian owners of their property without due process of law, as impairing the obligation of contracts made by them for furnishing such water to persons without the State, as an interference with interstate commerce, or as denying equal privileges and immunities to citizens of other States.

70 N. J. Eq. 695, affirmed.

THE facts are stated in the opinion.

Mr. Gilbert Collins and *Mr. Richard V. Lindabury* for plaintiff in error:

The act of 1905 is an attempt to control interstate commerce, and cannot be sustained under the police power.

As is established by principle and authority, the court must examine the reasonableness of a claim to support a state statute regulating commerce, under the guise of an exercise of the police power. The act of 1905, as applied to the Passaic, is without any justification in the needs of the inhabitants of the State.

Water when reduced to possession is a commodity, which may be sold, like any other. *Syracuse* v. *Stacey*, 169 N. Y. 231, 245; *Suburban Water Co.* v. *Harrison*, 72 N. J. L. 194.

When a statute, interfering with interstate commerce, is founded on the police power of the State, the question always arises whether the act goes beyond the necessity for its exercise. This question is judicial. The reasonableness of the statute is an element of the inquiry whether it encroaches upon the national authority. *Railroad Co.* v. *Husen*, 95 U. S. 473; *Lake Shore Railroad Co.* v. *Ohio*, 173 U. S. 285, 300; *Lochner* v. *New York*, 198 U. S. 45; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Brimmer* v. *Rebman*, 138 U. S. 78; *Scott* v. *Donald*, 165 U. S. 58; *Indiana* v. *Indiana &c. Oil, Gas & Mining Co.*, 120 Indiana, 575; *S. C.*, 6 L. R. A. 579; *Benedict* v. *Columbus Construction Co.*, 50 N. J. Eq. 23, 38.

The act is void because it denies equal privileges to citizens of another State. *Minnesota* v. *Barber*, 136 U. S. 313; *In re*

Watson, 15 Fed. Rep. 511; *Ward* v. *Maryland*, 12 Wall. 418; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 560.

The decision now under review, and the act of 1905, are both attempts to change the common law in order to destroy the vested and contract rights of the plaintiff in error.

The Federal courts will not follow the state courts in the interpretation of state law where it appears that the state courts have undertaken to change the law in such manner as to destroy contract and vested rights, or so as to take property without due process of law.

Plaintiff in error is entitled to have its case considered here fully on the merits, as a common law question, unhampered by any considerations of modern state policy. *Ohio Life & Trust Co.* v. *Debolt*, 16 How. 416, 432; *Chicago* v. *Robbins*, 2 Black, 418; *Michigan Central* v. *Myrick*, 107 U. S. 102.

The act of 1905 is an attempt to impair the obligation of contracts of the plaintiff in error.

The effect of the act is directly to destroy the contracts with consumers in Staten Island, by requiring the court of chancery to enjoin their fulfillment. Unless, therefore, the contracts were invalid upon other grounds than those created by the act of 1905, that act is void, as impairing the obligation of contracts, and the decree for an injunction should be reversed.

The waters of running streams in New Jersey are the common property of the riparian landowners.

Any riparian owner on a fresh water stream may divert and use as much water as he chooses, so long as he does not impair the like right of the owners down the stream without their consent. If he has their consent, he may divert up to the whole flow of the stream. A riparian owner nearest to tide water may divert the whole flow since there are no owners on the stream below him to be injured.

It is really a matter of little importance to know who, if any one, owns the water while running in the stream, because the real question is not the ownership of the water while running, but of the right to take it and divert it.

Running water is incapable of ownership, and neither the State nor the riparian owners have any title in it until it is appropriated. *Sweet* v. *Syracuse*, 129 N. Y. 316, 335; *City of Syracuse* v. *Stacey*, 169 N. Y. 235, 245; *Society* v. *Morris Canal*, 1 N. J. Eq. (Saxton) 157, 189; *Cobb* v. *Davenport*, 32 N. J. Law, 369; *Attorney General* v. *Del. & Bound Brook R.*, 27 N. J. Eq. 631; *Higgins* v. *Flemington Water Co.*, 36 N. J. Eq. 538, 543; *Albright* v. *Cortwright*, 64 N. J. L. 330, 337; *Simmons* v. *Paterson*, 60 N. J. Eq. 385, 389; *Doremus* v. *City of Paterson*, 65 N. J. Eq. 711, 713.

Mr. Robert H. McCarter, Attorney General of the State of New Jersey, for defendant in error:

The State, as a lower owner, is entitled to preserve the integrity of the stream so that it will come to it unimpaired in quantity. *Attorney General* v. *Delaware & Bound Brook R. R. Co.*, 12 C. E. Gr. (27 N. J. Eq.) 631; *Attorney General* v. *Jamaica Pond Aqueduct Corporation*, 133 Massachusetts, 361; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, and cases there cited; Story's Eq. Jur., §§ 922, 923; Kerr on Injunctions, 262; 1 Joyce on Injunctions, 120; *Missouri* v. *Illinois et al.*, 180 U. S. 208, 243.

The State, without regard to its lower proprietorship, is entitled to an injunction as successor to the crown and as representative of the public; and this, too, notwithstanding the provisions of the Federal Constitution relied upon by the appellant.

The State has a supervisory interest and property in the waters that lie or flow in it, entitling and requiring it, as the representative of the public, to preserve the same, and that this right and duty have been inherited from the King of England. Hargrave's Law Tracts, chap. 2; *Smith* v. *Rochester*, 92 N. Y. 463, 477 and cases cited; Farnham on Waters, §§ 133, 138, 138*a*, 140*a* and 141; *Connecticut River Lumber Co.* v. *Alcott Falls Co.*, 65 N. H. 290; *S. C.*, 21 Atl. Rep. 1090; *State* v. *Ohio Oil Co.*, 150 Indiana, 21; *S. C.*, 49 N. E. Rep. 809;

Ohio Oil Co. v. *Indiana*, 177 U. S. 190; *Kansas* v. *Colorado*, 185 U. S. 125; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 226, 237.

The law under consideration was passed as an exercise of the police power of the State, and as such is consequently free from any of the constitutional objections that are here raised against it. *Jones* v. *Brim*, 165 U. S. 180; *P. R. R.* v. *Hughes*, 191 U. S. 477; *Field* v. *Barber Asphalt Co.*, 194 U. S. 623; *Cleveland &c. Co.* v. *Illinois*, 177 U. S. 514; *Cook* v. *Marshall County*, 196 U. S. 261, 272.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an information, alleging that the defendant (the plaintiff in error), under a contract with the City of Bayonne in New Jersey, has laid mains in that city for the purpose of carrying water to Staten Island in the State of New York. By other contracts it is to get the water from the Passaic River, at Little Falls, where the East Jersey Water Company has a large plant by which the water is withdrawn. On May 11, 1905, the State of New Jersey, reciting the need of preserving the fresh water of the State for the health and prosperity of the citizens, enacted that "It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this State into any other State, for use therein." By a second section a proceeding like the present was authorized, in order to enforce the act. Laws of 1905, c. 238, p. 461. After the passage of this statute the defendant made a contract with the City of New York to furnish a supply of water adequate for the Borough of Richmond, and of not less than three million gallons a day. Thereupon this information was brought, praying that, pursuant to the above act and otherwise, the defendant might be enjoined from carrying the waters of the Passaic River out of the State. There are allegations as to the amount of water and the prob-

able future demand upon which the parties are not wholly agreed, but the essential facts are not denied. The defendant sets up that the statute, if applicable to it, is contrary to the Constitution of the United States, that it impairs the obligation of contracts, takes property without due process of law, interferes with commerce between New Jersey and New York, denies the privileges of citizens of New Jersey to citizens of other States, and denies to them the equal protection of the laws. An injunction was issued by the Chancellor, 70 N. J. Eq. 525, the decree was affirmed by the Court of Errors and Appeals, 70 N. J. Eq. 695, and the case then was brought here.

The courts below assumed or decided and we shall assume that the defendant represents the rights of a riparian proprietor, and on the other hand, that it represents no special chartered powers that give it greater rights than those. On these assumptions the Court of Errors and Appeals pointed out that a riparian proprietor has no right to divert waters for more than a reasonable distance from the body of the stream or for other than the well-known ordinary uses, and that for any purpose anywhere he is narrowly limited in amount. It went on to infer that his only right in the body of the stream is to have the flow continue, and that there is a residuum of public ownership in the State. It reinforced the State's rights by the State's title to the bed of the stream where flowed by the tide, and concluded from the foregoing and other considerations that, as against the rights of riparian owners merely as such, the State was warranted in prohibiting the acquisition of the title to water on a larger scale.

We will not say that the considerations that we have stated do not warrant the conclusion reached; and we shall not attempt to revise the opinion of the local court upon the local law, if, for the purpose of decision, we accept the argument of the plaintiff in error that it is open to revision when constitutional rights are set up. Neither shall we consider whether such a statute as the one before us might not be upheld, even if the lower riparian proprietors collectively were the absolute

owners of the stream, on the ground that it authorized a suit by the State in their interest where it does not appear that they all have released their rights. See *Kansas* v. *Colorado*, 185 U. S. 125, 142. But we prefer to put the authority which cannot be denied to the State upon a broader ground than that which was emphasized below, since in our opinion it is independent of the more or less attenuated residuum of title that the State may be said to possess.

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the State as *quasi*-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. *Kansas* v. *Colorado*, 185 U. S. 125, 141, 142; *S. C.*, 206 U. S.

46, 99; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 238. What it may protect by suit in this court from interference in the name of property outside of the State's jurisdiction, one would think that it could protect by statute from interference in the same name within. On this principle of public interest and the police power, and not merely as the inheritor of a royal prerogative, the State may make laws for the preservation of game, which seems a stronger case. *Geer* v. *Connecticut*, 161 U. S. 519, 534.

The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the State in which it flows. The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

We are of opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain

unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will.

The defense under the Fourteenth Amendment is disposed of by what we have said. That under Article I, § 10, needs but a few words more. One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter. *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 438; *Manigault* v. *Springs*, 199 U. S. 473, 480. But the contract, the execution of which is sought to be prevented here, was illegal when it was made.

The other defenses also may receive short answers. A man cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered in this respect by *Geer* v. *Connecticut*, 161 U. S. 519, and the same decision disposes of the argument that the New Jersey law denies equal privileges to the citizens of New York. It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others, as we already have said that it is necessary to reconcile and to adjust different principles of the common law. See *Asbell* v. *Kansas*, *ante*, p. 251. The right to receive water from a river through pipes is subject to territorial limits by nature, and those limits may be fixed by the State within which the river flows, even if they are made to coincide with the state line. Within the boundary citizens of New York are as free

to purchase as citizens of New Jersey. But this question does not concern the defendant, which is a New Jersey corporation. There is nothing else that needs mention. We are of opinion that the decision of the Court of Errors and Appeals was right.

Decree affirmed.

MR. JUSTICE MCKENNA dissents.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY *v.* CITY OF VICKSBURG.

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

No. 97. Argued February 28, 1908.—Decided April 6, 1908.

A corporation formed by the consolidation of several existing corporations is subject to the constitution and laws existing at the time of the consolidation in the same manner as all other corporations formed under the organic law of the State; and where the formation of the consolidated corporation is not imposed upon it, the constitution and laws in force become the law of its corporate being and if they prohibit the exemption of property of corporations from taxation such an exemption existing in favor of one of the constituent companies cannot be transferred to the consolidated corporation, and under such circumstances the exemption is not within the protection of the contract clause of the Constitution of the United States.

An exemption in favor of a Mississippi corporation granted by ordinance prior to 1890, *held*, not to inure to the benefit of a consolidated corporation, of which the exempted corporation was one of the constituent companies, organized after the adoption of the state constitution of 1890.

THE facts are stated in the opinion.

Mr. Edward Mayes, with whom *Mr. J. M. Dickinson* was on the brief, for appellant:

The provision of the act of 1884 is materially different from

the railroad charter provision which formed the subject of controversy in *Railroad Company* v. *Adams*, 77 Mississippi, 194, affirmed by this court, 180 U. S. 1. It does not fall within sec. 13, Art. 12 of the Mississippi constitution of 1869, nor within the decision of those cases, for the reason that it does not undertake to create an exemption such as is by them condemned.

The effect of the act of 1884, and its only effect as to this, is to empower the city of Vicksburg to contract for the location of the machine shops within its limits, and in and by such contract, if the municipal authorities should deem it to the interest of the city, to extend as a consideration, an exemption from municipal taxation. But such exemption, when extended, was to be and could only be, the act of the city, and not the act of the legislature. The exemption is conditioned upon and only exists so long as the shops are maintained upon the property.

It was not by the legislature designed to be, and it was not, the grant of an exemption to the railroad company, but it was the grant of a certain power to the city. In fact nothing was thereby granted to the company; because as to this, the company itself, and for its own part, had already the power to make such a contract.

The contract of 1884 was validly made under the act of 1884, a constitutional law; and it therefore was beyond the power of the State to repeal, by either statute or constitution. The recognition of this proposition pervaded the entire litigation in the *Mississippi tax cases* reported in 77 Mississippi, and 180 U. S., the entire controversy in them being either that the exemption was void *ab initio* because of the constitution of 1869, or else that it was lost by the consolidation of 1892, which created a new company, subject in all things to the constitution of 1890 and the code of 1892; in short, an abandonment voluntarily made.

The contract was made under the law; and whatever might be the losses of the railroad companies, in a general way, by

the consolidation of 1892 under the constitution of 1890, this particular exemption was not lost. It became, in 1884, a concrete, vested contract right, acquired on and for a valuable consideration; and as such, it was protected by the contract clause of the Federal Constitution, and also by the Fourteenth Amendment, against subsequent state action. In this instance the right of the old company to transmit the exemption by consolidation, and the power of the consolidated company to take the exemption, were both specifically contracted for in the year 1884. Even a reserved power to amend a charter could not lead to this result here claimed. *Stearns* v. *Minnesota*, 179 U. S. 223; *Railroad Company* v. *County*, 179 U. S. 302; *Smelting Company* v. *Colorado*, 204 U. S. 103.

Mr. Hannis Taylor, with whom *Mr. George Anderson* was on the brief, for appellees.

Mr. Justice Day delivered the opinion of the court.

The case originated in a bill in equity filed by the Yazoo and Mississippi Valley Railroad Company against the Mayor and Aldermen of the city of Vicksburg, to enjoin the collection of certain municipal taxes on the property of the railroad company assessed for the year 1901.

The bill was demurred to; the court below sustained the demurrer and rendered a final decree dismissing the bill. The case involving constitutional questions, was appealed directly to this court.

The allegations of the bill show that on February 22, 1884, the legislature of Mississippi passed an act authorizing the city of Vicksburg to enter into a contract with the Memphis and Vicksburg Railway Company, of which the following is the pertinent section:

"That the city of Vicksburg, through its Board of Mayor and Aldermen, and the Memphis and Vicksburg Railroad Company, or such other railroad as said Memphis and Vicks-

burg Railroad Company may hereafter become merged into, or a part of, by consolidation or otherwise, be and are hereby respectively authorized and empowered to enter into such contract or contracts with each other relative to the location and maintaining at such city of the machine shops of said railroad company, as they may mutually agree upon, together with such limitation, conditions, privileges, immunities, exemptions from city taxation, settlement of all claims . . . and such other things as may be decided and mutually agreed on between said city of Vicksburg and said railroad company," etc.

Under this authority, on August 11, 1885, a contract was made with the Louisville, New Orleans and Texas Railway Company, one of whose constituent companies was the Memphis and Vicksburg Railroad Company, named in the act above set forth. The pertinent parts of that contract are as follows:

"Second. Said city agrees to and does hereby exempt from all municipal taxation for a period of ninety-nine years all of the property used or which shall or may be used for tracks, switches, depots, machine shops, rolling stock, and any and all other railway purposes (except only buildings for residences or stores) of the Louisville, New Orleans and Texas Railway Company or of its successors, or of any company into which it may from time to time be merged by consolidation or otherwise, or of any company which, upon foreclosure or reorganization, may become the owners of its line of railroad within said city.

"Sixth. The general or main building, repairing and machine shops of the Louisville, New Orleans and Texas Railway Company, or its successors, [shall be] located and shall be permanently kept and maintained within the present limits of the city of Vicksburg, north of Fairground street, and any failure so to do shall forfeit to the city all lands granted to said railway company by the city, and all lands purchased by said railway company for and on which to locate said shops

as hereinafter in this section prescribed, and shall also annul and forfeit all the privileges and immunities granted by this contract, including the right to "locate and keep its freight depot south of Clay street," etc.

The railway company, it is averred, complied with the act and now insists upon its exemption from taxation.

The complainant, the Yazoo and Mississippi Valley Railroad Company, consolidated, on October 24, 1892, with the Louisville, New Orleans and Texas Railway Company, and in this consolidation undertook to acquire for the appellant the exemption from taxation under the contract of August 11, 1885, hereinbefore referred to.

The learned counsel for the appellant concedes that unless this case can be distinguished in principle from *Yazoo & Mississippi Valley Railway Company* v. *Adams*, 180 U. S. 1, the decree of the Circuit Court must be affirmed.

The *Adams case* came here on writ of error to review the judgment of the Supreme Court of Mississippi in the same case. 77 Mississippi, 194. The Mississippi court, whose judgment was affirmed in this court, held that a grant of exemption from taxation to a railroad company was void under the constitution of 1869 of that State, and that the organization of a consolidated company under the constitution of 1890 cut off an exemption from taxation granted to a constituent company prior to the adoption of that constitution. This judgment was affirmed, as we have said, in this court which, speaking by Mr. Justice Brown, held that the consolidation of October 24, 1892, created a new corporation, and that while it might be true that the exemption in question would pass to the consolidated company by the terms of the legislation under review, yet when the constitutional provision of 1890 took effect the consolidated corporation, organized under that constitution, was no longer entitled to the exemption. That constitution contained certain clauses which were then under review, as follows:

"SEC. 180. All existing charters or grants of corporate

franchises under which organizations have not in good faith taken place at the adoption of this constitution, shall be subject to the provisions of this article," etc.

"SEC. 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent, as property of individuals, etc. Exemptions from taxation, to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature."

This court held that even if the legislature, in the several acts of consolidation, had expressly provided that the new corporation should be exempted from taxation, such laws would be nullified by the provision of the constitution of 1890, requiring that the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals.

Conceding the force of the decision in the *Adams case*, the learned counsel for the railroad company undertakes to differentiate that case from this upon the ground that the legislation of the State of Mississippi (act of February 22, 1884) authorized a contract to be made with the railroad company for an exemption from taxation upon valuable considerations to be performed by the company, and that the grant in the *Adams case* was a mere legislative exemption from taxation; and the counsel insists that the validity of such legislation as is now under consideration has been sustained by the Supreme Court of Mississippi in a case decided by that court after its decision in *Railroad Company* v. *Adams*, 77 Mississippi, in the case of *Adams* v. *Tombigbee Mills*, 78 Mississippi, 676, in which an act of the legislature granting an exemption to certain factories for the manufacture of cotton or woolen goods, etc., for a period of six years from the completion of the factory, was sustained. But an examination of the opinion in that case convinces us that the Mississippi court had no intention to

depart from its ruling in the case in 77 Mississippi, for that case is expressly distinguished in the opinion, and, among other things in the course of the opinion, the court says:

"This appellee never lost its exemption by consolidating with any other corporation. It has always retained 'the precise corporate existence' it originally had. Its exemption was therefore continued by section 181 of the constitution of 1890, subject to legislative repeal, but it has never been repealed." 78 Mississippi, 692.

And again, on page 693:

"But a very different state of case existed, as already pointed out, as to the exemption denied in *Yazoo &c. R. R. Co.* v. *Adams*, 77 Mississippi, 194."

We think a reading of the opinion makes it clear that the Supreme Court of Mississippi differentiated the cases, and did not intend to depart from its ruling in the former case when similar circumstances were brought to its attention.

Apart from the ruling of the Mississippi court, we think it is entirely clear that the effect of organizing the consolidated corporation after the adoption of the Mississippi constitution of 1890 was to bring the new corporation within the terms and limitations of that constitution, which prohibited exemption of corporate property from taxation. The exemption to the former constituent company could not inure to the consolidated company without, in effect, ignoring the constitutional provision.

This subject was before this court and fully considered in the recent case of *Rochester Railway Company* v. *Rochester*, 205 U. S. 236, wherein it was held that where a corporation was incorporated under a general act creating certain obligations, it could not receive by transfer from another company an exemption inconsistent with its own charter or the constitution and laws of the State then applicable, and this even though the legislative authority undertook to transfer the exemption by words which clearly included it.

In that case previous decisions of this court are collated

on page 254. The court, speaking by Mr. Justice Moody, said:

"The principle governing these decisions, so plain that it needs no reasoning to support it, is that those who seek and obtain the benefit of a charter of incorporation must take the benefit under the conditions and with the burdens prescribed by the law then in force, whether written in the Constitution, in general laws or in the charter itself."

The formation of the consolidated company was not imposed upon the complainant; it had the privilege of standing upon such rights as it had by contract or otherwise under the former legislation in force before the adoption of the new constitution. When it saw fit to enter into the consolidation and form a new corporation in 1892 the constitution then in force in the State became the law of its corporate being, and the requirement that corporate property should not be exempt from taxation then became binding upon it, as upon all other corporations formed under the new organic law.

We find no error in the judgment of the Circuit Court for the Southern District of Mississippi, and the same is

Affirmed.

RICHARDSON, TRUSTEE IN BANKRUPTCY, v. SHAW.

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

No. 122. Argued January 17, 20, 1908.—Decided April 6, 1908.

While a broker who carries stocks for a customer on margin may not be strictly a pledgee at common law, he is essentially a pledgee and not the owner of the stock. *Markham* v. *Jaudon*, 41 N. Y. 235, approved.

Neither the right of the broker to repledge stock carried on margin for a customer, nor his right to sell such stock for his protection when the margin is exhausted, alters the relation of the parties, is inconsistent with the customer's ownership, or converts the broker into the owner of the stock.

A certificate of stock is not the property itself but the evidence of the property in the shares, and, as one share of stock is not different in kind or quality from every other share of the same issue and company, the return of a different certificate, or the right to substitute one certificate for another of the same number of shares, is not a material change in the property right held by the broker for his customer.

A broker who turns over to a customer, upon demand and payment of advances, stock which he is carrying on margin for that customer, or certificates for an equal number of shares, does not make the customer a preferred creditor within the meaning of § 60*a* of the bankrupt law; in the absence of fraud or preferential transfer the broker has the right to continue to use his estate for the redemption of pledged stocks in order to comply with the valid demand of a customer for stocks carried for him on margin.

A payment by the broker to a customer on account of excess margins to which the customer is entitled and which is taken into consideration when the account is finally closed, *held*, under the circumstances of this case, not to be a preferential payment within the meaning of § 60*a* of the bankrupt law.

147 Fed. Rep. 659, affirmed.

THE facts are stated in the opinion.

Mr. John Brooks Leavitt, with whom *Mr. Henry Arnold Richardson* was on the brief, for petitioner:

In the eye of the bankrupt law, the respondents were creditors of the insolvent, and his transfer to them of assets of his own, whereby they were enabled to redeem without loss to themselves the stocks which in carrying on their accounts he had pledged on general loans, constituted a preference over other customers as creditors in the same class.

Plainly so, if the *lex loci* is to govern. The contract was made and performed in Massachusetts, under whose law broker and customer are parties to an executory contract, whereby the broker is obligated to deliver to his customer on demand specified stocks at a price certain. *Wood* v. *Hayes*, 15 Gray, 375; *Covell* v. *Loud*, 135 Massachusetts, 41; *Chase* v. *Boston*, 180 Massachusetts, 458.

If the broker does not comply, the customer has a claim provable in insolvency. *Lothrop* v. *Reed*, 13 Allen, 294.

And if an insolvent broker uses his own assets to carry out such a contract, it is a preference under the insolvent law. *Weston* v. *Jordan*, 168 Massachusetts, 401.

But, even under the law of New York, the respondents should be considered as creditors of the insolvent broker. In that State broker and customer are parties to an executed contract, whereby the latter becomes the owner of specified stocks, and if he has availed himself of the broker's credit to aid in their purchase, he is deemed to have pledged the certificates to the broker for the amount of the latter's advances. *Markham* v. *Jaudon*, 41 N. Y. 235; *Stewart* v. *Drake*, 46 N. Y. 449; *Baker* v. *Drake*, 53 N. Y. 211; *Stenton* v. *Jerome*, 54 N. Y. 480; *Baker* v. *Drake*, 66 N. Y. 518; *Gruman* v. *Smith*, 81 N. Y. 25; *Capron* v. *Thompson*, 86 N. Y. 418; *Cassell* v. *Putnam*, 120 N. Y. 154; *Gillet* v. *Whiting*, 120 N. Y. 402; *S. C.*, 141 N. Y. 71; *Minor* v. *Beveridge*, 141 N. Y. 399; *Hurd* v. *Taylor*, 181 N. Y. 231; *Content* v. *Banner*, 184 N. Y. 121; *Leo* v. *McCormack*, 186 N. Y. 330.

And even though the broker is not bound to keep on hand the identical certificates, *Taussig* v. *Hart*, 58 N. Y. 425, yet if he puts it out of his power, by sale or rehypothecation on general loan, to deliver the identical or similar certificates, he is guilty of conversion. *Lawrence* v. *Maxwell*, 53 N. Y. 19.

If, however, the pledge on general loan by agreement is not a controlling factor in bringing this broker and his customer within § 60, and an inquiry must be made as to the true theory of their relation in respect of this speculative stock account, the New York theory should not be adopted, as it is based on an assumption which has no foundation in express agreement and is directly contrary to custom.

The following cases reviewed: *Clews* v. *Jamieson*, 182 U. S. 461; *Galigher* v. *Jones*, 129 U. S. 193; *Gillet* v. *Whiting*, 141 N. Y. 71; *Chase* v. *Boston*, 180 Massachusetts, 458; *Leo* v. *McCormack*, 186 N. Y. 330; *Kennedy* v. *Budd*, 5 App. Div. 140; *Bibb* v. *Allen*, 149 U. S. 481; *Hurd* v. *Taylor*, 181 N. Y. 231.

Mr. Louis Marshall, with whom *Mr. E. S. Theall*, *Mr. Francis Fitch* and *Mr. John A. L. Campbell* were on the brief, for respondents:

The relation between Shaw & Company and the bankrupt with regard to the shares of stock purchased by the latter for the former, was that of pledgor and pledgee, the bankrupt being the creditor of Shaw & Company, to the extent of any advances made in connection with the purchase of the stock, in excess of the margins deposited with him; hence a violation of § 60 of the bankrupt act cannot be predicated upon the payment by Shaw & Company of their indebtedness to the bankrupt, and the receipt of the securities for which such indebtedness had been incurred. Bankrupt Law, § 60*a*; *New York County National Bank* v. *Massey*, 192 U. S. 138.

Although the transaction under consideration occurred in Massachusetts, the questions involved are to be determined not by the local law of Massachusetts, but on principles of general jurisprudence, there being no question as to the validity of the contracts between the bankrupt and Shaw & Company under the local law. *Swift* v. *Tyson*, 16 Pet. 1; *Chicago* v. *Robbins*, 2 Black 418; *Gelpke* v. *City of Dubuque*, 1 Wall. 175; *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Boyce* v. *Tabb*, 18 Wall. 548; *Oates* v. *National Bank*, 100 U. S. 246; *Railroad Co.* v. *National Bank*, 102 U. S. 29, 30; *Burgess* v. *Seligman*, 107 U. S. 34; *Myrick* v. *Michigan Central R. R. Co.*, 107 U. S. 102; *Pana* v. *Bowler*, 107 U. S. 541; *Smith* v. *Alabama*, 124 U. S. 365, 378; *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 443; *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 371; *Washburn & Moen Mfg. Co.* v. *Reliance Insurance Co.*, 179 U. S. 1, 15.

When a broker purchases for a customer stock upon margin, the legal title to the stock vests in the customer. The relation of debtor and creditor exists between the customer and broker, as to the unpaid balance of the purchase money, and the stock, being in the possession of the broker, it is deemed pledged to him as security for such unpaid balance. The rela-

tion of pledgor and pledgee therefore arises, with this qualification to the usual rule applicable to such relation, that it is not necessary for the broker to retain in his possession the identical stock purchased by him on his customer's order, but it is sufficient if he has in his possession, or under his control, a quantity of the stock in question equal to that purchased, which he can deliver to the customer when the account is closed. *Markham* v. *Jaudon*, 41 N. Y. 235; *Skiff* v. *Stoddard*, 63 Connecticut, 198; *S. C.*, 21 L. R. A. 102, 113.

This is the uniform rule in New York. *Stewart* v. *Drake*, 46 N. Y. 449; *Stenton* v. *Jerome*, 54 N. Y. 480; *Baker* v. *Drake*, 53 N. Y. 211; *S. C.*, 66 N. Y. 518; *Taussig* v. *Hart*, 58 N. Y. 425; *Gruman* v. *Smith*, 81 N. Y. 25; *Capron* v. *Thompson*, 86 N. Y. 418; *Caswell* v. *Putnam*, 120 N. Y. 154; *Gillet* v. *Whiting*, 120 N. Y. 402; *S. C.*, 141 N. Y. 73; *Minor* v. *Beveridge*, 141 N. Y. 399; *LeMarchant* v. *Moore*, 150 N. Y. 209; *Rothschild* v. *Allen*, 90 App. Div. 233, aff'd 180 N. Y. 561; *Hurd* v. *Taylor*, 181 N. Y. 231; *Tompkins* v. *Morton Trust Co.*, 91 App. Div. 279, aff'd 181 N. Y. 578; *Content* v. *Banner*, 184 N. Y. 121; *Kennedy* v. *Budd*, 5 App. Div. 140; *Douglass* v. *Carpenter*, 17 App. Div. 329; *Strickland* v. *Magoun*, 119 App. Div. 113; *Andrews* v. *Clerke*, 3 Bosw. 585; *Taylor* v. *Ketcham*, 5 Rob. 507; *Chamberlain* v. *Greenleaf*, 4 Abb. N. C. 478; *Willard* v. *White*, 56 Hun, 581.

The same rule has been adopted in other States. *Child* v. *Hugg*, 41 California, 519; *Thompson* v. *Toland*, 48 California, 99; *Cashman* v. *Root*, 89 California, 373; *Skiff* v. *Stoddard*, 63 Connecticut, 198; *Gilpin* v. *Howell*, 5 Pa. St. 41; *Wynkoop* v. *Seal*, 64 Pa. St. 361; *Esser* v. *Linderman*, 71 Pa. St. 76; *Hopkins* v. *O'Kane*, 169 Pa. St. 478; *Maryland Life Ins. Co.* v. *Dalrymple*, 25 Maryland, 242; *Baltimore Ins. Co.* v. *Dalrymple*, 25 Maryland, 269; *Brewster* v. *Van Liew*, 119 Illinois, 554.

It has been likewise impliedly recognized in *Galigher* v. *Jones*, 129 U. S. 193; *Crawford* v. *Burke*, 195 U. S. 176, 194; *Re Bolling*, 147 Fed. Rep. 786. Also by the text-writers.

1 Dos Passos on Stockbrokers and Stock Exchanges (2d ed.), pp. 179–200.

The importance of the question is indicated by the fact, that the total number of shares dealt in on the New York Stock Exchange alone, during the past eight years, has been 1,675,768,925, the great bulk of these transactions having been on a margin basis.

The Massachusetts authorities considered and explained. *Wood* v. *Hayes*, 15 Gray, 375; *Covell* v. *Loud*, 135 Massachusetts, 41; *Weston* v. *Jordan*, 168 Massachusetts, 401; *Chase* v. *Boston*, 180 Massachusetts, 458; *Rice* v. *Winslow*, 180 Massachusetts, 500; *In re Swift*, 112 Fed. Rep. 315.

Even under the Massachusetts rule, Shaw & Company were entitled, under equitable principles, on payment of the unpaid purchase money, to require a delivery of the shares of stock which the bankrupt was carrying for them, and which he had on hand when the amount owing by them was tendered and the delivery of the shares was demanded. *Johnson* v. *Brooks*, 93 N. Y. 337; *Todd* v. *Taft*, 7 Allen, 371; 3 Story's Eq. Jur., § 728; 3 Pomeroy's Eq. Jur., § 1402; *Stuyvesant* v. *Mayor*, 11 Paige, 414; *Storer* v. *Great Western Ry. Co.*, 2 Young & Coll. 48 *Wilson* v. *Furness Ry. Co.*, L. R. 9 Eq. 28; *Express Co.* v. *Railroad Co.*, 99 U. S. 200; *Williams* v. *Montgomery*, 148 N. Y. 527; *Butler* v. *Wright*, 186 N. Y. 261; *New England Trust Co.* v. *Abbott*, 162 Massachusetts, 148.

A trustee in bankruptcy has no better title to property coming into his hands, or disposed of by the bankrupt before adjudication, than the bankrupt. Loveland on Bankruptcy (3d ed.), 439; *Yeatman* v. *Savings Inst.*, 95 U. S. 764; *Metcalf* v. *Barker*, 187 U. S. 165; *Hewit* v. *Machine Works*, 194 U. S 296; *Thompson* v. *Fairbanks*, 196 U. S. 516; *Humphrey* v. *Tatman*, 198 U. S. 91.

The withdrawal by Shaw & Company of $5,000 on June 24, 1903, was not a preference, being a part of the transaction which was consummated on the closing of the account two days thereafter.

MR. JUSTICE DAY delivered the opinion of the court.

This case comes here upon a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. The petitioner Richardson brought suit in the District Court of the United States for the Southern District of New York, as trustee in bankruptcy of J. Francis Brown, against John M. Shaw and Alexander Davidson, respondents, to recover certain alleged preferences.

Brown, the bankrupt, was a stockbroker transacting business in Boston. The respondents John M. Shaw and Alexander Davidson were partners and stockbrokers transacting business in New York as John M. Shaw & Company, and, as customers of Brown, they transacted business with him on speculative account for the purchase and sale of stocks on margin. The account was carried on in Brown's books in the name of "Royal B. Young, Attorney," as agent of Shaw & Company.

The transactions between Brown and Shaw & Company were carried on for several months, from February to June, 1903. A debit and credit account was opened February 10, when Shaw & Company deposited with Brown $500 as margin, which was credited to them on the account, and Brown purchased for them certain securities at a cost of $3,987.50, which was charged to them on the account.

By agreement between the parties it was understood and agreed that all securities carried in the account or deposited to secure the same might be carried in Brown's general loans and might be sold or bought at public or private sale, without notice, if Brown deemed such sale or purchase necessary for his protection. On the accounts rendered by Brown the following memorandum was printed: "It is understood and agreed that all securities carried in this account or deposited to secure the same may be carried in our general loans and may be sold or bought at public or private sale, without notice, when such sale or purchase is deemed necessary by us for our protection."

Until the account was closed on June 26, 1903, Shaw & Company from time to time paid to Brown various other sums of money as margins, which were credited to them. They also transferred to him various securities as margins in place of cash. They were charged with interest upon the gross amount of the purchase price, and credited with interest upon the margins they had deposited with Brown. If at any time the total amount of margins in securities or money exceeded ten per cent, they had the right to withdraw the excess. Brown was at no time left with a margin less than ten per cent. Shaw & Company kept a "liberal margin," at times rising to twenty-three and a half per cent.

According to the agreement the securities carried in this account or deposited to secure the same might be carried in Brown's general loans, and such securities were so pledged by him, and Young, as agent of Shaw & Company, was informed of the fact. The stocks were figured at the market price every day and statements rendered to Young.

The bankrupt Brown transacted much of his general business with Brown, Riley & Company, of Boston. He pledged his general securities with that company.

On June 24, 1903, Young, the agent of Shaw & Company, as above stated, learned of Brown's precarious financial condition, and demanded payment of $5,000 cash from Brown's agent, Fletcher. At that time the margins already paid by Shaw & Company exceeded the agreed ten per cent, and Fletcher returned to them $5,000 of such margins.

On the following day, June 25, Young demanded a final settlement from Brown. At that time Brown was insolvent within the meaning of the bankrupt law, and had been for the two preceding months. On June 26 the liquidation of this account was effected as follows: Brown, the bankrupt, indorsed to Brown, Riley & Company a note of $5,000, made by one of his debtors, and gave them a check for $1,200, thereby increasing his margin on the general loan, and agreed that $10,664.13 should be charged against his margin and cred-

ited to Shaw & Company, and a check was given by them, through the Beacon Trust Company, to the order of Brown, Riley & Company, for $34,919.62, and the securities to the value of $45,583.75 were turned over to them. None of the certificates of stock which Brown delivered to Shaw & Company were the identical certificates which they had delivered to Brown as margin. Two certain bonds, known as the "Shannon bonds," had been deposited with Brown.

Among the creditors (customers) of Brown on the final day of settlement there were a number of general customers upon transactions in purchase and sale of stocks by Brown as broker, similar to the transactions in the purchase and sale of stocks by Brown as broker for Shaw & Company.

On July 27, 1903, Brown made an assignment, and was adjudicated a bankrupt within four months, and petitioner in this case, Henry Arnold Richardson, was elected trustee.

It was conceded by plaintiff's counsel that it was the custom of the market to deliver shares from broker to customer of the same amount without regard to whether they were the identical shares received.

This suit was brought to recover the $5,000 paid to Shaw & Company June 24, 1903, which sum, it is alleged, was paid to them as excessive margins, and, it is alleged, enabled them to obtain a preference as one of the creditors of Brown. The second cause of action in the suit states that Shaw & Company are indebted to Brown's estate in the sum of $10,664.13, being the amount he transferred for their benefit, as above set forth.

At the close of the plaintiff's case he requested to go to the jury upon the issue of defendant's knowledge of Brown's insolvency. The court held that no preference was shown and directed a verdict for defendants. The judgment was affirmed. 147 Fed. Rep. 659, 665.

The ground on which the counsel for the petitioner predicates the alleged preferences in this case is that when the stockbroker Brown was approached for the settlement of the trans-

actions with Shaw & Company, being insolvent and dealing with several customers, as to each of whom he had pledged the stocks carried for them, and under the understanding of the parties being under obligation to each of them to redeem the stocks from the loan for which they were pledged, this obligation created a right of demanding the pledged stocks and securities on the part of each of the customers, which put the broker in the debtor class and the customers into the creditor class, so that if the broker used his assets to carry out such obligation to a particular customer, whereby the latter was able to redeem his stock from such pledge upon payment only of the amount of his indebtedness to the broker, with the result that the broker could not carry out similar obligations to other customers in like situation, a preference is created under § 60 of the bankrupt act, and this, says the learned counsel in his brief, under any theory concerning the relation of broker and customer, is "the main proposition upon which we hang our appeal."

This case, therefore, requires an examination of the relations of customer and broker under the circumstances disclosed in this record, at least so far as it is necessary to determine the question of preference in bankruptcy upon which the case turns. There has been much discussion upon this subject in the courts of the Union. The leading case, and one most frequently cited and followed, is *Markham* v. *Jaudon*, 41 N. Y. 235, a case which was argued by eminent counsel and held over a term for consideration. The opinion in the case is by Chief Judge Hunt, afterwards Mr. Justice Hunt of this court. He summarized the conclusions of the court as follows:

"The broker undertakes and agrees:

"1. At once to buy for the customer the stocks indicated;

"2. To advance all the money required for the purchase beyond the ten per cent furnished by the customer;

"3. To carry or hold such stocks for the benefit of the customer so long as the margin of ten per cent is kept good, or

until notice is given by either party that the transaction must be closed. An appreciation in the value of the stocks is the gain of the customer and not of the broker;

"4. At all times to have in his name and under his control ready for delivery the shares purchased, or an equal amount of other shares of the same stock;

"5. To deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker; or,

"6. To sell such shares, upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale.

"Under this contract the customer undertakes:

"1. To pay a margin of ten per cent on the current market value of the shares;

"2. To keep good such margin according to the fluctuations of the market;

"3. To take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker.

"The position of the broker is twofold. Upon the order of the customer he purchases shares of stocks desired by him. This is a clear act of agency. To complete the purchase he advances from his own funds, for the benefit of the purchaser, ninety per cent of the purchase money. Quite as clearly he does not in this act as an agent, but assumes a new position. He also holds or carries the stock for the benefit of the purchaser until a sale is made by the order of the purchaser or upon his own action. In thus holding or carrying he stands also upon a different ground from that of a broker or agent whose office is simply to buy and sell. To advance money for the purchase, and to hold and carry stocks, is not the act of the broker as such. In so doing he enters upon a new duty, obtains other rights, and is subject to additional responsibilities. . . . In my judgment the contract between the parties to this ac-

tion was in spirit and effect, if not technically and in form, a contract of pledge."

The case has been approved in other cases in New York, some of which are: *Stewart* v. *Drake*, 46 N. Y. 449; *Stenton* v. *Jerome*, 54 N.Y. 480; *Baker* v. *Drake*, 66 N. Y. 518; *Gruman* v. *Smith*, 81 N. Y. 25; *Gillet* v. *Whiting*, 120 N. Y. 402; *Content* v. *Banner*, 184 N. Y. 121; *Douglas* v. *Carpenter*, 17 App. Div. 329. And approved in other States: *Cashman* v. *Root*, 89 California, 373; *Brewster* v. *Van Liew*, 119 Illinois, 554; *Gilpin* v. *Howell*, 5 Pa. St. 41; *Wynkoop* v. *Seal*, 64 Pa. St. 361; *Esser* v. *Linderman*, 71 Pa. St. 76.

The subject was fully considered in a case which leaves nothing to be added to the discussion, *Skiff* v. *Stoddard*, 63 Connecticut, 198, in which the conclusions in *Markham* v. *Jaudon* were adopted and approved. These views have been very generally accepted as settled law by the text writers on the subject. 1 Dos Passos on Stockbrokers (2d ed.), 179–200; Jones on Pledges, § 496; Mechem on Agency, § 936.

Mr. Jones, in his work on pledges, summarizes the law as follows:

"The broker acts in a threefold relation: first, in purchasing the stock he is an agent; then in advancing money for the purchase he becomes a creditor, and finally, in holding the stock to secure the advance made, he becomes a pledgee of it. It does not matter that the actual possession of the stock was never in the customer. The form of the delivery of the stock to the customer, and a redelivery by him to the broker, would have constituted a strict, formal pledge. But this delivery and redelivery would leave the parties in precisely the same situation they are in when, waiving this formality, the broker retains the certificates as security for advances."

In Dos Passos on Stockbrokers, at page 114, the author says:

"Upon the whole, while it must be conceded that there are incongruous features in the relation, there seems to be no hardship in holding that a stockbroker is a pledgee; for although it is true that he may advance all or the greater part of the

money embraced in the speculation, if he acts honestly, faithfully and prudently, the entire risk is upon the client. . . . To introduce a different rule would give opportunities for sharp practices and frauds, which the law should not invite."

The rule thus established by the courts of the State where such transactions are the most numerous, and which has long been adopted and generally followed as a settled rule of law, should not be lightly disturbed, and an examination of the cases and the principles upon which they rest lead us to the conclusion that in no just sense can the broker be held to be the owner of the shares of stock which he purchases and carries for his customer. While we recognize that the courts of Massachusetts have reached a different conclusion and hold that the broker is the owner, carrying the shares upon a conditional contract of sale, and, while entertaining the greatest respect for the Supreme Judicial Court of that State, we cannot accept its conclusion as to the relation of broker and customer under the circumstances developed in this case. We say this, recognizing the difficulties which can be pointed out in the application of either rule.

At the inception of the contract it is the customer who wishes to purchase stocks and he procures the broker to buy on his account. As was said by Mr. Justice Bradley speaking for the court in *Galigher* v. *Jones*, 129 U. S. 193, 198, a broker is but an agent, and is bound to follow the directions of his principal or give notice that he declines the agency.

The dividends on the securities belong to the customer. The customer pays interest upon the purchase price and is credited with interest upon the margins deposited. He has the right at any time to withdraw his excess over ten per cent deposited as margin with the broker. Upon settlement of the account he receives the securities. In this case the broker assumed to pledge the stocks not because he was the owner thereof, but because by the terms of the contract printed upon every statement of account he obtained the right from the customer to pledge the securities upon general loans, and in like

manner he secured the privilege of selling when necessary for his protection.

The risk of the venture is entirely upon the customer. He profits if it succeeds; he loses if it fails. The broker gets out of the transaction, when closed in accordance with the understanding of the parties, his commission and interest upon the advances, and nothing else. That such was the arrangement between the parties is shown in the testimony of the broker's agent, who testified "if these stocks carried for J. M. Shaw & Company made a profit, that profit belongs to Shaw & Company over and above what he owed us."

When Young, the agent of Shaw & Company, demanded the stocks, their right of ownership in them was recognized, and, while pledged, they were under the control of the broker, were promptly redeemed and turned over to the customer. Consistently with the terms of the contract, as understood by both parties, the broker could not have declined to thus redeem and turn over the stock, and when adjudicated a bankrupt his trustee had no better rights, in the absence of fraud or preferential transfer, than the bankrupt himself. *Security Warehousing Co.* v. *Hand*, 206 U. S. 415, 423; *Thompson* v. *Fairbanks*, 196 U. S. 516, 526; *Humphrey* v. *Tatman*, 198 U. S. 91; *York Man'f'g Co.* v. *Cassell*, 201 U. S. 344, 352.

It is objected to this view of the relation of customer and broker that the broker was not obliged to return the very stocks pledged, but might substitute other certificates for those received by him, and that this is inconsistent with ownership on the part of the customer, and shows a proprietary interest of the broker in the shares; but this contention loses sight of the fact that the certificate of shares of stock is not the property itself, it is but the evidence of property in the shares. The certificate, as the term implies, but certifies the ownership of the property and rights in the corporation represented by the number of shares named.

A certificate of the same number of shares, although printed upon different paper and bearing a different number, repre-

sents precisely the same kind and value of property as does another certificate for a like number of shares of stock in the same corporation. It is a misconception of the nature of the certificate to say that a return of a different certificate or the right to substitute one certificate for another is a material change in the property right held by the broker for the customer. *Horton* v. *Morgan,* 19 N. Y. 170; *Taussig* v. *Hart,* 58 N. Y. 425; *Skiff* v. *Stoddard,* 63 Connecticut, 198, 218. As was said by the Court of Appeals of New York in *Caswell* v. *Putnam,* 120 N. Y. 153, 157, "one share of stock is not different in kind or value from every other share of the same issue and company. They are unlike distinct articles of personal property which differ in kind and value, such as a horse, wagon or harness. The stock has no earmark which distinguishes one share from another, so as to give it any additional value or importance; like grain of a uniform quality, one bushel is of the same kind and value as another."

Nor is the right to repledge inconsistent with ownership of the stock in the customer. *Skiff* v. *Stoddard,* 63 Connecticut, 216, 219; *Ogden* v. *Lathrop,* 65 N. Y. 158. It was obtained in the present case by a contract specifically made and did not affect the right of the customer, upon settlement of the accounts, to require of the broker the redemption of the shares and their return in kind.

It is true that the right to sell, for the broker's protection, which was not exercised in this case, presents more difficulty, and is one of the incongruities in the recognition of ownership in the customer; nevertheless it does not change the essential relations of the parties, and certainly does not convert the broker into what he never intended to be and for which he assumes no risk, and takes no responsibility in the purchase and carrying of shares of stock.

The broker cannot be converted into an owner without a perversion of the understanding of the parties, as was pertinently observed in the very able discussion already referred to in *Skiff* v. *Stoddard,* 63 Connecticut, 216. "So long as the

interpretation of the contract preserves as its distinctive feature the principal proposition that the customer purchases merely the right to have delivery to him in the future, at his option, of stocks or securities at the price of the day of the agreement, and its corollary that the customer derives no right, title or interest in the stocks or securities until final performance, the difficulties in the way of harmonizing the situation are bound to exist. The fundamental difficulty grows out of the necessary attempt in some way to transform the customer, who enjoys all the incidents and assumes all the risks of ownership, into a person who in fact has no right, title or interest, and to create out of the broker, who enjoys none of the incidents of ownership, and assumes not a particle of its responsibility, a person clothed with a full title and an absolute ownership."

We reach the conclusion, therefore, that although the broker may not be strictly a pledgee, as understood at common law, he is, essentially, a pledgee and not the owner of the stock, and turning it over upon demand to the customer does not create the relation of a preferred creditor within the meaning of the bankrupt law.

We cannot consent to the contention of the learned counsel for the petitioner, that the insolvency of the broker at once converts every customer, having the right to demand pledged stocks, into a creditor who becomes a preferred creditor when the contract with him is kept and the stocks are redeemed and turned over to him.

In the absence of fraud or preferential transfer to a creditor the broker had a right to continue to use his estate for the redemption of the pledged stocks. As this court said in *Cook* v. *Tullis*, 18 Wall. 332, 340:

"There is nothing in the bankruptcy act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealings be conducted without any pur-

pose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously."

The bankrupt act in § 60*a* provides: "A person shall be deemed to have given a preference if, being insolvent, he has within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

A creditor is defined to include any one who owns a demand or claim provable in bankruptcy. Sec. 1, sub. 9, Bankruptcy Act, 1898, 3 U. S. Comp. St. 3419. It is essential, therefore, in order to set aside the alleged preference, that Shaw & Company at the time of the transfer should have stood in the relation of creditor to the bankrupt. Of course, if the New York rule based upon *Markham* v. *Jaudon* is correct, and the broker was the pledgee of the customer's stock, there can be no question that in redeeming these stocks for the purpose of satisfying the pledge no preferential transfer under the bankruptcy act resulted.

In our view we think no different result is reached, so far as a preference in bankruptcy is concerned, if the Massachusetts cases could be taken to lay down the correct rule of the relations between broker and customer.

That rule is said to have its origin in *Hayes* v. *Wood,* 15 Gray, 375, decided in 1860, in which the opinion, though by Chief Justice Shaw, is very brief. It was therein held that the broker was a holder of the shares upon conditional contract

to deliver them to the customer upon the payment of so much money, and until the money was paid the right to have performance did not accrue.

In *Covell* v. *Loud*, 135 Massachusetts, 41, the right of the broker was considered after the customer had refused to pay the necessary margin, and after the customer had requested the broker to do the best he could for him and to sell the stock at the broker's board without notice, and it was held that under such circumstances the broker was not liable for conversion.

In *Weston* v. *Jordan*, 168 Massachusetts, 401, the question was as to the relation between customer and broker after the broker had parted with the shares after repeated demands by the customer and refusal by the broker to deliver the shares, and it was held that a valid cause of action arose in favor of the customer, whether for breach of contract, or for conversion, it matters not.

In *Chase* v. *Boston*, 180 Massachusetts, 459, the opinion is by Chief Justice Holmes, and the question directly decided is whether a broker who held shares of stock in his own name, and which he carried for his customer on margin, was required to pay a city tax upon the value. It was held that he was. In that case the learned justice said:

"No doubt, whichever view be taken, there will be anomalies, and no doubt it is possible to read into either a sufficient number of implied understandings to make it consistent with itself. Purchases on margin certainly retain some of the characteristics of ordinary single purchases by an agent, out of which they grew. The broker buys and is expected to buy stock from third persons to the amount of the order. *Rothschild* v. *Brookman*, 5 Bligh (N. R.), 165; *Taussig* v. *Hart*, 58 N. Y. 425. He charges his customer a commission. He credits him with dividends and charges him with assessments on stock. However the transaction is closed, the profit or loss is the customer's. But none of these features is decisive."

And while the rule dating back to the decision of Chief Justice Shaw in 15 Gray was recognized as the law of Massachu-

setts, there is nothing in the case decisive of the question now before us.

The case most relied upon as showing the preference is *Weston* v. *Jordan*, 168 Massachusetts, *supra*. It was held in that case that Wheatland, the broker (Weston was his assignee in insolvency), had become a debtor to the customer Jordan, having parted with the control of the shares and substituting none others for them after repeated demands for them by the customer. And it was held that when the insolvent broker went into the street and bought that kind of stocks with his own money and the customer took the stocks knowing of such purchase, the transaction amounted to a preference; and in course of the discussion Mr. Justice Allen, referring to the contention of counsel that the Massachusetts rule should be reconsidered in view of the rules adopted in New York and other States, said (p. 404):

"The defendant seeks to have these decisions reconsidered; but the facts of the present case do not call for such reconsideration of the general doctrine. Even if at the outset Jordan were to be deemed a pledgor, and Wheatland a pledgee, of the shares, that relation was changed by what happened afterwards. . . . After Wheatland had parted with the control of the shares, and *after repeated demands for them by Jordan, and refusals by Wheatland to deliver them, Jordan had a valid ground of action against Wheatland, either for breach of contract or for a conversion; it matters not which.*"

The facts in the present case are entirely different from those disclosed in the case just cited. In the present case there was no demand for the return of the stocks which was refused by the broker; but, recognizing the obligation of the contract, when the stocks were demanded the broker proceeded to redeem them from the pledge which he had made of them under the right given by the contract between the parties, and turned them over to the customer. In such case the relation of debtor and creditor did not arise as it might upon the refusal, as in *Weston* v. *Jordan*, to turn over the stocks upon demand.

After an examination of the Massachusetts cases, Judge Lowell held in *In re Swift*, 105 Fed. Rep. 493, while following the Massachusetts rule as between broker and customer, that no cause of action arose until after demand by the customer. And the same view was taken in the same case upon review in the Court of Appeals for the First Circuit in an opinion by Judge Putnam. 112 Fed. Rep. 315. While both courts held that under the law, as defined in the Massachusetts cases, bankruptcy excused demand, they held that the customer did not become a creditor upon insolvency, but only after demand and refusal or its equivalent.

How then stood the parties at the time of the demand for the return of these shares of stock? They were held upon a contract, which required the broker, upon demand, to turn over the shares purchased, or similar shares, to the customer upon payment of advancements, interest and commissions. These stocks were redeemed and turned over to him; as a consequence the relation of debtor and creditor as between the broker and customer did not arise.

Upon the principles heretofore discussed, we think the payment of the $5,000, on June 24, was not a preferential payment to a creditor. The customer had demanded settlement, the broker had paid the $5,000, and on the following day this sum was taken into account in settling the account before turning over to the customer the stock belonging to him, according to the understanding of the parties.

We find no error in the judgment of the Court of Appeals, and the same is

Affirmed.

MR. JUSTICE HOLMES:

If I had been left to decide this case alone I should have adhered to the opinion which, upon authority and conviction, I helped to enforce in another place. I have submitted a memorandum of the reasons that prevailed in my mind to my brethren, and as it has not convinced them I presume that

I am wrong. I suppose that it is possible to say that after a purchase of stock is announced to a customer he becomes an equitable tenant in common of all the stock of that kind in the broker's hands, that the broker's powers of disposition, extensive as they are, are subject to the duty to keep stock enough on hand to satisfy his customers' claims, and that the nature of the stock identifies the fund as fully as a grain elevator identifies the grain for which receipts are out. It would seem to follow that the customer would have a right to demand his stock of the trustee himself, as well as to receive it from the bankrupt, on paying whatever remained to be paid. A just deference to the views of my brethren prevents my dissenting from the conclusion reached, although I cannot but feel a lingering doubt.

THOMAS *v.* TAGGART.

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

No. 197. Argued January 17, 20, 1908.—Decided April 6, 1908.

Richardson v. *Shaw*, *ante*, p. 365, followed to the effect that as a general rule the broker is the pledgee and the customer the owner and pledgor of stocks carried on margin.

Where there is a repugnancy between the printed and written provisions of a contract, the writing is presumed to express the specific intention of the parties and will prevail. In this case the written portion on the receipt given for stocks, deposited with the broker as collateral on account, was held as specially applicable thereto and that the broker's right to rehypothecate stocks under the printed portion of the contract was confined to the stocks purchased and carried on margin.

If title to property is good as against the bankrupt or his creditors at the time the trustee's title accrues, title does not pass, and the owner of the property is entitled to have it restored to him, or, if it has been sold, the proceeds thereof.

Shares of stock held by a broker as collateral for the account of a customer, upon which the latter is not indebted to the broker, are the property of

the customer, and, as the trustee has no better right thereto than the bankrupt, the customer is entitled to their possession; and this right is not affected by the fact that the broker had hypothecated the shares. In such case the customer is entitled to the shares, or their proceeds, when returned to the trustee if the loan has been paid by proceeds of other securities pledged therefor.

Proof of claim of a customer against a broker, including value of securities deposited as collateral, does not amount to a waiver of his right to recover possession of the specific stocks, if found, where his claim specifically states that he does not waive such right of possession.

149 Fed. Rep. 176, affirmed.

THE facts are stated in the opinion.

Mr. Abram I. Elkus, with whom *Mr. Carlisle J. Gleason* was on the brief, for petitioners.

Mr. Graham Sumner and *Mr. George E. Hall,* with whom *Mr. Thomas Thacher, Mr. Edwin M. Lawrence,* and *Mr. Hugo S. Mack* were on the briefs, for respondents.[1]

MR. JUSTICE DAY delivered the opinion of the court.

This case was argued and submitted with *Henry Richardson, as Trustee in Bankruptcy,* v. *John M. Shaw and Alexander Davidson,* No. 122, just decided, *ante* p. 365. To the extent which the case involves the same general questions as to the legal relations of stockbrokers and customers, we need not repeat the discussion had in *Richardson* v. *Shaw,* by which the conclusion was reached that under the usual contract for a speculative purchase of stock the customer is considered the pledgor and the broker the pledgee.

In this case it is necessary to notice certain specific features not arising in the case just referred to. The petitioners, Edward S. Thomas, Lloyd M. Howell and Ashbel P. Fitch, are the trustees in bankruptcy of Jacob Berry and Harold L. Bennett, individually and as partners as Berry & Company. Several persons, among others Anna D. Taggart, Harris Filson, William C. Bowers and George E. Hall, made claims to re-

[1] Argued simultaneously with No. 122, *Richardson* v. *Shaw, ante,* p. 365.

cover certain certificates of stock, as against the trustees in bankruptcy, or to have a lien on the funds, the proceeds of other stocks in the hands of the trustees. The claims were referred to a referee in bankruptcy, and, upon hearing, he found in favor of certain of the claimants, among others Mrs. Taggart, Filson, Hall and Bowers. The report of the referee was confirmed by the District Judge on October 4, 1905, and the trustees were directed to turn over certain certificates of stock and proceeds of other certificates to the claimants. Upon appeal the order and judgment of the District Court was affirmed by the Circuit Court of Appeals for the Second Circuit, *sub nomine In re Berry*, 149 Fed. Rep. 176, and the case is now here upon a writ of certiorari.

From the findings of the referee it appears that certificates of stock were pledged with the Hanover National Bank by Berry & Company the day before the failure. This pledge was to secure a demand loan of $45,000. Subsequently the bank returned to the trustees all funds and stocks over and above its loans. It returned in cash $6,310.41 and certain shares of stock.

Taking up the several claims, we will first notice that of Anna D. Taggart. She claims two certificates for 83 shares of United States Steel stock preferred, which were returned by the Hanover Bank unsold to the trustees in bankruptcy. The receipt given to Mrs. Taggart at the time of the deposit is in the words following:

"SEP. 14, 1904.

"Received from Anna D. Taggart 83 shs. U. S. Steel pfd. No. A30563–C15546. The same to be a general deposit and this receipt is given and received with mutual understanding that Jacob Berry & Co. may hold the same as margin and as a security for or apply the deposit in part payment of or account of losses or any other transactions in the purchase or sale of stocks, bonds, securities or commodities made by them for your account.

"This receipt is given and received upon the further under-

standing and agreement in consideration of Jacob Berry & Co. executing such orders for the purchase or sale of stocks, bonds, securities or commodities as may be given to them in writing, orally, by telegraph or telephone; that the said Jacob Berry & Co. may repledge, rehypothecate or loan any or all of said stocks, bonds, securities or commodities held by them on account thereof as margin or otherwise; may substitute similar stocks, bonds, securities or commodities therefor, and that said Jacob Berry & Co. may, without notice upon the approximate exhaustion of margin sell, or buy, as the case may be, any stocks, bonds, securities or commodities bought and sold or held by them as collateral, or margin, or otherwise, and that in case of contracts for future delivery that said Jacob Berry & Co. may close the same by purchase or sale as the case may be, without notice, provided however, that such purchases or sales may be made upon the Consolidated Stock and Petroleum Exchange of New York, the New York Stock Exchange, the Chicago Board of Trade, or in any other exchange in the City of New York where such stocks, bonds, securities or other commodities are dealt in.

"No. A30563—33 Shs.

"No. C15546—50 "

"GEO. M. DAVIS, *Mgr.*"

Across the face of this receipt was written, in ink, the words "as collateral on account." The question is, Mrs. Taggart not being indebted to the trustees, but having a balance due from the estate to her, did these shares of stock belong to the trustee in bankruptcy as part of the bankrupt's estate, or were they the property of the claimant, Mrs. Taggart? The learned Court of Appeals construed the receipt as consisting of two parts—the first paragraph relating to the shares of steel stock especially deposited, and the second to the stocks, bonds and securities or commodities purchased upon her account by the brokers, concerning which they were given the right to repledge, rehypothecate or loan, and the right to substitute therefor similar stocks, bonds and securities.

In *Richardson* v. *Shaw, ante,* p. 365, we have discussed the legal relation existing between a customer and a broker who has the right to pledge and hypothecate securities purchased for the customer and substitute similar securities therefor, with the obligation to respond at all times to the demand of the customer for the redemption of the stocks, and we need not here repeat what is therein said.

We are of the opinion that the Circuit Court of Appeals correctly construed this receipt. It was the evident purpose of the parties that the eighty-three shares of United States Steel stock preferred was to be held, as the receipt shows, as security for losses in purchase or sale of stocks, bonds or securities on account of the customer, and the separate paragraph of the receipt, giving the right to repledge, etc., and substitute similar stocks, bonds and securities, had reference to the stock, securities, etc., obtained in executing the orders for purchase made by the customer. And this construction of the receipt is, we think, placed beyond contradiction when effect is given to the words written across the face of the printed receipt as "collateral on account." It is a well-settled rule of law that if there is a repugnancy between the printed and the written provisions of the contract, the writing will prevail. It is presumed to express the specific intention of the parties. *Hagan* v. *Scottish Insurance Co.*, 186 U. S. 423.

This being the situation as to Mrs. Taggart's claim, we think the court properly held that she was entitled to recover her shares of stock. They were not the property of Berry & Company, but were held as collateral to her account upon which she is not indebted to the brokers. The certificates were returned to the trustees, who had no better right in them than the bankrupt.

The rule is generally recognized that if the title to property claimed is good as against the bankrupt and his creditors at the time the trustee's title accrued, the title does not pass and the property should be restored to its true owner; or, if the property has been sold, the proceeds of the sale takes the place

of the property. Loveland on Bankruptcy (3d ed.), § 152; *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344.

We will next consider the claim of Harris Filson.

Filson claims a lien on the fund as the owner of two certificates for ten shares each of preferred stock of the Atchison, Topeka and Santa Fé Railroad Company.

Filson identified the certificates by their numbers and produced Berry & Company's receipts therefor. The bankrupts, Berry & Company, had hypothecated them with the Hanover Bank, which sold them for $2,072.50, which the claimant seeks to recover.

The master finds that Filson had a speculative account with Berry & Company, and "was trading on both sides of the market." On the morning of November 25, his account showed that he had bought on margin, 70 shares of stock, including 40 shares of Pennsylvania Railroad, and that he had sold "short" 50 shares of stock, including 20 shares of "Atchison preferred," and 10 shares of "Erie, first preferred." The account also showed a cash credit of $3,105.97. The claimant testified that he called at the office of Berry & Company on November 25, to arrange to take out of the account the 40 shares of Pennsylvania, which he had previously bought on margin on November 17. He took with him one of the ten share certificates of Atchison, Topeka and Santa Fé, and asked the cashier to figure up the account and let him know if the deposit of the Atchison certificate would leave sufficient margin to withdraw the Pennsylvania stock. He was told that it was not sufficient, as the withdrawal of the Pennsylvania stock would leave a credit balance of only $300 or $400. Filson then went to his safe deposit box and took out two additional certificates for 10 shares of Atchison and 10 shares of Erie, and delivered them, together with other certificates, to Berry & Company on their usual receipt, which was, in form, the same as the receipt given to Mrs. Taggart, above quoted.

The next day Berry & Company failed, Filson never re-

ceived his Pennsylvania stock, and on November 26 no certificate of Pennsylvania stock came into the hands of the receiver in bankruptcy, nor was deposited in any bank as collateral.

Upon the principles stated, we are clearly of the opinion that Filson had a valid claim for the value of his shares of Atchison stock in controversy.

As to two shares of New York, New Haven and Hartford stock, claimed by William C. Bowers, the facts require no additional discussion. These shares were pledged and the same receipt given as above described. The shares were pledged to the Hanover Bank and returned unsold to the trustees. As Bowers was not indebted on the account for which they were held as security, the shares belonged to him.

George E. Hall seeks to recover a certificate for ten shares of common stock of the United States Steel Corporation, returned to the trustees by the Hanover Bank, unsold.

On November 1, 1904, Hall deposited certain securities, including the steel stock, with the New Haven manager of Berry & Company, and took a receipt, specifying that they were held "as collateral." Berry & Company hypothecated them with the Hanover Bank. Hall had a speculative account with Berry & Company at the time, and the securities were deposited in lieu of cash margin for the account. By a prior order in the bankruptcy proceeding the claimant has recovered from the trustees certain stocks found to be his property, but which had not been hypothecated with Berry & Company.

No lien or claim on the stock in question is asserted by the trustees, and Hall was not indebted to Berry & Company on November 25, 1904. Hall filed a claim in bankruptcy on December 19, 1904, for $1,850, which included the value of all his stocks in the hands of Berry & Company, valued at $1,600, and a cash balance of $250 due him. In the proof of his claim, Hall sets forth the following statement relative thereto:

"Said deponent hereby stipulates that by filing notice of this claim he does not waive any right of action that he now

has to recover possession of said certificates or the value thereof against either of the bankrupts or any person in whose possession they may be found, or any right of action that he has against either or both of said bankrupts for the conversion of said certificates to their own use, when said bankrupts knew that said certificates were not their property, and never had been; and that the said deponent does not waive any right whatsoever of any kind, nature or description against said bankrupts, or either of them, for or on account of the failure of the bankrupts or either of them to return said certificates to said deponent, and for the unlawful hypothecation and conversion of the same by said bankrupts, or either of them."

In this claim the essential question is as to the effect of Hall's proof of his claim in bankruptcy as a waiver of his right to recover the shares of stock covered by the receipt. We are of the opinion that, in view of the reservation just made, there was nothing in Hall's conduct amounting to an election to pursue his claim as a creditor in bankruptcy, which now prevents his recovery of the certificates of stock in question. It is true that he voted at the first meeting of the creditors on December 19, 1904, upon an informal ballot for trustee in bankruptcy, and at the formal election of trustees on December 21, 1904, Mr. Hall did not vote, though the referee finds that he participated actively at the meetings held for the election of trustee. We are of the opinion that the reservation of Hall evidenced his intention to hold on to whatever rights he had in his shares of stock, and there is nothing in his conduct which should preclude him, after he had discovered that the shares had been returned to the assignee in bankruptcy, from reclaiming them as his own property.

We find no error in the judgment of the Circuit Court of Appeals for the Second Circuit, and the same is

Affirmed.

BEADLES *v.* SMYSER, MAYOR OF THE CITY OF PERRY, OKLAHOMA.

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

No. 150. Argued March 4, 1908.—Decided April 6, 1908.

While this court cannot review judgments of the Supreme Court of the Territory of Oklahoma unless the amount involved exceeds $5,000, where the judgment also directly involves the validity of other judgments the amount in controversy may be measured by the aggregate of such judgments.

The principles of right and justice upon which the doctrine of estoppel *in pais* rests, are applicable to municipal corporations.

Where public property of a municipality cannot be seized on execution and the municipality enters into a valid agreement with judgment creditors to apply the judgment fund to judgments in order of entry and complies therewith, it cannot, after the expiration of the statutory period when a judgment becomes dormant for failure to issue execution, plead the statute of limitations as a bar to those judgments not yet reached for payment under the agreement. The municipality is estopped both on the contract and on the ground of equitable estoppel, and so *held* as to judgments against a city in Oklahoma.

17 Oklahoma, 162, reversed.

THE facts are stated in the opinion.

Mr. A. G. C. Bierer, with whom *Mr. S. H. Harris* and *Mr. Frank Dale* were on the briefs, for plaintiff in error and appellant:

The action being in mandamus to compel a city to recognize the validity of plaintiff's judgments and to pay out the moneys already accrued in the judgment fund upon these judgments, and to continue to make levies to enforce the same, the statutory period of limitation fixed by law for civil actions does not run against the relief asked. *Duke, Mayor, et al.* v. *Turner et al.,* 204 U. S. 623.

The section of the Oklahoma statute permitting the enforcement of a judgment by execution and providing for the dormancy of such judgment if execution is not issued within five years, has no application to judgments against municipalities in this Territory which are collectible only by the levy of taxes which are required by the law to be made to create a judgment fund out of which to pay such judgments.

The cases of *Hart* v. *City of New Orleans*, 12 Fed. Rep. 292; *State ex rel. Courter* v. *Buckles*, 35 N. E. Rep. 846; *Laredo* v. *Benavides*, 25 S. W. Rep. 482, cited by Supreme Court of Oklahoma, reviewed and distinguished from the case at bar.

Oklahoma law provides for collecting judgments by tax instead of execution.

That it is and has been throughout the life of all these judgments the duty of the city of Perry to make a levy of five mills on the dollar to provide a fund with which to pay these judgments is clearly declared by our statute. Sec. 1, art. 5, p. 83, Statutes of 1897; Session Laws of 1899, § 1, c. 8, p. 103; Wilson's Stat. of 1903, § 466.

The cases cited by the Oklahoma Supreme Court in the cases of *Beadles* v. *Fry*, 15 Oklahoma, 423, are inapplicable to the facts in the case at bar. *Newton* v. *Arthur*, 55 Pac. Rep. 446; *Israel* v. *Nichols*, 14 Pac. Rep. 438; *Brockway* v. *Oswego Township*, 4 Pac. Rep. 79; and *Baker* v. *Hummer*, 2 Pac. Rep. 808, discussed and distinguished.

Statutes of limitation do not run against municipal obligations of the character of judgments in Oklahoma. *Barnes* v. *Turner*, 14 Oklahoma, 284; *Freehill* v. *Porter*, 4 Pac. Rep. 646; *Lincoln Co.* v. *Luning*, 133 U. S. 529.

The placing of the obligations in question into judgments which are to be paid out of the judgment fund of the city, does not in any way affect the principles applied in the *Barnes* or *Duke* v. *Turner case*. *United States* v. *County of Macon*, 99 U. S. 582; *A., T. & S. F. Ry. Co.* v. *Territory of New Mexico*, 72 Pac. Rep. 14; *Darcy* v. *Mumpford*, 58 Georgia, 119; *United States ex rel. Field* v. *Township of Oswego*, 28 Fed. Rep. 55.

The city of Perry recognized these judgments as valid judgments and continued to levy taxes to provide money in the judgment fund to pay these judgments, and mandamus, which is the only execution against a municipality, could not have issued until the city refused to recognize and pay the judgments in 1905. *Alter* v. *State*, 86 N. W. Rep. 1080.

The city of Perry having ratified and approved the agreement among the judgment creditors to pay these judgments in their order of rendition, and having carried out this agreement in the levy of taxes and the payment out of the judgment fund of these tax moneys for all these years, should now be held to be estopped from pleading the dormancy of these judgments even if otherwise they could have become dormant.

Mr. A. N. Whiteside and *Mr. H. B. Martin*, for defendants in error and appellees, submitted:

This court has no jurisdiction of this action, because the amount involved is less than $5,000.00.

If the validity of plaintiff's judgments were conceded, the only cause of action appearing upon the face of the alternative writ is against Fry, the treasurer of the city, and that said cause of action cannot involve more than the amount of money in the hands of the treasurer, which is less than the amount necessary to give this court jurisdiction of the subject-matter of the action.

A judgment against a city of the first class under the statutes of Oklahoma becomes dormant after five years from the date of its rendition if execution shall not be sued out within that time and such judgment cannot be revived without the consent of the judgment debtor unless it be revived within one year from the time it becomes dormant. Section 4337, statutes of Oklahoma, 1893; *Lafayette County* v. *Wonderly*, 92 Fed. Rep. 313; *Beadles* v. *Fry*, 82 Pac. Rep. 1041, and cases cited; Statutes of Oklahoma, 1893, §§ 4325 and 4332. All these statutes were adopted from the State of Kansas, whose courts have frequently construed them as we contend they

should be. See *Angell* v. *Martin*, 24 Kansas, 334; *Myers* v. *Kotham*, 29 Kansas, 19; *Tefft* v. *Citizens' Bank*, 36 Kansas, 457; *Mawhinney* v. *Doane*, 40 Kansas, 681; *Tibbetts* v. *Deck*, 41 Kansas, 492; *Bradford* v. *Loan Co.*, 47 Kansas, 587; *Raff* v. *State*, 48 Kansas, 45; *Railroad Co.* v. *Butts*, 55 Kansas, 661; *New Hampshire Bank Company* v. *Ball*, 57 Kansas, 812; *Reeves* v. *Long*, 63 Kansas, 700; *Steinback* v. *Murphy*, 70 Kansas, 487.

As to the necessity of reviving judgments against municipal corporations within the statutory periods of time, see *Brockway* v. *Oswego Township*, 4 Pac. Rep. 79; *Ware* v. *Pleasant Grove Township*, 59 Pac. Rep. 1089; *City of Chanute* v. *Trader*, 132 U. S. 210; *Field* v. *Township of Oswego*, 28 Fed. Rep. 55; *Coulan* v. *Doull*, 133 U. S. 596; *M'Aleer* v. *Clay Co.*, 42 Fed. Rep. 665; *Lafayette Co.* v. *Wonderly*, 92 Fed. Rep. 313.

MR. JUSTICE DAY delivered the opinion of the court.

This is a proceeding to review the judgment of the Supreme Court of the Territory of Oklahoma, affirming the judgment of the District Court of Noble County in that Territory, denying a peremptory writ of mandamus to the plaintiff in error, also plaintiff below, seeking to compel the recognition of certain judgments and the levy of taxes by the city officers of the city of Perry, a city of the first class, in Noble County. The action was begun March 12, 1906, in the District Court upon a petition, which set forth the ownership in the plaintiff of judgments against the city of Perry, rendered, with two exceptions, in the year 1898; the other two rendered in January and March, 1899, and aggregating the sum of $16,304.51, including interest and costs.

The petition avers that these judgments were rendered on warrants issued by the city of Perry upon the general fund of the city; that no funds having been provided for the payment of plaintiff's and certain other judgments, on December 3, 1901, the judgment creditors of the city entered into an

agreement with the city treasurer of the city by signing a certain paper writing, to wit:

"I, the undersigned, judgment creditor, holding judgment against the city of Perry, Noble County, Oklahoma Territory, hereby ask that the city treasurer pay all judgments against the city of Perry in order of rendition, hereby waiving right to payment *pro rata*, if such right exists, and this waiver shall apply to all grantees and assigns. Said judgments are in amounts and dates as follows:" [Here follows a list of the judgments.]

At that time the outstanding unpaid judgment indebtedness of the city of Perry amounted to $22,000, all of the owners of which, excepting the sum of $4,000, signed the agreement; that the waivers thus signed were presented to the city council of the city, which adopted the following resolution:

"Whereas, the judgment creditors holding judgments against the city of Perry have practically all signed written waivers of the right, if such right exists, to payment of said judgments *pro rata*, and therein consent to the payment of said judgments in the order of their rendition against said city:

"Therefore, be it resolved, That the city treasurer is hereby authorized and directed to pay the said judgments existing against the city of Perry in the order of their rendition out of the funds now on hand and as they shall accrue in the judgment fund."

That thereafter the city treasurer followed the plan thus outlined of paying judgments up to the early part of the year 1905, and the judgments prior to those sued upon by the plaintiff were paid off in that way. And it is averred that under the laws of the Territory of Oklahoma a judgment fund must be created to satisfy a judgment against a municipality, and a judgment of that kind can be paid in no other way. And that under the laws of Oklahoma no execution can be levied upon a judgment against the municipality, and that during the time since the rendition of the judgments the city of Perry

has had no property subject to levy upon execution, and that the judgments of the plaintiff could not have been paid, and taxes levied for that purpose, because there had not been sufficient money in the judgment fund of the city of Perry to pay the judgments or any part thereof. That under the agreement of December 3, 1901, payments of judgments against the city have been made, but in the order of rendition the fund has been paid upon judgments prior to the plaintiffs. That under the law of the Territory, during the life of the said judgments, at least since the year 1899, it has been the duty of the city of Perry to levy annually a tax not to exceed five mills on the dollar on all the property of the said city, to create a judgment fund, and that said city has made said levy annually, and paid judgments down to the early part of 1905, since which time the city treasurer of the city of Perry, under the direction of the mayor and city council, has declined to pay the plaintiff's judgments or any proportion of the same, and that there has accumulated in the hands of the city treasurer $2,286.96, the judgment fund of said city. And that at all times down to the beginning of the year 1905 the city of Perry has recognized the binding force and validity of said judgments; that the mayor and council and treasurer of said city decline and refuse to recognize the validity of the plaintiff's judgments or pay any part thereof, and deny any liability thereon, solely on the ground that the same have become dormant and barred by the statute of limitations of the Territory of Oklahoma. And other averments are made as to the inability of the plaintiff to otherwise collect their money upon the judgments than by payment by a levy at five mills on the dollar of the taxable property of the city. And the plaintiff prayed a writ of mandamus against the mayor, city council and treasurer of said city, commanding them to recognize the said judgments and to continue to make the five-mill levy allowed by the law for the judgment fund for the payment of said judgments against the city, as provided by law.

An alternate writ of mandamus was issued, reciting the al-

legations of the petition, to which the defendant filed an amended answer, in which they set up that each and all of the judgments set out in the alternate writ of mandamus have become dormant because no execution was issued on any of said judgments, and no proceeding begun for the revival of any of them, and the same were barred by the statute of limitations of the Territory.

The plaintiff filed a motion for judgment upon the amended answer and prayed the issuance of a peremptory writ of mandamus upon the ground that the amended answer failed to state any legal reason why said peremptory writ should not be issued. The defendant moved the court for judgment on the pleadings, on the ground that all the judgments were barred by the statute of limitations. The court sustained the motion of the defendant and entered final judgment in the defendant's favor, upon the ground that all the judgments set out in the alternate writ of mandamus have become dormant and are barred by the statute of limitations.

Upon proceedings in error in the Supreme Court of the Territory of Oklahoma this judgment was affirmed on the authority of *Beadles* v. *Fry*, 15 Oklahoma, 428. The present case is reported, 17 Oklahoma, 162.

The question is first made as to the jurisdiction of this court, because it is averred that the sum of $5,000 is not involved, but we are of the opinion that the issue made and decided involved the validity of the $16,000 and upwards, of judgments described in the petition and amended writ. The prayer of the petitioner was for a continuous levy of taxes for the amount permitted by law to be applied in payment of the judgments. The answer set up that all the judgments were barred by the statute of limitations, and the District Court of Noble County determined that the judgments and each and all of them set out in the petition and alternate writ of mandamus had become dormant and were barred by the statute of limitations. This judgment was affirmed by the Supreme Court of Oklahoma.

Appeals and writs of error are allowed from the Supreme Court of Oklahoma to this court where the value of the property or the amount in controversy, to be ascertained by the affidavit of either party or other competent witness, exceeds $5,000. Supplement U. S. Revised Stats. vol. 1, p. 724.

We think the judgment in this case involves the validity of all the plaintiff's judgments, and that the amount in controversy is not simply the fund in the hands of the treasurer, but the amount of all the judgments concerning which relief was sought and which were directly adjudicated to be barred by the statute of limitations.

The question made in the case is whether the judgments are dormant by the statute of limitations of the Territory of Oklahoma for failure to issue execution thereon for the period of five years, and because the same were not revived within one year after they became dormant. The statutes of Oklahoma in 2 Wilson's Statutes of 1903, provide as follows:

Section 4635. "If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered, in any court of record in this Territory, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor."

Section 4623 is as follows:

"An order to revive an action against the representative or successor of a defendant shall not be made without the consent of such representative or successor unless in one year from the time it could have been first made."

And section 4630 provides:

"If a judgment becomes dormant it may be revived in the same manner as prescribed for reviving actions before judgment."

It is contended by the counsel for the appellant that this case is governed by the ruling of this court in *Duke, Mayor*

&c. v. *Turner and others,* 204 U. S. 623. We are of opinion that the question here involved was not determined in that case. There was no question of a judgment becoming dormant under the statute of limitations for want of execution within five years. The point decided in that case was that the petition for mandamus was not a civil action within the meaning of the Oklahoma Code, barred by the three-year statute of limitations, and the question was whether the relator had slept upon his rights for such an unreasonable time as to prejudice the rights of the defendant and preclude relief by mandamus. In this case the underlying question is not as to whether a writ of mandamus is the proper remedy, but is, whether the judgment is dormant by reason of the statute of limitations and incapable of being enforced against the municipality.

The Supreme Court of Oklahoma held that the statute made no exception, and that notwithstanding the averment of the petition that the city of Perry had no property liable to be reached on execution, that unless execution were issued within the five years, or the judgment revived within one year, it had become dormant for failure to comply with the law.

There is some difference of view in the opinion of the courts upon the subject of executions against municipalities, and in some of them it is held that property of a municipality may be reached on execution which is held for profit and not charged with any public trust or use. It was held in this court that the public property of a municipal corporation cannot be seized upon execution. *Klein* v. *New Orleans,* 99 U. S. 149.

Judge Dillon, in his work on Municipal Corporations (4th ed.) notices the differences of ruling on the subject, and states as his own conclusion § 576:

"On principle, in the absence of statutable provision, or legislative policy in the particular State, it would seem to be a sound view to hold that the right to contract and the power to be sued give to the creditor a right to recover judgment; that judgment should be enforceable by execution against the

strictly private property of the corporation, but not against any property owned or used by the corporation for public purposes, such as public buildings, hospitals and cemeteries; fire engines and apparatus, waterworks, and the like; and that judgments should not be deemed liens upon real property except when it may be taken in execution."

Accepting the decision of the Supreme Court of Oklahoma, rendered in 15 Oklahoma, *supra*, construing the statute so as to permit the issuance of execution against the municipality, with the right to levy upon the private property of the corporation if it has any, could the city take advantage of the failure to issue execution under the circumstances shown in this case? This subject was briefly disposed of in the opinion in that court, and of it the learned court said (15 Oklahoma, 436):

"It is alleged that this agreement and resolution of the city council prevented the running of the statutes. This resolution was passed at a time when the plaintiff's judgments were in full force and effect. The city council did not attempt to renew its liability on these judgments. Without expressing our views as to whether such judgments should be paid *pro rata*, or in order of priority as to date, we are of the opinion that the council could not change the law, and if the resolution purported to change it, it would be void; and if it was in conformity with the law it would not change the relation of the parties."

That the principles of right and justice, upon which the doctrine of estoppel *in pais* rest, are applicable to municipal corporations, is recognized by textwriters and in well-considered cases. In 1 Dillon on Municipal Corporations (4th ed.), in a note to § 417, that learned author says:

"Any positive acts (*infra vires*) by municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself, by retracting what its officers had done, will work an estoppel."

And this case does not rest on the ground of equitable es-

toppel alone. The manner of liquidation of these judgments was the subject of express contract between the parties.

In the present case, by the action of the city council, the judgment creditors were so placed that during the time, at least while the city council were carrying out the arrangement of December 3, 1901, in good faith, they could not consistently with fair dealing and the terms of the contract on their part, issue an execution to seize the property of the municipality; had they undertaken to do so a court of equity would have promptly restrained such proceedings.

It is averred, and not denied, that up until the year 1905 the city council made a levy each year for the largest amount which the statute permitted, to create a judgment fund out of which to pay, and out of which was regularly paid, the outstanding judgments against the city, and that these payments continued until the plaintiff's judgments were reached, which were next in order. While thus acting to the limit to which the law permitted, and in good faith carrying out the arrangement between the parties, it is perfectly apparent that the plaintiff was not in a position to seize by execution any property of the municipality.

If it could be held, as the authorities indicate (2 Dillon on Municip. Corp., 4th ed., § 850, note 1), that when execution cannot be issued on a judgment against a municipality, mandamus may take its place, the action of the city council in making the arrangement in question would have equally prevented the plaintiffs from availing themselves of that writ.

In this case the agreement made by the parties in December, 1901, was being continuously carried out until 1905. And during that time the city of Perry was doing all it could be compelled by mandamus to do in levying taxes to the full amount required by law for the payment of judgments against the city. The court would have no power by mandamus to compel the levy of taxes which the law did not authorize. *United States* v. *Macon County Court*, 99 U. S. 582.

As we have said, the principles of natural justice and fair

dealing are alike applicable to municipal corporations as to individuals, and to permit the city to escape the payment of judgments, whose validity is not otherwise questioned, for failure to issue execution or sue out a writ of mandamus during the time when the action of the city officers was such as to prevent the exercise of the right, would be to permit the action of the representatives of the city, who have had the benefit of the contract during the time both parties were observing its obligations, to work a gross injustice upon the creditors holding valid judgments against the municipality.

We have been referred to no case precisely in point. Analogous cases are not altogether wanting. In *Mercantile Trust Co.* v. *St. L. & S. F. Rwy.*, 69 Fed. Rep. 193, it was held that a stay of execution in the record prevented the judgment becoming dormant. In *Marshall* v. *Minter*, 43 Mississippi, 678, it was held that the statute did not run during the time an injunction was in force, sued out by the adverse party and afterwards dissolved.

It is not argued at the bar in this case that the arrangement with the judgment creditors was void for want of power in the municipality to make the arrangement of December, 1901, and we fail to see any valid reason why the municipality might not enter into this arrangement. It was permitted by law to make an annual levy of five mills on the dollar. 1 Wilson's Statutes, 1903, § 466. If the judgment creditors and the municipality saw fit to make an arrangement by which the amount of this annual levy might be distributed by the consent of the creditors among them in accordance with the priority of their judgments, we perceive no reason why this may not be legally done. The effect of this arrangement was to prevent the judgment creditor from taking such steps as the law permitted to collect his judgment, and, upon principles of common right and justice, it would not do to permit the city to carry out such an arrangement during nearly all the five years' period, and then meet its obligation by a plea of the statute of limitations upon the ground that the judgments

had become dormant, while both parties were recognizing their binding obligation and doing all that the law permitted, to effect their satisfaction, and had entered into a contract which prevented the judgment creditors from taking steps to avail themselves of their right to collect their judgments by execution or by writ of mandamus.

For these reasons the judgment of the Supreme Court of Oklahoma Territory is

Reversed, and the cause remanded to the Supreme Court of the State of Oklahoma for further proceedings in accordance with this opinion.

WARE AND LELAND *v.* MOBILE COUNTY.
WARE AND LELAND *v.* STATE OF ALABAMA.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

Nos. 173, 174. Submitted March 10, 1908.—Decided April 6, 1908.

Contracts for sales of cotton for future delivery, which do not oblige interstate shipments, are not subjects of interstate commerce, nor does the fact that a delivery may be made by means of interstate carriage make them so; and a state tax on persons engaged in buying and selling cotton for future delivery held in this case not to be a regulation of interstate commerce and as such beyond the power of the State. *Paul* v. *Virginia* (insurance policy case), 8 Wall. 168, followed; *Lottery Case*, 188 U. S. 321; *Rearick* v. *Pennsylvania*, 203 U. S. 507, distinguished.
146 Alabama, 163, affirmed.

THE facts are stated in the opinion.

Mr. Burwell Boykin Boone for plaintiffs in error:

The license tax in question, sought to be collected from the plaintiffs in error, is a burden upon and a regulation of interstate commerce, and in conflict with Article I, Section 8, para-

graph 3, of the Constitution of the United States. *Champion* v. *Ames*, 188 U. S. 351; *Hanley* v. *Kansas City Southern R. R. Co.*, 187 U. S. 619; *Stradford* v. *City Council of Montgomery*, 110 Alabama, 619; *Stockard* v. *Morgan*, 185 U. S. 27; *Brennan* v. *Titusville*, 153 U. S. 289; *Caldwell* v. *North Carolina*, 187 U. S. 622.

No counsel appeared for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

These cases were submitted together and are in all respects similar, and involve the constitutional validity of subdivision 40 of an act of the legislature of Alabama imposing license taxes, "to better provide for the revenue of the State," General Acts, 1903, p. 207, which reads as follows:

"For each person engaged in the business of buying and selling futures for speculation or on commission, either for themselves or for other persons, and each place of business commonly known as cotton exchanges, or stock exchanges, and sometimes called 'bucket shops,' in towns and cities of twenty thousand inhabitants or more, five hundred dollars; in all other towns and cities, two hundred and fifty dollars; but this shall not be held to legalize any contract which would otherwise be invalid."

In case No. 173 the action was brought by Mobile County for the recovery of the defendants' license tax for the year 1903, for engaging in the business of buying and selling futures on commission for other persons in the city of Mobile. The other case (No. 174) was an action by the State. Plaintiffs recovered in the Circuit Court and both judgments were affirmed by the Supreme Court. 146 Alabama, 163.

The cases were submitted upon an agreed statement of the facts as follows:

"During the whole of the year 1903 defendants had an office in the city of Mobile, in the county of Mobile and State

of Alabama: they also had offices in the city of New York in the State of New York, and in the city of New Orleans in the State of Louisiana, and in the city of Chicago in the State of Illinois, each of which offices was connected by private telegraph wires with said Mobile office. Said Mobile, Alabama, office was in the charge of their agent, one Robbins, and was engaged in the business of buying and selling cotton for future delivery, on commission, for the public generally and for special customers, said business being conducted in the following way and in no other way: They would undertake, through their agent, to buy or sell a cotton future contract for a customer in the Cotton Exchange in New York or in New Orleans, as he might select, he making at the time a deposit of money with them as a margin to protect them against loss in making such transaction for him. When the customer gave the order to Ware and Leland, either for a sale or a purchase of a future contract, it was not usual for anything to be said between them about an actual delivery of the cotton, but when the transaction was commenced by a purchase or sale of the cotton Ware and Leland would immediately furnish to the customer a memorandum thereof, partly written and partly printed, upon which the following stipulations were printed: 'On all marginal business, we reserve the right to close transactions without further notice when margins are about exhausted, and to settle contracts in accordance with the rules and customs of the exchange on which the order is placed, it being understood and agreed in all trades that actual delivery is contemplated,' and 'All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the exchange on which the order is placed, and the rules, regulations and requirements of the board of managers of said exchange, and all amendments that may be made thereto.' Such agent would thereupon transmit such order by their private telegraph line to the defendants' office in the city without the State of Alabama selected for such transaction; that such order would be there-

upon executed by defendants by the purchase or sale, as directed, of a future cotton contract for such customer in the cotton exchange of the city to which such order was sent, and subject to the rules and regulations of such cotton exchange, which rules and regulations may be introduced in evidence by defendants in this cause; that said contract would be held by defendants for such customer until he ordered the same closed out, when they would sell or buy another cotton contract against it as might be necessary to cover the same or close it out, or receive or deliver the cotton on said contract. If a profit was made on the transaction defendants remitted the same to its agent in Mobile, who paid it over to the customer; if a loss was made, it was taken by the agent out of the customers' margin, or, if that was insufficient therefor, the customer was called on for the balance. Said business was done on a commission paid defendants by the customers.

"No actual delivery of cotton or grain was ever made on any such contracts, except in a few instances, when such deliveries were made where the contracts were executed, to wit: in New York, New York, or in New Orleans, Louisiana, or Chicago, Illinois. When any such delivery of cotton was made to defendants for the customer on a purchase by him, it was held by the defendants for account of the customer at the place of delivery, either in New York, New York, or in New Orleans, Louisiana, until ordered sold by the customer, and was then sold by them there for the account of the customer, and the proceeds accounted for by them to such customer. When they made delivery of cotton on a sale of futures made by them for a customer, the cotton was shipped by the customer for whom such sale was made from Alabama to the place of sale and there delivered through defendants to the buyer.

"A similar future grain business was done by defendants at their said office in Mobile, Alabama, for customers through their office in Chicago, in the State of Illinois—said orders being executed on the Chicago, Illinois, Board of Trade, and subject to its rules and regulations, which contemplated and

provided for the actual receipt or delivery of grain bought or sold therein—such delivery to be made in Chicago, Illinois.

"During the whole of the year 1903 said city of Mobile, Alabama, was a city of more than twenty thousand inhabitants.

"Defendant paid to plaintiff a license tax of one hundred dollars for doing such business in said city for the year 1903, which payment was made prior to the fourth day of March, 1903; they have not paid any further license tax to plaintiff for doing such business in said year."

Upon the trial of the action, in addition to the foregoing agreed facts, the counsel for the plaintiff admitted that the rules and regulations of the New York Cotton Exchange, New Orleans Cotton Exchange and Chicago Board of Trade, respectively, provided "that contracts executed therein should be in writing; and also provided that in every cotton or grain contract for future delivery executed and entered into in said exchange or board of trade, it should be stipulated, agreed and understood that an actual receipt and delivery of the cotton or grain was to be had, and that said contracts were transferable and assignable."

The sole question here presented is, whether the statute in question is an attempt to regulate interstate commerce, for if the plaintiffs in error are shown by the foregoing agreed facts to be engaged in interstate commerce then the statute is void, as an attempt by a State to regulate the commerce which the Constitution of the United States places within the exclusive control of Federal authority.

Interstate commerce must be such as takes place between States as differentiated from commerce wholly within a State. It must have reference to interstate trade or dealing, and if the regulation is not such, and comprehends only commerce which is internal, the State may legislate concerning it. In each case the recurring question is, on which side of the line does the commerce under investigation fall?

It is unnecessary to review the former decisions of this court,

as that has been done in very recent cases such as the *Lottery case*, 188 U. S. 321, where it was held that the transportation of lottery tickets was interstate commerce, and as such subject to regulation by act of Congress. In that case the Federal act, prohibiting the transmission of lottery tickets, was sustained, because of the actual carriage in interstate traffic of the tickets themselves, and in concluding the opinion of the majority of the court Mr. Justice Harlan said (p. 363):

"The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that under its power to regulate commerce among the several States Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce and may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress."

And in *Leloup* v. *Mobile*, 127 U. S. 640, it was held that a telegraph company, whose business is the transmission of messages from one State to another, invested with the powers and privileges conferred by Congress, could not be compelled to pay a license tax by the State. And in *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, it was held that interstate telegraphic communications, conducted by companies organized for that purpose, was commerce within the regulating power of Congress. The *Pensacola case* was affirmed in *Telegraph Co.* v. *Texas*, 105 U. S. 460, in which case Mr. Chief Justice Waite, speaking for the court, said, p. 464: "A telegraph company occupies the same relation to commerce as

a carrier of messages that a railroad company does as a carrier of goods."

While the general principles applied in these cases are not to be denied, there is a class of cases which hold that contracts between citizens of different States are not the subjects of interstate commerce, simply because they are negotiated between citizens of different States, or by the agent of a company in another State, where the contract itself is to be completed and carried out wholly within the borders of a State, although such contracts incidentally affect interstate trade.

As in the cases involving insurance policies, it has been held that issuing them in one State and sending them to another, to be there delivered to the insured upon payment of premium, is not a transaction of interstate commerce. *Paul* v. *Virginia*, 8 Wall. 168; *Hooper* v. *California*, 155 U. S. 648; *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389.

In *Paul* v. *Virginia*, Mr. Justice Field, delivering the opinion of the court, said (p. 183):

"Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent to the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase

and sale of goods in Virginia, by a citizen of New York whilst in Virginia, would constitute a portion of such commerce."

In *Hooper* v. *California*, 155 U. S. 648, it was said:

"If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude State control over many contracts purely domestic in their nature. The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.' "

These cases are not in conflict with those in which it is held that the negotiation of sales of goods in a State by a person employed to solicit for them in another State, the goods to be shipped from the one State to the other, is interstate commerce. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; similar cases are *Rearick* v. *Pennsylvania*, 203 U. S. 507, and *Caldwell* v. *North Carolina*, 187 U. S. 622. In these cases goods in a foreign State are sold upon orders for the purpose of bringing them to the State which undertakes to tax them, and the transactions are held to be interstate commerce, because the subject-matter of the dealing is goods to be shipped in interstate commerce; to be carried between States and delivered from vendor to purchaser by means of interstate carriage.

But how stands the present case upon the facts stipulated? The appellants are brokers who take orders and transmit them to other States for the purchase and sale of grain or cotton upon speculation. They are, in no just sense, common carriers of messages, as are the telegraph companies. For that part of the transactions, merely speculative and followed by no actual delivery, it cannot be fairly contended that such contracts are

the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery, as result in actual delivery of the grain or cotton, the stipulated facts show that when the orders transmitted are received in the foreign State the property is bought in that State and there held for the purchaser. The transaction was thus closed by a contract completed and executed in the foreign State, although the orders were received from another State. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one State to the place of delivery in another State. And though it is stipulated that shipments were made from Alabama to the foreign State in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic, because of the contracts made by the brokers.

These contracts are not, therefore, the subjects of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another State than that of the residence and office of the company. The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce.

We are of the opinion that the Supreme Court of Alabama correctly held that the transactions of the plaintiffs in error were not interstate commerce, and the judgments in both cases are

Affirmed.

LONGYEAR *v.* TOOLAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 177. Argued March 13, 1908.—Decided April 6, 1908.

An owner of property must be held to knowledge that failure to pay duly assessed taxes will be followed by sale; and if the statute gives him full opportunity to be heard as to the assessment on definite days, and definitely fixes the time for payment and the time for sale in case of default, so that he cannot fail, if duly diligent, to learn of the pendency of the sale, he is not denied due process of law because the notice of sale is by publication and not by personal service; and the validity of a tax sale under the law of Michigan sustained.

144 Michigan, 55, affirmed.

THE facts are stated in the opinion.

Mr. Edward Cahill for plaintiff in error:

When notice by statute is relied on to supply the place of process it must contain the elements of notice and must be as definite and certain in all the essentials of notice as any other legal process. If a statute is deficient in respect to prescribing with certainty the time and place of hearing, the defect cannot be supplied by publication of the notice unless the statute also fixes definitely the time and place when and where the publication shall be made and so furnishes, by reference, a means of certainty. What is required is notice and notice to be of value must possess certainty or furnish the means of certainty to the person entitled to it. *State R. R. Tax cases*, 92 U. S. 575; *Davidson* v. *Board of Administration of New Orleans*, 97 U. S. 108; *Hager* v. *Reclamation District*, 111 U. S. 701; *C. N. O. & T. P. R. R. Co.* v. *Kentucky*, 115 U. S. 321; *Spencer* v. *Merchant*, 125 U. S. 345; *P. C. C. & St. L. Ry. Co.* v. *Backus*, 154 U. S. 421; *Winona Land Co.* v. *Minnesota*, 159 U. S. 526, substantially differ from the case at bar.

Mr. Harris E. Thomas, with whom *Mr. Charles W. Nichols* was on the brief, for defendants in error.

MR. JUSTICE MOODY delivered the opinion of the court.

This is a writ of error to the Supreme Court of Michigan. That court rendered judgment for the defendants in error, who were the original plaintiffs, against the plaintiff in error, who was the original defendant, in an action of ejectment to recover a certain lot of land. The defendant was at one time the owner of the land in dispute, but it was conveyed to the plaintiffs by a deed given in pursuance of a sale for taxes. The title to the land depends upon the validity of the tax title, which was upheld by the court below. The issue in this court is narrowed to the question whether the sale of the land for the enforcement and collection of the taxes, which it is conceded were duly levied, violated the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The method in Michigan of the assessment and collection of taxes on real property is as follows: On or before the third Monday in May the Supervisor of the township makes a tax roll, on which each parcel of real property is described, and the name of its owner, if known, set opposite. The Supervisor then estimates the true cash value of the property. On the Tuesday next following the third Monday of May the Supervisor submits his assessment roll to a board of review for correction and approval. On the fourth Monday of May and the day following the board sits, and, at the request of any taxpayer, has the power to correct the assessment on his property. The members of the board have authority to administer the oath and to examine witnesses. The assessment roll is then finally made up and certified. The Supervisor then proceeds to assess taxes in accordance with the assessment roll, and from the first day of December following they become a lien upon the property until payment. Act 206 of the Laws of 1893 provides for

the enforcement and collection of delinquent taxes by sale. All lands, the taxes upon which have remained unpaid for a year after the lands have been returned to the Auditor General or the county treasurers as delinquent, are declared to be subject to sale in satisfaction of the tax lien. The law provides, § 61, that "as soon as practicable after the first day of June . . . the Auditor General shall prepare and file in the office of the County Clerk . . . a petition addressed to the Circuit Court for said county in chancery, stating therein by apt reference to lists or schedules annexed thereto, a description of all lands in such county upon which taxes have remained unpaid for more than one year prior to . . . the first day of May of the year in which the petition is filed, and the total amount of such taxes. . . . Such petition shall pray a decree in favor of the State of Michigan against said land for the payment of the several amounts so specified therein, and in default thereof that such lands be sold." The petition is then entered in "a substantial record book," with a list of the lands and the taxes upon them. The Circuit Judge thereupon makes an order that the petition will be brought to hearing and decree at a time and place named, at which all persons interested who desire to contest the lien of the State may appear and file their objections, and that in default of appearance a decree as prayed for will be entered. The petition, with the order thereon, must then be published at least once a week for four weeks next prior to the time fixed for hearing, in some newspaper published and circulating in the county to be designated by the Auditor General. If there is no such newspaper, or none such can be secured, the petition and order must be printed and furnished to each voter in the county and copies posted in three public places in each township. The foregoing publication is declared by the law to be "equivalent to a personal service of notice on all persons who are interested in the lands specified in such petition, of the filing thereof, of all proceedings thereon and of the sale of the lands under the decree, and shall give the court jurisdiction"

to proceed to a decree. An appeal to the Supreme Court may be taken by either party. On the first Monday of December following the county treasurer begins to make the sales decreed by the court, must report them to the clerk of the court, and eight days after the sales are reported to the clerk of the court are given for objections to the sale, which may be set aside as in the practice in cases of sales in equity on the foreclosure of mortgages. The sale is then confirmed, subject to a right of redemption, which may be exercised at any time within one year from the sale. The sale, however, may be set aside within one year after the owner has notice of the sale, if the taxes have been paid or the property was exempt.

The sale in the case at bar was made after proceedings which, in all respects, conformed to the statute. The single objection made in behalf of the plaintiff in error is that the statute denies to him, then being a resident of the State, the due process of law required by the Constitution, in that it substitutes notice by publication of the proceedings for sale for personal service. It has been shown that the Michigan law provides a board of review, which holds sessions on days fixed by the law, where every person whose property is on the provisional assessment roll submitted by the Supervisor may be heard to correct the assessment. It would seem that this opportunity for hearing, coupled with the provision for setting aside the sale within one year after notice of it, which has been stated, satisfies the requirement of due process of law made by the Fourteenth Amendment, and that the State may be left to enforce the collection of the taxes as it chooses. But we pass this question without deciding it, simply observing that in *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, it was said, p. 537, that the Fourteenth Amendment was not violated "if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its collection." If it be assumed that the delinquent taxpayer, who has already had an opportunity to be heard upon the assessment of the

tax upon his property, is entitled to further notice of the pendency of proceedings to sell the land in satisfaction of the tax lien, then the statute before us requires a sufficient notice. It is no objection that the notice was only by publication. In the case of *Leigh* v. *Green*, 193 U. S. 79, a case of publication, the authorities were reviewed, and it was said, p. 92: "Where the State seeks directly, or by authorization to others to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the Court, and a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment to the Constitution." Moreover, the case at bar cannot be distinguished from *Winona & St. Peter Land Co.* v. *Minnesota, supra.* There a statute similar to the one now before us was held to afford due process of law. The only distinction suggested is that the Minnesota statute fixed more definitely than the Michigan statute the time of filing the petition, of making the order for hearing, and of the hearing itself. But those times are fixed with sufficient certainty here. The owner of property whose taxes, duly assessed, have remained unpaid for more than one year must be held to the knowledge that proceedings for sale are liable to be begun as soon as practicable after the first day of June, and that the law contemplates that they will be ended before December 1, when the sales will be made by the county treasurer. The proceedings are inscribed on the public records and otherwise made notorious. If he exercises due vigilance, he cannot fail to learn of their pendency, and that full opportunity to defend is afforded to him. This satisfies the demands of due process of law, and the judgment is

Affirmed.

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

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

No. 196. Submitted March 20, 1908.—Decided April 6, 1908.

A ruling by the highest court of the State sustaining the method of proving the existence of a law of that State presents no Federal question.

Where the language of the appellate court is ambiguous, if it may be taken as a declination to pass upon a question not necessary to the decision, this court will not, in order to aid a technical and non-meritorious defense, spell out a Federal question; but it will resolve the ambiguity against the plaintiff in error who is bound, in order to give this court jurisdiction, to clearly show that a Federal right has been impaired.

Writ of error to review 185 N. Y. 107, dismissed.

THE facts are stated in the opinion.

Mr. Edward Mitchell for plaintiffs in error.

Mr. David B. Hill for defendant in error.

MR. JUSTICE MOODY delivered the opinion of the court.

This is a writ of error to a Surrogates' Court of the State of New York. The judgment brought under review was entered in obedience to a judgment of the Court of Appeals of that State. The judgment imposed a transfer tax upon certain real property devised by the will of Joseph Stickney, deceased. The tax was properly assessed if an act purporting to be passed on March 16, 1903, 1 Session Laws of 1903, p. 165, was a duly enacted law of the State. It appears that, by the constitution of the State, laws of the nature of this one require for their due enactment a majority vote in each legislative chamber when three-fifths of the members are present. The presiding officers of both branches of the legislature, in certifying that this bill was duly passed by a majority vote, failed to certify that three-fifths of the members were then present.

The defendant in error was permitted, over the objection of the plaintiffs in error, to prove that the journals of the two houses showed that the requisite number of members were, in point of fact, present. This the Court of Appeals held to be sufficient to show that the statute was validly enacted. The first five assignments of error in this court simply allege in various forms that the Court of Appeals erred in its decision of the cause. These assignments may be summarily overruled upon the plain ground that they present no Federal question. It must not, however, be understood that we intimate that any form of assignment would have given this court the authority to review the determination of the highest court of a State of the proper method of proving the existence of its own laws. *Town of South Ottawa* v. *Perkins*, 94 U. S. 260; *Railroad Co.* v. *Georgia*, 98 U. S. 359; *Post* v. *Supervisors*, 105 U. S. 667; *In re Duncan*, 139 U. S. 449; *Wilkes County* v. *Coler*, 180 U. S. 506.

There is, however, a sixth assignment of error. For its understanding it is necessary to make a further statement of facts. When certified copies of the journals of the two houses were offered in evidence, for the purpose of showing that at the time of the passage of the bill three-fifths of the members were in fact present, notwithstanding the omission of the presiding officers to certify to their presence, counsel for plaintiffs in error made the following objection: "I object on the ground that the paper offered is incompetent, irrelevant and immaterial; that the original journal, if produced, is not a record either at common law or by the statute, and cannot be introduced in evidence, and cannot be resorted to by the court for the purpose of either validating or impeaching any law, and that the legislative law makes the certificates of the presiding officers conclusive evidence as to whether the majority were present or three-fifths, and the conclusive evidence is that there was only a majority present and not three-fifths." The objection was overruled, the evidence was admitted, and an exception was taken. It will be observed that no objec-

tion was taken that the original journals were not produced, but only that if produced they were not admissible to add to or vary the certificates of the presiding officers, which were conclusive as to the numbers present. The judgment of the Surrogate, which was in writing, and of the Appellate Division of the Supreme Court, proceeded upon this view of the objection, and treated the question exactly as if the original journals had been offered. But the judgment of the Court of Appeals indicates that there it was objected, for the first time as far as the record discloses, that the original journals were not produced and that the certified copies were not competent evidence of their contents. The inference that such a question was raised can only be drawn from the concluding part of the opinion. After deciding that the presence of the requisite number of members could be proved by recourse to the journals, and that the journals showed the fact, the court said: "It is contended, however, that the authenticity of the journals of the Legislature, certified copies of which were put in evidence, was not established, and that with the failure of any original record certified extracts therefrom were not competent. Without expressing any opinion on this objection, it is sufficient to say that the question has now been set at rest by the enactment, since the argument of the appeal, of Chapter 240 of the Laws of 1906, p. 471, which in express terms declares the printed copies to be the original journals of the two houses, and makes them, or copies thereof, competent evidence when certified by the respective clerks of the Senate and Assembly." A motion for rehearing was made and denied. Based upon this part of the opinion, a supposed Federal question is alleged in the sixth assignment of error in this court, which is as follows:

"VI. That the said Court of Appeals of the State of New York erred in holding and deciding that the motion for reargument and for a hearing on the validity and effect of Chapter 240 of the Laws of 1906 should be denied; by reason of which denial the said Court of Appeals has, in effect, held:

"(*a*) that Chapter 240 of the Laws of 1906 should be construed to have a retroactive effect, and

"(*b*) that such construction would not be in violation of the Fourteenth Article of the Amendments to the Constitution of the United States and,

"(*c*) would not impose and exact a tax without due notice and without due process of law, and

"(*d*) that the State would not by such act and such construction thereof deprive the plaintiffs in error of property without due notice and without due process of law; each of these grounds having been stated in the notice of said motion by the plaintiffs in error, who then and there insisted upon their constitutional rights in such respects as soon as the occasion arose."

We do not intend to intimate that, if the words of the opinion were capable of the meaning which is attributed to them in this assignment of error, there would have been shown any violation of the Fourteenth Amendment. *League* v. *Texas*, 184 U. S. 156. But we think, in view of the fact that when the copies of the journals were offered in evidence no objection had been made that the originals were not produced, the language of the court may quite as naturally be interpreted as a declination to pass on a question, not necessary to the decision, which had been set at rest for the future by legislation. The best that can be said for the plaintiffs in error is that the action of the court was ambiguous. We resolve the ambiguity against the parties complaining, who are bound to show clearly that a Federal right was impaired, rather than misuse our ingenuity to spell out a Federal question to aid a defense which is merely technical and destitute of substantial merit.

It does not therefore appear that the judgment under review was based upon the decision of any Federal question. *Bachtel* v. *Wilson*, 204 U. S. 36.

The writ of error is

Dismissed.

SHAWNEE COMPRESS COMPANY *v.* ANDERSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 140. Argued March 2, 3, 1908.—Decided April 13, 1908.

Where the Supreme Court of the Territory of Oklahoma reverses the judgment of the trial court, the reviewing power of this court is limited to determining whether there was evidence supporting the findings and whether the facts found were adequate to sustain the legal conclusions.

In this case, the Supreme Court of the Territory having found that a lease, being made to further an unlawful enterprise, was void as an unreasonable restraint of trade and as against public policy, this court sustains the judgment, there being proof supporting the conclusions to the effect that the lessor company agreed to go out of the field of competition, not to enter that field again, and to render every assistance to prevent others from entering it—other acts in aid of a scheme of monopoly also being proved.

It is not necessary to determine whether the Supreme Court of the Territory based its judgment holding such a lease void, on the common law, on the Sherman law, or on the statutes of the Territory; the restraint placed upon the lessor was greater than the protection of the lessee required.

17 Oklahoma, 231, affirmed.

THIS suit was brought in the District Court of the county of Lincoln, Territory of Oklahoma, by appellees as stockholders of the Shawnee Compress Company against appellants, to cancel a lease made by the Shawnee Compress Company to the Gulf Compress Company.

The original petition alleged that the compress companies were respectively corporations of Oklahoma and the State of Alabama; that the plaintiffs, appellees here, were minority stockholders of the Shawnee Company; that certain of the stockholders of the Shawnee Company, claiming to be its officers, "conceived the idea of leasing the entire property and business of said company, together with its good will and the right to the business thereof to said defendant, Gulf Compress Company, a foreign corporation;" that subsequently the

same stockholders, claiming to be the directors of the corporation in certain meetings and by certain resolutions, executed the purpose. These meetings were alleged to be invalid as not being in conformity with the by-laws, and that the proceedings therein were "wholly illegal and beyond the powers and authority of the said stockholders and directors of said corporation;" that the corporation was organized to construct and operate a cotton compress in the city of Shawnee, and that its officers and stockholders were not authorized to execute a lease for a period of years, vesting in another and foreign corporation, the rights, duties and business of the company, and that the lease was void as against the rights of plaintiffs, being minority stockholders of the company. A copy of the lease was attached to the petition.

The petition was amended, making the allegations somewhat fuller, and alleged that appellants Stubbs and Beatty, who assumed to act respectively as president and secretary of the company, and certain other stockholders who joined with them in the negotiation of the lease, were induced thereto by certain advantages personal to themselves and not by the interest of the company. It was also alleged that the "exigencies of the business" of the company did not demand or justify the lease, and that its revenues for the season 1904–1905, over and above taxes and insurance, notwithstanding negligent and incompetent management, were $7,485.89; and, plaintiffs expressed the belief, could be made greater for the years covered by the lease. It was alleged that the Gulf Compress Company was in the business of leasing and operating competing compresses for the purpose of monopolizing, as far as possible, the business of compressing cotton in a large portion, if not all, of the cotton-raising districts of the United States, and that the lease was procured from the Shawnee Company in pursuance of said scheme, and other leases of other compresses were also secured for like purposes, and that the Gulf Company is in its operation and method of conducting business a trust, combine and conspiracy, in restraint of trade

and commerce, in violation of the Federal anti-trust law and the anti-trust law of the Territory of Oklahoma, and that it is the design of the Gulf Compress Company to increase the charge of compressing cotton, and that it will be able to enforce such charges by reason of the fact that it will control all of the compresses in the Territory.

There was a demurrer to the petition, which was overruled. An answer was then filed, which in detail asserted the validity of the proceedings preceding the execution of the lease; that the company was indebted in the sum of $17,250—$6,000 to the Shawnee National Bank and $11,250 to the Webb Press Company, Limited, which was past due; that its creditors were pressing for payment, and that the lease was necessary in order to procure money by which to pay the Shawnee Bank and to secure the extension of time on the indebtedness due the Webb Press Company, and that for these reasons the negotiations for the lease were entered into and the lease finally made. And it is alleged that the consideration paid was fair and reasonable and for the best interest of the stockholders of the Shawnee Company; that defendants could procure said second mortgage money in no other way, and that the property of the Shawnee Company would have been sold at a great sacrifice unless the lease had been made.

It is alleged that appellees are firms of cotton buyers, and in order to obtain an unfair advantage over other buyers have conspired together for the purpose of forming a monopoly of all the compresses in the Territory and destroying competition in compressing, and, in order to carry out the conspiracy, have, for more than six months, endeavored to obtain a majority of the stock of the Shawnee Company, and, knowing that Beatty and Stubbs were involved and in need of money, have in all ways oppressed said Beatty and Stubbs to compel them to sell their stock to appellants for an inadequate consideration and conspired to compel the Shawnee Company, knowing it was involved and its demands pressing, to sell and convey its property to them for the inadequate consideration of $25,000.

And it is alleged that the lease was made to defeat such conspiracy. Other plans of the appellees to harass the Shawnee Company are averred.

The case went to trial on the issues thus formed and resulted in a judgment for defendants (appellants here). The judgment recited that "the court having heard all the evidence offered . . . and being fully advised in the premises finds for the defendants and against the plaintiffs that the allegations of the petition of the plaintiffs are not supported by the law and the evidence."

A motion for a new trial was denied and the case was then taken to the Supreme Court of the Territory, which court reversed the judgment of the court below, and the case was remanded to the District Court, with instructions to that court to render judgment for plaintiffs in the case (appellees here) in accordance with the opinion of the Supreme Court, and the prayer of the amended petition.

Mr. B. B. Blakeney, with whom *Mr. G. T. Fitzhugh* was on the brief, for appellants:

An act is not necessarily invalid because in restraint of trade, when the restriction of trade is an ancillary or incidental result.

To be condemned by the law a contract must be an agreement between the parties to restrict trade, and such contract is invalid, whatever may be the result of its operation. If a purchaser buys one or more compresses and operates them as his own property, competition is to that extent restricted, but being incidental, such contract is not invalid, and will not be held invalid because the purchaser may have taken a contract from the seller obligating the seller not to carry on or resume such business. Such provisions are usual and have been sanctioned by the courts. *Fowle et al.* v. *Park et al.*, 131 U. S. 88; *Gibbs* v. *Gas Co.*, 130 U. S. 396; *Cin., P. B. S. & P. P. Co.* v. *Bay et al.*, 200 U. S. 179; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *Bement & Sons* v. *National Harrow Co.*,

186 U. S. 70, 92; *Navigation Company* v. *Windsor*, 20 Wall. 64, 68; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *Tode* v. *Gross*, 127 N. Y. 480; *Beal* v. *Chase*, 31 Michigan, 490; *Hubbard* v. *Miller*, 27 Michigan, 15; *National Ben. Co.* v. *Union Hospital Co.*, 45 Minnesota, 272; *Whitney* v. *Slayton*, 40 Maine, 224; *Pierce* v. *Fuller*, 8 Massachusetts, 222; *Richards* v. *Seating Co.*, 87 Wisconsin, 503; *National Enameling & Co.* v. *Haveman*, 120 Fed. Rep. 415; *United States* v. *Addyston P. & S. Co.*, 29 C. C. A. 141; *S. C.*, 85 Fed. Rep. 271; *Davis* v. *Booth*, 131 Fed. Rep. 31, 37; *S. C.*, 127 Fed. Rep. 871; *In re Greene*, 52 Fed. Rep. 104; *Chicago, St. L. &c. Ry. Co.* v. *Pullman*, 139 U. S. 79; *Jarvis et al.* v. *Knapp*, 121 Fed. Rep. 39; *Booth et al.* v. *Davis*, 127 Fed. Rep. 871, and cases cited; *Carter* v. *Alling*, 43 Fed. Rep. 208; *Harrison* v. *Refining Co.*, 116 Fed. Rep. 304; *State* v. *Shippers Compress &c. Co.*, 95 Texas, 603; *S. C.*, 69 S. W. Rep. 58.

The statutes of Oklahoma expressly authorize a contract of this character. Wilson's Revised and Annotated Statutes of Oklahoma, §§ 819, 820.

Both of these statutes were adopted from the statutes of California and have been frequently construed by the Supreme Court of that State. *Brown* v *Kling*, 101 California, 295; *Gregory* v. *Speiker*, 110 California, 150; *Ragsdale* v. *Nagle*, 106 California, 332; *City Carpet Beating &c. Works* v. *Jones*, 102 California, 506; *Vulcan Powder Company* v. *Hercules Powder Company*, 96 California, 510.

Under these sections of the statute one who leases a compress and its good will may enter into a contract to refrain from carrying on a similar business within a specified county. The contract of lease in controversy limits such competition to fifty miles.

The evidence did not disclose whether a radius of fifty miles would have carried it without the boundaries of the county or not, but if fifty miles was an excessive restriction, the excess only was invalid and the restriction might be enforced within the limits of the law.

Such a contract being valid could not serve as a basis for concluding that it would be against public policy by creating an unnecessary restraint of trade, preventing competition and creating a monopoly.

The court below overlooked a well recognized principle which would control in any event in the disposition of this case. If the Gulf Compress Company itself was a monopoly, the Shawnee Compress Company could not for that reason prevent the specific performance of a contract for sale or lease, and, *a priori*, the minority stockholders could not interpose to prevent such performance. *Trenton Pottery Co.* v. *Olyphant*, 51 N. J. E. 507; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473; *Metcalf* v. *American School Furniture Co.*, 122 Fed. Rep. 115–120; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 547; *Willoughby* v. *Chicago Junction Ry. Co.*, 50 N. J. 656.

Mr. James R. Keaton and *Mr. Andrew Wilson*, with whom *Mr. John W. Shartel*, *Mr. Frank Wells* and *Mr. Noel W. Barksdale* were on the brief, for appellees:

The contract of lease from the Shawnee Compress Company to the Gulf Compress Company, of April 26, 1905, tended to create a combination unreasonably in restraint of trade, the prevention of competition and the establishment of a monopoly, therefore being against public policy. 26 Stat. at Large, 209, c. 647, § 3; Wilson's Statutes of Oklahoma, §§ 819, 820. The contract is illegal under the common law, also, which declares all contracts in unreasonable restraint of trade to be contrary to public policy and void.

Under the act of Congress above referred to not only contracts in unreasonable restraint of trade, but every contract in restraint of trade is condemned. See *Pocahontas Coke Co.* v. *Powhatan Coal &c. Co.*, 60 W. Va. 508; *S. C.*, 56 S. E. Rep. 264; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211.

In view of the evidence, it certainly cannot be said that any portion of the lease would unquestionably have been entered into regardless of the provisions for illegal restraint and hence

the entire contract must fall. Okla. Stat. 1893, § 810; Wilson's Ann. Stat. § 767; *Bishop* v. *Palmer*, 146 Massachusetts, 469; *Western Wooden-Ware Assn.* v. *Starkey*, 84 Michigan, 76; *Saratoga Co. Bank* v. *King*, 44 N. Y. 87; *Consumers' Oil Co.* v. *Nunnemaker*, 142 Indiana, 560; *More* v. *Bonnet*, 40 California, 251; *Frost* v. *More*, 40 California, 347.

A contract based upon several considerations, one of which is unlawful, is void. *Edwards Co.* v. *Jennings*, 89 Texas, 618; *Gage* v. *Fisher*, 5 N. D. 297; *Collins* v. *Merrell* (Ky.), 2 Met. 163; *St. L. J. & Co. R. R. Co.* v. *Mathers*, 104 Illinois, 257.

Furthermore, these provisions, in connection with the undisputed testimony to the effect that one of his purposes in procuring the execution of said lease on behalf of the Gulf Compress Company was to prevent unreasonable or unnecessary competition, renders the entire lease contract void, under § 3 of the Sherman law which applies to trade and commerce within the Territories as well as to interstate commerce. *Northern Securities Co.* v. *United States*, 193 U. S. 196; *Western Wooden-Ware Association* v. *Starkey*, 84 Michigan, 76; *Santa Clara Val. M. & L. Co.* v. *Hayes*, 76 California, 387; *Pacific Factor Co.* v. *Adler*, 90 California, 110; *Anheuser-Busch* v. *Houck*, 88 Texas, 184; *State* v. *Distilling Co.*, 29 Nebraska, 700.

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

The Supreme Court of the Territory, in its opinion, discussed only two of the questions urged upon its consideration, to wit (1) the legal power of the Shawnee Compress Company to execute the lease; and (2) the purpose in its execution to secure a monopoly of the business of compressing cotton and to unlawfully restrict competition. Of the first the court said: "We find no express authority to lease set out in the articles of incorporation, but we are nevertheless of the opinion the weight of authority is that when a strictly private corporation finds it cannot profitably continue operations it may lawfully make a lease of its entire property for a term of years."

The court cited cases, and continued (p. 238): "It is only when such exigencies exist as necessitate or render appropriate such or similar action that the right can be exercised." And it was observed that while there was no special finding of fact "in that regard by the trial court, yet this feature must necessarily have been considered, in the light of the evidence introduced at the trial, and the judgment based thereon."

The court further said that it found "ample authority in the record for that action" and, following the rule "often reiterated," the court further said, "it must hold that where the record contains some evidence to support the finding of the trial court," the judgment will not be disturbed.

The ruling sustaining the power of the Shawnee Company to execute the lease is attacked by appellees, but we do not find it necessary to express an opinion upon it, on account of the view we entertain of the second proposition.

In passing on the second proposition the Supreme Court decided adversely to the view taken by the trial court. The court therefore must either have considered that there was not some evidence supporting the conclusions of fact of the trial court or must have deemed the principles of law which the trial court upheld were not sustained by its conclusion of fact. As our review, in the nature of things, is confined to determining whether the court below erred, it follows that our reviewing power under the circumstances is coincident with the authority to review possessed by the court below, and therefore we are confined, as was the court below, to determining whether there was some evidence supporting the findings and whether the facts found were adequate to sustain the legal conclusions. *Southern Pine Lumber Co.* v. *Ward*, 208 U. S. 126.

The court, in its opinion, gives a summary of the pleadings and states the salient points of the lease to be that it conveys all of the property of the Shawnee Company to the Gulf Company, that the Shawnee Company covenants that it will not "directly or indirectly engage in the compressing of cotton

within fifty miles of any plant operated by the" Gulf Company, and that the Shawnee Company "agrees and pledges" to the Gulf Company "its good will, moral and legal support, and that it, individually and collectively, will render the 'Gulf Company' every assistance in discouraging unreasonable and unnecessary competition." And from the evidence the court deduces the following conclusions (p. 236):

"It further appears from the evidence at the trial that C. C. Hanson is the president of both the Atlanta Compress Company and the Gulf Compress Company, being a stockholder in each, and is the one who negotiated the lease in question. That the Atlanta Compress Company operates in the States of Alabama, Georgia and Florida, and was organized and is owned and controlled solely by the carriers for their benefit. That the board of directors and stockholders of said corporation are composed entirely of railroad officials. That the Atlanta Company controls the operation of twenty-five plants. That the Gulf Compress Company is a close corporation, chartered in Mobile, Alabama, and operating in the States of Alabama, Mississippi, Tennessee, Louisiana, Arkansas, Indian Territory and Oklahoma, and controlling the operation of twenty-seven compresses in those States, located at various points therein. That none of the Gulf Company's plants and the Atlanta Company's compresses are operated at the same points.

"It is further disclosed by the evidence that the capital stock of the Gulf Company, as originally incorporated, was $25,000.00, but that it has, within the past year, been increased to one million dollars, of which $600,000.00 is treasury stock. That its field of operation has been rapidly extended from Alabama to all the cotton-growing territory; that it is at the present time engaged in the purchase or leasing of compresses at various points, and, as testified to by its president, is 'prepared to buy or lease, whichever proposition suits us best.' It appears from the evidence that negotiations conducted by Mr. Hanson with Stubbs and Beatty for the lease of the Shaw-

nee plant were in pursuance of an effort to avoid, 'directly or indirectly, the possibility, if not probability, of unnecessary and unreasonable competition.'

"It is further disclosed by the testimony that the carrier pays for the compression of cotton, incorporating the cost thereof in its tariff. That tariffs for the hauling of cotton are established by the railroads as well as hauling districts or territories, within which the haul of cotton must be one way, or otherwise the higher rate, denominated the terminal rate, applies, rendering it unprofitable to ship to other than the established point in the hauling district."

And the court says that from these facts, and others referred to supporting them, it cannot be doubted that the object of the Gulf Company and its allied corporation, the Atlanta Compress Company, "is to prevent competition in compression of cotton throughout the cotton-producing States." The court declared it to be its judgment that "not only is the enterprise in which the Gulf Compress Company is engaged an unlawful one, as now conducted, but the contract in question in this case, being made to further its objects and purposes, is void on the ground that it is in unreasonable restraint of trade and against public policy."

This conclusion is the direct antithesis of that drawn by the trial court and we are brought to the inquiry, is it justified?

The evidence cannot be given in detail, and we may say at the outset that there is no question as to its weight—we are not confronted with conflicting testimonies. This branch of the case is constituted of the lease, principally of the testimony of one witness, the president of the Gulf Company, and of facts which are not disputed. The other testimony, a great deal of which is documentary, is mostly directed to the financial condition of the Shawnee Company as the inducement of the lease and to the proceedings taken to authorize its execution. There is also testimony directed against the purpose and motives of the appellees, and some tending to show that one of the officers and stockholders of the Shawnee Company

had been loaned money by the president of the Gulf Company, whereby control of the Shawnee Company might be obtained and the lease authorized. This, however, we may put out of view.

It may be conceded that the evidence shows that the Shawnee Company was financially embarrassed, and its condition might have justified a lease of its property if that had been all it did. It, however, covenanted for its assistance in discouraging competition against its tenant, and bound itself not to "directly or indirectly engage in the compressing of cotton within fifty miles of any plant operated by the tenant." So far it covenanted to aid in the restraint of trade. It went out of the field of competition; it covenanted not to enter into that field again, and it pledged itself to render every assistance to prevent others from entering it. And it could not misunderstand the purpose for which its lease was solicited. It was told by the president of the Gulf Compress Company. In a letter dated April 18, 1905, addressed to it by the president of that company, among other inducements, the following was expressed: "Our getting together on a lease proposed means the avoiding for each other, directly or indirectly, of the possibility, if not probability, of unnecessary competition." And what was the condition to which the Shawnee Company contributed? It appears from the letter just mentioned that the writer was president of two companies, which operated "forty odd compresses." Twenty-seven of them, it appears from the testimony, were operated by the Gulf Company, six only of which it owned. Most of the latter were acquired in the summer preceding the lease, and the president of the Gulf Company testified that "we are prepared to buy or lease, whichever proposition suits us best." To what object was the assembling in one ownership or management so many compresses, and keeping the means and declaring the purpose of acquiring more? The answer would seem to be obvious. The first effect would necessarily be the cessation of competition. If there was left a possibility of other compresses being con-

structed, it was made less by the power that could be opposed to them. The Gulf Company was a close corporation, which, starting in Alabama, rapidly extended from Alabama to all the cotton-growing territory. These are some of the points of the testimony which, taken in connection with other testimony, and with the terms of the lease and the restriction upon the Shawnee Company, support the conclusions of the Supreme Court of the Territory. This case presents something more than the lease of property by the Shawnee Company, induced or made necessary by financial embarrassment. It presents something more than the acquisition by the Gulf Company of another compress—of a mere addition to its business. It presents acts in aid of a scheme of monopoly. *Swift Co.* v. *United States*, 196 U. S. 375.

It does not appear whether the Supreme Court based its judgment upon the common law, the Sherman law, act of July 2, 1890, c. 647, 26 Stat. 209, or the statutes of Oklahoma. The appellees insist that the law applicable to the case comes from all three sources. The Sherman law provides that, "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia . . . is hereby declared illegal." And it has been decided that not only unreasonable but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law. But it is contended that it was held in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and in *United States* v. *Joint Traffic Association*, 171 U. S. 505, that the sale of the good will of a business with an accompanying agreement not to engage in a similar business was not a restraint of trade within the meaning of the Sherman act.

Counsel has discussed with an affluent citation of cases the principle which regulates such contracts, and insists that the lease by the Shawnee Company conforms to such principle. The principle is well understood. The restraint upon one of the parties must not be greater than protection to the other

party requires, and it needs no further explanation than is given in *Gibbs* v. *Baltimore Gas Company*, 130 U. S. 396. The Supreme Court of the Territory recognized the principle, but said: "Tested by the general principles applicable to contracts of this character, this agreement is far more extensive in its outlook and more onerous in its intention than is necessary to afford a fair protection to the lessee." And in this conclusion the statute of the Territory may have had its influence. That statute makes void every contract by which any one is restrained from exercising a lawful profession, trade or business, except, however, that one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city or part thereof. Wilson's Statutes, §§ 819, 820. It is clear that the lease of the Shawnee Company to the Gulf Company does not literally comply with this requirement. Whether it can be limited by construction, as it is contended by appellants it can be, we need not decide. As written, it was, no doubt, considered with other considerations by the court in concluding that "the real, the veritable purpose actuating the officers of the Gulf Compress Company, as disclosed by its plan of operation, and as manifested by the circumstances surrounding the conduct of its business and the results of its management by them is, beyond a reasonable question, to place within their power the control of the compress industry, by purchasing or leasing those plants which are advantageously located in each of the hauling districts or territories established by the carriers (railroads) in their cotton tariffs. Within certain boundaries the hauling must be one way, and when the Gulf Company seizes the strategic point, under its lease, competition within that district is annihilated."

Decree affirmed.

Ex parte THE STATE OF NEBRASKA.

PETITION FOR WRIT OF MANDAMUS.

No. 15, Original. Argued March 17, 1908.—Decided April 20, 1908.

Mandamus will not lie to correct the decision of the Circuit Court that a party to the record—in this case a State—is not an indispensable party to the suit, and that a separable and removable controversy exists. Such a decision is within the jurisdiction and judicial discretion of the court and can be reviewed by appeal after final judgment in the case.

The mere presence on the record of a State as a party plaintiff will not defeat the jurisdiction of the Federal court when it appears that the State has no real interest in the controversy; and it is the duty of the Circuit Court to ascertain whether the State is an actual party by consideration of the nature of the suit and not by reference to the nominal parties.

The Circuit Court having held that the State of Nebraska was not an actual and necessary party plaintiff to a suit, brought in its name by the Attorney General against a non-resident railroad company to enjoin it from charging more than the rates fixed in a statute of the State and from disobeying orders of the State Railway Commission, refused to remand the case; as such decision may clearly have been correct, was within the jurisdiction of the Circuit Court, and involved no abuse of judicial discretion, this court will not review the decision on petition for mandamus.

On June 15, 1907, the State of Nebraska; William T. Thompson, Attorney General; Nebraska State Railway Commission; Hudson J. Winnett, J. A. Williams and Henry T. Clarke, Jr., as members of the Nebraska State Railway Commission of the State of Nebraska brought suit against the Chicago, Burlington and Quincy Railway Company to enjoin that company from charging more for the transportation of freight and passengers within the State of Nebraska than the rates fixed for such transportation in certain acts of the legislature of the State of Nebraska, and also from disobeying the orders of the Nebraska State Railway Commission, and from concealing from that commission the condition of its business, and from making any unlawful discrimination in violation of the state statute.

June 22, the defendant company filed its petition for the removal of the action to the Circuit Court of the United States. The petition for removal alleged:

"Your petitioner further avers that in the above-entitled suit there is a controversy which is wholly between citizens of different States, to wit: A controversy between your petitioner, Chicago, Burlington & Quincy Railway Company, which your petitioner avers was at the time of the commencement of this suit, ever since has been and now is a corporation created and existing under and by virtue of the laws of the State of Iowa; the said William T. Thompson, Attorney General of the State of Nebraska, one of the plaintiffs, who your petitioner avers was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the State of Nebraska; the Nebraska State Railway Commission, a board organized under the laws of the State of Nebraska for the supervision of railways in said State, and the members composing the said board, whom your petitioner avers were, at the time of the commencement of this suit, ever since have been and still are citizens and residents of the State of Nebraska; the said Hudson J. Winnett, one of the plaintiffs and a member of the aforesaid Nebraska State Railway Commission, who your petitioner avers was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the State of Nebraska; the said J. A. Williams, one of the plaintiffs and a member of the aforesaid Nebraska State Railway Commission, who your petitioner avers was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the State of Nebraska, and the said Henry T. Clarke, Jr., one of the plaintiffs and a member of the aforesaid Nebraska State Railway Commission, who your petitioner avers was, at the time of the commencement of this action, ever since has been and still is a citizen and resident of the State of Nebraska. And your petitioner avers that it was not at the time of the commencement of this suit, nor since has been

and is not now a resident or citizen of the State of Nebraska.

"Your petitioner further avers that the State of Nebraska as a party plaintiff in the said suit, is not a proper or necessary party in the said suit; that the said State of Nebraska is not the real party in interest in the said suit; that the said State of Nebraska has no interest, beneficial or otherwise, in the said suit, and has been named as a party plaintiff simply for the purpose of depriving the Circuit Court of the United States of jurisdiction over this suit."

Bond was filed with the petition for removal and also the transcript of the record in the office of the clerk of the Circuit Court of the United States for the District of Nebraska on the third day of July, 1907.

Plaintiffs then, on July 12, filed a motion to remand the case to the Supreme Court of the State of Nebraska, on the ground that the Circuit Court of the United States did not have jurisdiction over the subject-matter of said action or of the parties thereto, and had no jurisdiction to hear or determine the cause. The motion to remand, having been argued and submitted to the court, was overruled for reasons set forth in an opinion.

Subsequently leave was granted to file a petition in this court for a writ of mandamus directing the remanding of the action to the Supreme Court of the State of Nebraska, and, being filed, a rule was entered thereon directing the District Judges for the District of Nebraska, holding the Circuit Court of the United States in and for that district, to show cause why said petition for mandamus should not be granted.

The judges made due return to the rule, in which, after reciting the proceedings had in the Circuit Court, they stated that it became and was their duty as judges holding that court to hear the argument on the motion to remand and consider and decide that motion, which, pursuant to said duty, the said judges heard and decided accordingly. They further showed that the motion to remand was denied by the judges

holding the Circuit Court, in the exercise of the jurisdiction conferred upon them by law, and that their decision upon the motion was in the exercise of judicial judgment and discretion vested in them. The return, and as a part thereof, was accompanied by a complete transcript of the record of the cause in the Circuit Court.

Mr. William T. Thompson, Attorney General of the State of Nebraska, and *Mr. William B. Rose* for petitioner:

Where a Circuit Court of the United States has no jurisdiction over a cause removed by defendant from a state court and refuses to remand it upon a proper motion, mandamus is plaintiff's remedy.

The State of Nebraska is a party plaintiff on the record of the case commenced in the Supreme Court of Nebraska, and it is the real and necessary party plaintiff. It is not a citizen within the removal acts of Congress. The Circuit Court of the United States acquired no jurisdiction by removal and its refusal to remand was without authority of law and mandamus requiring the United States district judges to remand the case to the state court is the remedy of the State of Nebraska. *Ex parte Wisner*, 203 U. S. 449.

The present application is within the rule stated, and mandamus is the proper remedy. The Circuit Court of the United States was wholly without jurisdiction to proceed in the case as removed from the Supreme Court of Nebraska.

Under the constitution of the State of Nebraska, as interpreted by the Supreme Court thereof, that State may become a plaintiff and maintain in the Supreme Court of the State a suit in equity to promote the general welfare by protecting the public from oppressions, extortions or other injuries, though the State of Nebraska has no pecuniary or property interest in the suit. *In re Debs*, 158 U. S. 584; Constitution of Nebraska, Art. 6, § 2; *Sheppard* v. *Graves*, 14 How. 504; *State* v. *Commercial State Bank*, 28 Nebraska, 682; *State* v. *Exchange Bank of Milligan*, 34 Nebraska, 200; *Burton* v. *United States*,

202 U. S. 344, and cases cited; *Attorney General* v. *Great Northern Railroad Co.*, 1 Drewry & Smale, 154; *Stockton, Attorney General,* v. *Central Railway Co.*, 50 N. J. Eq. 80; *Trust Co.* v. *Georgia,* 109 Georgia, 748; *Attorney General* v. *Jamaica Pond Aqueduct Co.*, 133 Massachusetts, 363; *Louisville & Nashville Railway Co.* v. *Commonwealth,* 97 Kentucky, 695; *Attorney General* v. *Railway Companies,* 35 Wisconsin, 529.

Mr. William D. McHugh and *Mr. Maxwell Evarts* for respondents:

Mandamus is not the proper remedy in this case. The writ of mandamus cannot be used to perform the office of an appeal or writ of error; it will not issue to compel the Circuit Court to reverse its decision refusing to remand a case removed by a defendant on the ground that there is, in the case, a controversy wholly between citizens of different States, to the complete determination of which controversy, one of the plaintiffs of record is not an indispensable or necessary party. Such a decision, being within the jurisdiction and discretion of the court, should be reviewed after final judgment by appeal or writ of error. *United States* v. *Lawrence,* 3 Dall. 42; *Ex parte Bradley,* 7 Wall. 364; *Ex parte Loring,* 94 U. S. 418; *Ex parte Hoard,* 105 U. S. 578, and cases cited; *In re Pollitz,* 206 U. S. 323, and cases cited. *Ex parte Wisner,* 203 U. S. 449, discussed and distinguished.

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

The motion to remand presented for decision the question whether there was in the case a controversy wholly between citizens of different States, to the complete determination of which the State of Nebraska was not an indispensable party. If defendant's contention was correct, the action could have been originally brought in the Federal court and its jurisdiction of the case was complete on removal. The Circuit Court

was called upon to determine that question and to exercise judicial discretion in deciding it. This being so, its jurisdiction was complete, and if it erred in its conclusions the remedy is not by writ of mandamus, which cannot be used to perform the office of an appeal or writ of error. The applicable principles have been laid down in innumerable cases. *Ex parte Bradley*, 7 Wall. 364; *Ex parte Loring*, 94 U. S. 418; *In re Rice*, 155 U. S. 396; *In re Atlantic City Railroad*, 164 U. S. 633.

It appeared in the case of *Pollitz, Petitioner*, 206 U. S. 323, that Pollitz had brought suit in the Supreme Court of New York against the Wabash Railroad Company and a number of defendants. Pollitz was a citizen of the State of New York; a number of the defendants were citizens of the State of New York; the Wabash Railroad Company was a corporation organized under the laws of States other than New York. The Wabash Railroad Company filed a petition to remove the case to the Circuit Court of the United States for the Southern District of New York. The petition for removal alleged that there was, in the cause, a controversy wholly between citizens of the different States, to the determination of which controversy the defendants, citizens of the State of New York, were not indispensable or necessary parties. The cause was removed and Pollitz made a motion to remand, which was denied. Pollitz applied to this court for a writ of mandamus directing the remanding of the cause to the state court. The rule was entered, and a return was made to the effect that the order denying the motion to remand had been made and entered in the exercise of the jurisdiction and judicial discretion conferred upon the Circuit Judge by law, and for the reasons expressed in the opinion filed with the order.

The rule was discharged and the petition dismissed, and the court said (330):

"The suit was commenced in the state court by a citizen and resident of the city, county and State of New York against a corporation, a citizen of the State of Ohio, and other defendants, many of whom were residents and citizens of the

State of New York, the value of the matter in dispute, exclusive of interest and costs, exceeding the jurisdictional sum.

"The defendant, the Wabash Railroad Company, a citizen of Ohio, filed its petition and bond in proper form for the removal of the suit into the United States Circuit Court for the Southern District of New York, on the ground of separable controversy so far as it was concerned, and it was removed accordingly. A motion to remand was made and denied by the Circuit Court, which held that the controversy was separable, and that the other defendants were not indispensable or necessary parties to the complete determination of that separable controversy.

"The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the Circuit Court, to which the decision was by law committed.

"The application to this court is for the issue of the writ of mandamus directing the Circuit Court to reverse its decision, although in its nature a judicial act and within the scope of its jurisdiction and discretion.

"But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.

"Where the court refuses to take jurisdiction of a case and proceed to judgment therein, when it is its duty to do so, and there is no other remedy, mandamus will lie unless the authority to issue it has been taken away by statute. *In re Grossmayer, Petitioner,* 177 U. S. 48; *In re Hohorst, Petitioner,* 150 U. S. 653. And so where the court assumes to exercise jurisdiction on removal when on the face of the record absolutely no jurisdiction has attached. *Virginia* v. *Paul,* 148 U. S. 107; *Ex parte Wisner,* 203 U. S. 449.

"In *In re Hohorst, Petitioner,* 150 U. S. 653, the bill was filed in the Circuit Court of the United States for the Southern District of New York against a corporation and certain other defendants, and was dismissed against the corporation for want of jurisdiction. From that order complainant took an appeal to this court, which was dismissed for want of jurisdiction because the order, not disposing of the case as to all the defendants, was not a final decree from which an appeal would lie. 148 U. S. 262. Thereupon an application was made to this court for leave to file a petition for a writ of mandamus to the judges of the Circuit Court to take jurisdiction and to proceed against the company in the suit. Leave was granted and a rule to show cause entered thereon, upon the return to which the writ of mandamus was awarded. *In re Atlantic City Railroad,* 164 U. S. 633.

"In *Ex parte Wisner,* Wisner, a citizen of the State of Michigan, commenced an action at law in the Circuit Court for the city of St. Louis, State of Missouri, against Beardsley, a citizen of the State of Louisiana. After service of summons on Beardsley, he filed his petition to remove the action from the state court into the Circuit Court of the United States for the Eastern District of Missouri, on the ground of diversity of citizenship, with the proper bond, and an order of removal was made by the State court, and the transcript of record was filed in the Circuit Court. Wisner (who had had no choice but to sue in the state court) at once moved to remand the case, on the ground that the suit did not raise a controversy within the jurisdiction of the Circuit Court, and that, as it appeared on the face of the record that plaintiff was a citizen and resident of Michigan, and defendant a citizen and resident of Louisiana, the case was not one within the original jurisdiction of the Circuit Court, in accordance with the statute providing that where jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. The motion to remand was de-

nied, and Wisner applied to this court for a writ of mandamus, which was subsequently awarded.

"In the present case the removal was granted and sustained on the ground that there was a controversy between the removing defendant and plaintiff, which could be fully determined as between them without the presence of the other defendants. That being so, the suit might have been brought originally in the Circuit Court against the railroad company as sole defendant.

"If the ruling of the Circuit Court was erroneous, as is contended, but which we do not intimate, it may be reviewed after final decree on appeal or error. *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556–582."

If this case is one wherein there was a controversy wholly between citizens of different States, to the complete determination of which other parties to the record were not indispensable or necessary, then the removal being properly sought on that ground, the Federal court had jurisdiction. If the State of Nebraska was not an indispensable party by reason of its interest in the controversy, its presence on the record as a plaintiff would not defeat the jurisdiction of the Federal court. And to the Circuit Court was committed the decision of those questions in the first instance, the correctness of which cannot be examined upon this application.

We must add that the mere presence on the record of the State as a party plaintiff, will not defeat the jurisdiction of the Federal court when it appears that the State has no real interest in the controversy. And in the present case the Circuit Court was not bound to adjudicate the question merely by an inspection of the nominal parties to the record, for the mere presence of the State of Nebraska as a party plaintiff was not of itself sufficient necessarily to defeat the jurisdiction of the Federal court. It became, and was, the duty of the Circuit Court to determine the question whether the State of Nebraska was an actual party plaintiff in the present suit, and to determine that question by consideration of the nature

of the case as presented by the whole record, and not "by a reference to the nominal parties to the record."

This the Circuit Court did, and from an inspection of the entire record, for the reasons stated in the opinion filed, the court held that, although the State of Nebraska was a nominal party plaintiff on the record, yet it had no real substantial legal interest in the controversy. The complaint alleged that the Nebraska State Railway Commission was charged with the duty to regulate proper and lawful intrastate rates upon the railroad lines in the State of Nebraska, and to enforce thereon all lawful intrastate rates and charges for the transportation of passengers and freight, and to prevent discrimination in such intrastate freight and passenger rates and charges; and alleged the duty of the Attorney General to bring all suits necessary for that purpose; the suit had for its object and purpose merely the securing of an injunction against the defendant company, to restrain that company from charging for the transportation of freight and passengers within the State of Nebraska more than the rates fixed by the state authority for that purpose, and from disobeying orders of said Nebraska State Railway Commission, and from concealing from said commission the true condition of its business, and from making any unlawful discrimination in issuing intrastate passes, mileage tickets and transportation within the State of Nebraska.

The question whether the State of Nebraska is the real party plaintiff must be determined from the consideration of the nature of the case as disclosed by the record. If the nature of the case is such that the State of Nebraska is the real party plaintiff, the Federal court will so decide for all purposes of jurisdiction, even though the State were not named as a party plaintiff. If the nature of the case is such that the State is not a real party plaintiff, the Federal court will so decide for the purposes of jurisdiction, even though the State is named nominally as a party plaintiff.

The question whether such a case as this is one in which

the State is the real party in interest and the real party plaintiff was determined by this court in *Missouri, Kansas & Texas Railway Company* v. *Missouri R. R. & Warehouse Commissioners*, 183 U. S. 53, where the only question presented was whether in a suit brought to enjoin a railroad company from charging greater rates within the State of Missouri than those fixed by state authority, the State of Missouri was the real party plaintiff. The State was not joined as a party plaintiff, but the question had to be determined, not by a view of the nominal parties to the record, but from the consideration of the nature of the case as shown by the whole record. The defendant company presented to the state court a petition for removal, which was denied. The Supreme Court of the State held that it was proper to go behind the face of the record and inquire who was the real party plaintiff; and, after making such examination, decided that the State was the real party plaintiff, and that the Federal court had no jurisdiction on the removal. The case was brought to this court for a review of the decision of the Supreme Court of Missouri, and this court recognizing the rule that a mere inspection of the parties named as the plaintiffs was not conclusive, examined the record and the nature of the case, and in an opinion rendered by Mr. Justice Brewer held that the nature of the case was such that the State of Missouri was not a real party in interest and not a real party plaintiff.

The court analyzed the nature of the proceeding, showed that there was nothing in such an action which affected the State as such, and that the relief sought did not inure to the State alone, and that a decree in favor of the plaintiff would not effectively operate in favor of the State.

The Circuit Court might clearly have been correct in its decision that the present case was one in which the State of Nebraska was not the real party plaintiff, but that decision could not be reviewed by mandamus.

The Circuit Court was called upon on this record to decide whether the State of Nebraska had any real or legal interest

in the controversy alleged to have been wholly between citizens of different States; and it was a decision which the court had a right to make, involving no abuse of judicial discretion. A premature review cannot be obtained by a writ of mandamus.

Without expressing any opinion as to whether the State was a necessary party to the relief asked, which involved the removability of the case, this court bases its judgment on the mandamus entirely upon the ground that, as the Circuit Court had jurisdiction to pass upon the question of the removability of the case, and as its order overruling the motion to remand was subject to be reviewed by a higher court after the case had been disposed of by final judgment, the remedy was by appeal and not by mandamus.

Rule discharged; petition dismissed.

UNITED STATES *v.* CHANDLER-DUNBAR WATER POWER COMPANY.

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

No. 599. Argued April 6, 7, 8, 1908.—Decided April 20, 1908.

Statutes of limitations with regard to land affect the right even if in terms only directed against the remedy. The act of March 3, 1891, c. 561, § 8, 26 Stat. 1099, providing that suits to vacate and annul patents theretofore issued shall only be brought within five years after the passage of the act, applies to a void patent, and where suit has not been brought within the prescribed period a patent of public lands, whether reserved or not, must be held good and to have the same effect as though valid in the first place.

On the admission of Michigan to the Union the bed of the Sault Ste. Marie, whether strait or river, passed to the State, and small unsurveyed islands therein became subject to the law of the State.

By the law of Michigan a grant of land bounded by a stream whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof, and under this rule the patentee of government

land bordering on the Sault Ste. Marie, takes to the center line, including small unsurveyed islands between the main land and the center line; nor are the rights of riparian owners to the center affected by the fact that the stream is a boundary.

152 Fed. Rep. 25 affirmed.

THE facts are stated in the opinion.

The Attorney General, The Solicitor General and *Mr. Duane E. Fox*, special assistant to the Attorney General, for the United States.[1]

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[1] The brief, on behalf of the United States, of over 280 pages, presented the case in the following manner as appears by the index of the brief:

Statement of the case; manner in which the questions are raised; the questions involved; specifications of errors.

Argument, I. The law of the waters; A. Locus of the islands; B. The status of the waters established by treaties; (1) The treaties of peace (Paris); (2) The treaty of Ghent; (*a*) Boundary established under Article VI; (*b*) Boundary established under Article VII; (3) The Treaty of Washington (Webster-Ashburton treaty); (4) Other treaty provisions; C. The status of the waters established by the law of nations; D. The law of riparian and littoral ownership; (1) Public and private waters; (2) The Great Lakes; (3) The connecting waters between the Great Lakes; (4) Legislative recognition by the State of Michigan of the public character of the connecting waters between the Great Lakes; (5) Michigan cases distinguished; (6) State decisions—how far controlling; (7) The distinction between inland waters of a State and international waters; (8) The question a political one; E. Former construction by the Government.

II. Title to Islands 1 and 2 in the United States.

III. The islands and adjacent shore land reserved for public uses; A. Historical statement and authorities; B. Effect of order of December 9, 1852, releasing portion of lands previously reserved; (1) The reservation of 1822; (2) The general temporary reservation of April 3, 1847; (3) The specific reservation of September 2, 1847; (4) The specific and final reservation under the act of 1850; (5) The Indian reserve of an easement; C. Further contemporaneous construction.

IV. Land in Chandler patent never surveyed.

V. Said land not subject to location with Porterfield scrip; A. Lack of legal survey; B. No price established for said land; C. Said land otherwise appropriated at the time of such location; (1) Effect of the military reservation; (2) The land within the limits of an incorporated town.

VI. The interest of the United States in this suit; A. International obligations of the United States; B. The locus needed for works in aid of commerce; C. Refusal by Circuit Court to consider the validity of appellee's alleged title to adjacent shore; D. Employment of special counsel.

Mr. Arch B. Eldridge, Mr. Moses Hooper and *Mr. John H. Goff* for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the United States to remove a cloud from its alleged title to two islands, numbered One and Two, in the Sault Ste. Marie, between Lake Huron and Lake Superior. The islands are in the rapids of the river or strait, on the American side of the Canada boundary line, and near to a strip of shore lying between the rapids and the United States ship canal referred to in *United States* v. *Michigan*, 190 U. S. 379. The defendant claims this strip and the islands under a patent from the United States, dated December 15, 1883, describing the land as bounded by the river St. Mary on the east, north and west. The United States says that the patent was void because the land had been reserved for public purposes, and that even if it was valid the islands did not pass. The defendant replies that the land was not reserved, and also sets up the statute of limitations. Act of March 3, 1891, c. 561, § 8. 26 Stat. 1099. The Circuit Court dismissed the bill, and its decree was affirmed by the Circuit Court of Appeals. 152 Fed. Rep. 25.

There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of opinion that now the patent must be as-

VII. Statute of limitation not applicable.

VIII. Estoppel.

IX. Laches.

The appendix contained: A. Extracts from the report of the Commissioners under the treaty of Ghent; B. Diplomatic correspondence preceding the treaty of 1842; C. Extract from Article II of the treaty of 1842; D. Correspondence regarding the restoration of certain lands embraced in the temporary reservation of April 3, 1847; E. Commissions and correspondence showing the relation of special counsel to this case; F. Extract from letter of the Secretary of State to Lord Ashburton, dated July 27, 1842. There were also a number of maps.

sumed to be good. The statute just referred to provides that "suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act," that is to say, from March 31, 1891. This land, whether reserved or not, was public land of the United States and in kind open to sale and conveyance through the Land Department. *United States* v. *Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476. The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to "any patent heretofore issued," it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. *Leffingwell* v. *Warren*, 2 Black, 599.

In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. *Leffingwell* v. *Warren*, 2 Black, 599, 605; *Sharon* v. *Tucker*, 144 U. S. 533; *Davis* v. *Mills*, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See *United States* v. *Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476.

We waste no time upon suggestions of bad faith on the one side or the other, as there is no sufficient warrant for them, and as they were touched rather than pressed at the argument. The only other question is whether the United States has title to the islands, notwithstanding its patent and notwith-

standing the incorporation of Michigan as a State. The bill admits and alleges that the bed of the river, or strait, surrounding the islands, passed to Michigan when Michigan became a State, *Pollard* v. *Hagan*, 3 How. 212; *Shively* v. *Bowlby*, 152 U. S. 1, subject to the same public trusts and limitations as lands under tide waters on the borders of the sea. *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387. But it sets up that the islands remained the property of the United States, and it argues that in such circumstances the islands did not pass by the patent of the neighboring land.

The act offering Michigan admission to the Union provided that no right was conferred upon the State "to interfere with the sale by the United States, and under their authority, of the vacant and unsold lands within the limits of the said State." Act of June 15, 1836, c. 99, § 4. 5 Stat. 49, 50. And again, by a condition, that the State should "never interfere with the primary disposal of the soil within the same by the United States." Act of June 23, 1836, c. 121. *Fifth.* 5 Stat. 59, 60. The islands are little more than rocks rising very slightly above the level of the water, and contain respectively a small fraction of an acre and a little more than an acre. They were unsurveyed and of no apparent value. We cannot think that these provisions excepted such islands from the admitted transfer to the State of the bed of the streams surrounding them. If they did not, then, whether the title remains in the State or passed to the defendant with the land conveyed by the patent, the bill must fail.

The bed of the river could not be conveyed by the patent of the United States alone, but, if such is the law of the State, the bed will pass to the patentee by the help of that law, unless there is some special reason to the contrary to be found in cases like *Illinois Central Railroad Co.* v. *Illinois*, 146 U. S. 387. This view is well established. *Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U. S. 87, 93, 94; *Hardin* v. *Shedd*, 190 U. S. 508, 519. The right of the State to grant lands covered by tide waters or navigable lakes and the qualifications, as

stated in *Shively* v. *Bowlby*, 152 U. S. 1, 47, are that the State may use or dispose of any portion of the same "when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce." But it cannot be pretended that private ownership of the bed of the stream or of the islands, subject to the public rights, will impair the interest of the public in the waters of the Sault Ste. Marie. See *Kaukauna Water Power Co.* v. *Green Bay & Mississippi Canal Co.*, 142 U. S. 254, 271, 272. Therefore, if by the law of Michigan the bed of the river or strait would pass to a grantee of the upland, we may assume that it passed to the defendant, and we may assume further that the islands also passed. If, as we think, they belonged to the State, they passed along with the bed of the river. If they had belonged to the United States, probably they would have passed as unsurveyed islands and neglected fragments pass. *Whitaker* v. *McBride*, 197 U. S. 510; *Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U. S. 87, 91, 92. Of course other nice questions are suggested and might be asked; for instance, how it would be if the title to the bed of the stream was in the State and did not pass with the upland, and the islands remained to the United States. It still would be a reasonable proposition that the islands followed the upland. But in the view that we have taken that may be left in doubt.

The question then is narrowed to whether the bed of the strait is held to pass by the laws of Michigan. We are content to assume that the waters are public waters. *Genesee Chief* v. *Fitzhugh*, 12 How. 443, 457. But whatever may be the law as to lands under the great lakes, *People* v. *Silberwood*, 110 Michigan, 103, we believe that the law still is as it was declared to be in *Grand Rapids & Indiana R. R. Co.* v. *Butler*, 159 U. S. 87, 94, that "a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof," and that this

applies to the Sault Ste. Marie, whatever it be called. The fact that it is a boundary has not been held to make a difference. The riparian proprietors upon it own to the center. *Ryan* v. *Brown*, 18 Michigan, 196; *Scranton* v. *Wheeler*, 113 Michigan, 565, 567; *Kemp* v. *Stradley*, 134 Michigan, 676. See also *Scranton* v. *Wheeler*, 57 Fed. Rep. 803, 812; *S. C.*, 179 U. S. 141, 163; *Lorman* v. *Benson*, 8 Michigan, 18; *Water Commissioners* v. *Detroit*, 117 Michigan, 458, 462. We see no plausible ground for the claim of the United States.

Decree affirmed.

MR. JUSTICE HARLAN dissents.

LIU HOP FONG *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 181. Argued March 18, 1908.—Decided April 20, 1908.

Under the provisions of § 13 of the act of September 13, 1888, c. 1015, 25 Stat. 476 and § 3 of the act of May 15, 1890, c. 60, 27 Stat. 25, the appeal given to a Chinaman from an order of deportation made by a commissioner is a trial *de novo* before the district judge to which he is entitled before he can be ordered to be deported, and the order cannot be made on a transcript of proceedings before the commissioner.

After a commissioner has made and filed a certified transcript in the case of a Chinaman ordered by him to be deported his authority over the matter ends. There is no statutory right to make up and file additional findings.

While a certificate issued as provided by § 3 of the Treaty of December, 1894 between the United States and China to entitle Chinese subjects to enter the United States may be overcome by proper evidence, and may not have the effect of a judicial determination, when a Chinaman has been admitted to the United States on a certificate made in conformity with the treaty, he cannot be deported for having fraudulently entered the United States unless there is competent evidence to overcome the legal effect of the certificate.

THE facts are stated in the opinion.

Mr. Frank L. McCoy, with whom *Mr. John L. Webster* and *Mr. Robert H. Olmsted* were on the brief, for plaintiff in error:

The complaint is insufficient in substance to sustain the conviction or order of deportation, in that it does not allege facts showing fraud in defendant's coming to the United States.

In fact the issuance to plaintiff in error of his student's certificate and his subsequent admission thereunder into this country, by the officers of the government, operated as an adjudication of the *bona fides* and lawfulness of his coming. That decision, unappealed from, is *res judicata* and entitles the defendant to remain here, at least until such determination is overcome by strong competent evidence. And his changing his occupation from student to laborer, or anything else, after coming here, would not constitute such overcoming evidence or defeat his right to remain here. His right to remain depends altogether on his "coming," whether that was lawful, whether *bona fide* or *mala fide*, whether he was in fact a student and one of the student or teacher class in China, or a laborer there intending to be a laborer here. *United States* v. *Sing Lee*, 71 Fed. Rep. 680; *Re Chin Ark Ning*, 115 Fed. Rep. 412; *Re Yew Fing Hi*, 128 Fed. Rep. 319; *Louie Gwen* v. *United States*, 128 Fed. Rep. 522; *United States* v. *Leo Won Fong*, 132 Fed. Rep. 190, 195; *United States* v. *Joe Dick*, 134 Fed. Rep. 988, 989; *United States* v. *Seid Bow*, 139 Fed. Rep. 56; *Tom Hong* v. *United States*, 193 U. S. 517.

There was not sufficient evidence before the District Court to warrant or support the finding that plaintiff in error was not one of the student or teacher class in China, or that he came into the United States *mala fide* and fraudulently, or to sustain the order of deportation.

There is no support in the evidence for the judge's findings, except perhaps in the commissioner's additional and separate findings of December 30. And such additional findings were not competent evidence, or indeed any evidence.

There was evidence before the court in plaintiff in error's favor, which created a presumption of the rightfulness of plaintiff in error's presence here at all times, which presumption was just as conclusive as an adjudication, unless it was overthrown by positive, direct and competent evidence of fraud to the contrary. And this conclusive evidence in plaintiff in error's favor was the certificate, with all its indorsements, under which he was admitted into the United States. There was no competent evidence to overthrow it or even in contradiction thereof, the findings of December 30 being merely gratuitous, without authority or sanction in law; and the rightfulness or lawfulness of plaintiff in error's coming, entry and continued residence here is therefore undisputed in the evidence. *United States* v. *Sing Tuck*, 194 U. S. 161; *United States* v. *Ju Toy*, 198 U. S. 253; *Andrews* v. *Eastern Oregon Land Co.*, 203 U. S. 127.

The burden of proof in a case of this nature is on the Government. *Moy Suey* v. *United States*, 147 Fed. Rep. 697.

This court will review the evidence and find for itself the facts, particularly in view of the fact that the district judge and commissioner misconstrued the treaty and laws and their findings of fact were made what they are only because of their misconceived idea of the true intent and meaning of said treaty and laws. *Tom Hong* v. *United States*, 193 U. S. 517; *United States* v. *Seid Bow*, 139 Fed. Rep. 56; *Moy Suey* v. *United States*, 147 Fed. Rep. 697.

Mr. Assistant Attorney General Cooley for defendant in error:

The procedure followed was regular, and satisfied the requirements of the law. The complaint should not be tested by the technical rules of pleading in criminal cases. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 728; *Chin Bak Kan* v. *United States*, 186 U. S. 193, 199; *Ah How* v. *United States*, 193 U. S. 65, 77.

The policy of the law in regard to a deportation proceeding

seems merely to require a fair, though summary hearing. *Chin Yow* v. *United States*, 208 U. S. 8. The court was justified in affirming the decision solely upon the commissioner's report of the evidence. *Ah How* v. *United States*, 193 U. S. 78.

A student's certificate is only *prima facie* evidence of the right of the Chinaman to remain in the United States, and its effect may be overcome by other evidence in the case. Such evidence was furnished by the Government officers in this case, and the order of deportation was rightfully entered. *United States* v. *Yong Yew*, 83 Fed. Rep. 832; *United States* v. *Ng Park Tan*, 86 Fed. Rep. 605.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiff in error, Liu Hop Fong, on November 23, 1904, was arrested upon the sworn complaint of the United States district attorney and brought before a United States commissioner at Omaha, Nebraska, charged with being unlawfully within the United States of America, living and residing at Omaha, Nebraska, and there pursuing the occupation of a common laborer, contrary to the laws of the United States. The complaint prayed that he might be arrested and dealt with according to law. Upon a plea of not guilty, on December 29, 1904, a hearing was had before the commissioner. The bill of exceptions shows that the commissioner on December 29, 1904, made an order finding the defendant guilty, and ordered his deportation from the United States to the Empire of China; that an appeal was taken to the District Court of the United States for the District of Nebraska; that the case was heard upon the thirteenth day of April, 1905, being one of the days of the November term of the District Court; that the case was tried and submitted to the judge without any new evidence upon the complaint, upon the transcript of the proceedings made by the United States commissioner from whose order the case was appealed, and the additional sep-

arate findings made by the commissioner and the original student's certificate of the defendant and the translation thereof, with all indorsements and certificates thereon under which the defendant was admitted into and entered the United States. The commissioner's transcript shows:

On November 23, 1904, the defendant was brought before the commissioner, entered a plea of not guilty, and the hearing was continued to December 29, 1904, when witnesses were examined for the United States and for the defendant. Their names are given, but their testimony is not set out. On the same day (December 29, 1904) defendant was adjudged guilty and ordered to be deported, and on that day defendant appealed to the District Court and gave bond for his appearance in that court. This transcript was duly certified and indorsed, filed January 9, 1905, by "R. C. Hoyt, Clerk," and the commissioner filed additional and separate findings bearing date December 30, 1904, as follows:

"That the said Liu Hop is a Chinese manual laborer, and was born in and is a subject to the (Emperor) of China; that he was found within the limits of the United States, to wit, in the city of Omaha, Douglas County, State of Nebraska, in the District of Nebraska, on the 23d day of November, A. D. 1904, and that when he was so found as aforesaid, the said Liu Hop was in possession of a certain certificate, proper in form, No. 179, registered in book three, folio 164, issued by the Colonial Secretary of Macau Province, by authority of H. E. Governor of said province, and dated the 17th day of May, 1899, which said certificate, among other things, recites as follows:

"'By order of H. E. the Governor, I grant this passport to a Chinaman Liu Hop, bachelor, natural, and residing in Macua, student of Chinese literature for over 4 years, being his professor Lu-ioc-po, living in Rua dos Mercadores, No. 180, to go to the United States of America, in order to study there the English language and European sciences, and to live in the company of his brother Eiu-eng-Fun, manager of the firm

"Lun-Sing-Chong"—Rockspring, Wyo.—San Francisco, California.'

"That I find from the evidence adduced upon the hearing herein that the said Liu Hop landed in the city of San Francisco on or about July 3, 1899, and shortly thereafter and during said year of 1899 came to the city of Omaha, State and district of Nebraska, where he has ever since resided and still resides.

"I further find that during the time of his residence in said city he has at all times been a common laborer, and has at no time pursued the study of the English language beyond the merest rudiments taught by his Sunday school teacher, and has at no time pursued the study of European sciences or any other study except as to the rudiments of the English language; and that the said Liu Hop has at no time been a student within the meaning of the act of Congress approved May 5, 1892, and acts of Congress amendatory thereof, and that he is now unlawfully within the United States of America.

"To all of which foregoing order and findings of the United States commissioner, the said Liu Hop excepts and prays an appeal, and bail is fixed in the sum of $500.00; his certificate pending an appeal to remain in the custody of the said United States commissioner."

These findings are endorsed as follows: "Filed Jan. 9, 1905. R. C. Hoyt, Clerk."

The certificate upon which the plaintiff in error was admitted to this country is as follows:

"(*Endorsements—Translation.*)

"Government of Macau Province.

"Colonial Secretary of Macau Province. No. 179. Registered in Book 3, folio 164.

"Maria Pires Nonteiro Bandeira de Lima, Colonial Secretary of Macau Province, His Majesty the King, &c., &c.

"By order of H. E. the Governor, I grant this passport to a Chinaman Liu-Hop, bachelor, natural and resident in Macau, student of Chinese literature for over 4 years being his professor Liu-ioc-po, living in Rua dos Mercadores, No. 180, to go to the United States of America, in order to study there the English language and European sciences, and to live in the company of his brother Liu-eng-Fun, manager of the firm 'Lun-Sin-Chong'—

Signals:
Age..... 20 years.
Height .... 1 m. 590 ms.
Face..... Long.
Hair ..... Black.
Eyebrows.. do.
Eyes..... Dark chestnut.
Nose..... Flat.
Mouth .... Big.
Color of the Asiatic Race.
Cost of passport, $3.50.

"Rockspring, Wyo.—San Francisco—Cal.

"Guaranteed.

"Fulfilling the obligation to have this passport viséd by the respective diplomatic or consular agent residing in this city, I beg to request the administrative authorities, and all those to whom it may concern, not to put any objection to the bearer.

"Valuable for 30 days to leave this city.

"Given at Macau on the 17th day of May 1899.

"By authority of H. E. the Governor.

"The Colonial Secretary,
"MARIO B. DE LIMA.

(Signed)
"Bearer's signature
(S'd) LIU HOP.
"Translated by A. M. Roza Peruia, Jr.
"Visé U. S. Consulate General Hongkong, May 31, 1899.
"R. WILDMAN, *Consul Gen.*"

The bill of exceptions further shows that the evidence taken before the commissioner was not reduced to writing or preserved, or in any manner taken to the District Court, and no further or other evidence was submitted by either of the parties. After argument of counsel the judge filed an opinion and

ordered the defendant to be deported, to which the defendant excepted.

The opinion of the learned District Judge, a copy of which is given in the record, shows that the order of deportation was made because in his opinion the facts as found by the commissioner indicate that Liu Hop Fong did not come to the United States to study the English language and the English sciences as a student, and that such contention was a mere device to gain entrance into this country, and not in good faith to pursue studies as a student, and his real intent was to labor only; "and I am of the opinion," says the learned judge, "that his entry under the certificate mentioned was a fraud upon the United States, and such certificate does not afford him protection." He thereupon affirmed the finding and judgment of the commissioner. Subsequently, and after the adjournment of the term at which this order was made, a petition was filed for a new trial upon the record and affidavits submitted on behalf of Liu Hop Fong, and while the judge recognized that he had no further power over the proceedings after the adjournment of the court for the term, upon investigation adhered to his former opinion as to the order of deportation.

We need not be concerned with these proceedings after the term, for clearly the judge's authority over the case had ended. The question is here upon the record made in the original proceeding before him. Was the judge warranted in making the order of deportation? By the third section of the treaty with China of December 8, 1894 (28 Stat. 1210), it is provided:

"The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their government or the government where they last resided, viséd by the diplomatic or consular

representative of the United States in the country or port whence they depart."

By § 13 of the act of 1888 (25 Stat. 476), it is provided:

"That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge or commissioner of any United States court, returnable before any justice, judge or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came."

By § 3 of the act of May 5, 1892 (27 Stat. 25), it is provided:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States, unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States."

Section 13 of the act of 1888 (25 Stat. 476) also provides that any Chinese person convicted before the commissioner of the United States court may within ten days of such conviction appeal to the judge of the District Court for the district.

In this case the Chinaman did prosecute his appeal from the commissioner to the District Judge. The statute is curiously silent as to how the appeal is to be heard; it says nothing as to what papers are to be filed or as to what testimony shall be given. In our view, in giving the Chinaman an appeal, the law contemplates that he shall be given the right of a hearing *de novo* before the district judge before he is ordered to be deported. It is a serious thing to arrest a Chinaman, who, as in this case, has been in this country a number of years, lawfully admitted upon a certificate complying with the treaty, and order his deportation without giving him a full oppor-

tunity to assert his rights before a competent court. There being no provision of the statute that the hearing shall be upon a transcript of the proceedings before the commissioner, we think when a party demands it Congress intends he shall have the right to a hearing and judicial determination before the District Judge.

In the case of *Ah How* v. *United States*, 193 U. S. 65, it was assumed that the judge who tried the case upon appeal did so solely upon the commissioner's report, and heard no witnesses. In *Tom Hong* v. *United States*, 193 U. S. 517, the commissioner made a finding, which was made part of the record by order of the District Court. In the present case the record shows that there was before the District Court the transcript of the proceedings hereinbefore set out as having taken place before the commissioner on December 29, 1904; and then, without the order of the court, an additional and separate finding of the commissioner appears to have been filed. We are not aware of any statute that gives the commissioner a right to make up and file such additional finding; he had made and filed a certified transcript in the case, and there ended his authority in the matter. There was no order, as in the *Tom Hong case*, making the commissioner's findings part of the record. There was no consent to a hearing of the case upon such additional findings, and the case presented to the District Judge embraced the student's certificate hereinbefore referred to, and a statement that witnesses were examined without any findings of facts or the giving of any testimony. On this state of the record we are of the opinion that the court had no authority to order the deportation of the Chinaman.

The treaty with China provides that officials, teachers, students, etc., shall have the privilege of coming to and residing in the United States (Article 3, Treaty of December, 1894, above referred to), and further provides:

"To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their government or the government where they

last resided, viséd by the diplomatic or consular representative of the United States in the country or port whence they depart."

When this young man entered a port of the United States in July, 1899, he presented such a certificate, duly issued and viséd by the consular representative of the United States. Upon application for admission this certificate is *prima facie* evidence of the facts set forth therein. 22 Stat. 58, § 6; 33 Stat. 428. This certificate is the method which the two countries contracted in the treaty should establish a right of admission of students and others of the excepted class into the United States, and certainly it ought to be entitled to some weight in determining the rights of the one thus admitted. While this certificate may be overcome by proper evidence and may not have the effect of a judicial determination, yet being made in conformity to the treaty, and upon it the Chinaman having been duly admitted to a residence in this country, he cannot be deported, as in this case, because of wrongfully entering the United States upon a fraudulent certificate, unless there is some competent evidence to overcome the legal effect of the certificate. In this record we can find no competent testimony which would overcome such legal effect of the certificate, and the plaintiff in error was therefore wrongfully ordered to be deported.

The judgment of the District Court is reversed, and the cause remanded to that court with directions to discharge the plaintiff in error from custody without prejudice to further proceedings.

BOGARD *v.* SWEET.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 156. Submitted March 6, 1908.—Decided April 27, 1908.

A decree of Supreme Court of Oklahoma cancelling a deed given to defendant below in furtherance of a scheme of development of property which had been abandoned, affirmed on the facts.
17 Oklahoma, 40, affirmed.

THE facts are stated in the opinion.

Mr. John W. Shartel, Mr. James R. Keaton and *Mr. Frank Wells* for appellants.

Mr. Charles M. Thacker for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

There can be no doubt upon this record, confused though it be, as to the real nature of the present case.

The substantial facts are these: In December, 1890, one Sweet, claiming to be owner of certain town lots covered by a patent to him from the State of Texas, of date December 10, 1885, conveyed the same by deed (his wife uniting with him) to J. G. Bogard and other named persons. The lots were in the town of Mangum, which was in what is now Greer County, Oklahoma. The deed, which was recorded, was with warranty and absolute upon its face. On the same day, at the same time, a written agreement was entered into between, substantially, the same parties. That agreement referred in terms to the deed and bound the grantees therein to sell the lots, collect the proceeds of sale, and out of the gross receipts in cash received and collected on such sales, as soon as collected, pay over two-thirds to Sweet and his wife. The agree-

ment recites that Sweet had transferred to the other parties a large number of promissory notes, which Sweet had taken for purchase money due on certain town lots previously sold by him. Bogard and his associates by the agreement bound themselves to use due diligence to collect the notes, handing over to Sweet two-thirds of the amount collected on them.

The parties with whom Sweet made this arrangement were members of the Mangum Star Printing and Publishing Association, a partnership located at Mangum. The arrangement, evidenced by the deed and the agreement, had for its object the building up of that town, the parties, as stated, with whom Sweet contracted receiving, as compensation for their services, one-third on the sales of lots and a like proportion of the proceeds of any notes collected by them. There was no other consideration for the arrangement. The absolute title to the lots was put in Bogard and his associates for purposes of convenience, namely, that they might the more easily effect sales of the property. The situation was accurately described by the Supreme Court of the Territory of Oklahoma when it said: "The record discloses that at a date when Greer County was claimed to be a part of and under the jurisdiction of the State of Texas, H. C. Sweet purchased the land in controversy from that State, and while claiming the same under such title, platted it into town lots which became, and were at the time of the action, a part of the townsite of the city of Mangum. H. C. Sweet, desiring to aid in the upbuilding of a newspaper and the town generally, entered into a contract with the defendants in error, and others, to allow the plaintiffs in error to sell his townsite property, and to collect certain notes which he then had, for property by him theretofore sold, the understanding and agreement being that, in order to facilitate the business, the plaintiffs in error were to form a corporation for the purpose of running the newspaper and selling the real estate, it being agreed that the corporation should sell the property and collect the notes and pay to Sweet two-thirds of the amount of the sales and retain one-third thereof as their

commission. As a matter of convenience, in the carrying out of the contract, a deed was made by Sweet and wife to all of the property. Afterwards an attempt was made to form the corporation. There being no law in Texas under which such a corporation could be formed, that portion of the scheme failed, and, as shown by the record, the project was dropped by almost all, if not entirely all, of the parties connected therewith, and the deed, although recorded, was returned to Sweet, together with the notes."

As already indicated, at the time the above arrangement was made it was supposed by some that Greer County was part of the State of Texas. For many years, indeed, from the time of its admission into the Union, Texas asserted that Greer County was within its recognized limits. But subsequently, in a suit brought in this court by the United States against the State, it was adjudged that Greer County constituted no part of the State of Texas, but was under the exclusive jurisdiction of the United States. *United States* v. *Texas*, 162 U. S. (1895), 1, 90.

At a later date, January 18, 1897 (29 Stat. 490), Congress passed an act whereby grants of lands in Greer County could be obtained under the homestead law of the United States as modified by that act. Under that legislation Sweet, on October 13, 1898, obtained a patent from the United States and holds title under it.

The original scheme for the upbuilding of Mangum as outlined in the deed and agreement of 1890 failed and was wholly abandoned by the parties to those instruments, and the present suit was brought by Sweet and wife for the cancellation of the deed made to Bogard, and for a decree removing the cloud created by it upon the title to the property in question. The plaintiffs having died, after the institution of the suit, there was a revivor of the suit in the name of their children and heirs. Notwithstanding some of the parties to the original scheme defended the suit, a decree was rendered in accordance with the prayer of the plaintiffs, and that decree was affirmed

by the Supreme Court of the Territory of Oklahoma. 17 Oklahoma, 40.

Neither argument nor citation of authorities is necessary to establish the correctness of the decree below, and it is

Affirmed.

LANG v. NEW JERSEY.

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

No. 649. Argued April 6, 1908.—Decided April 27, 1908.

It is within the power of the State to divide accused persons into two classes, those who are, and those who may be, accused, and, if there is no discrimination within the classes, a person in one of the classes is not denied the equal protection of the laws because he does not have the same right of challenge of a grand juror as persons in the other class.

As construed by the highest court of that State, the statute of New Jersey providing that challenges to grand jurors cannot be made after the juror has been sworn does not deprive a person accused after the grand jury has been impanelled and sworn of the equal protection of the law because one accused prior thereto would have the right of challenge.

68 Atl. Rep. 210, affirmed.

THE facts are stated in the opinion.

Mr. Alan H. Strong for plaintiff in error:

To challenge a grand juror for any ground of disqualification is the right at common law of any one who is under prosecution for any crime whatever. 2 Hawkins P. C., c. 25, § 16; 1 Bishop Crim. Pro. (3d ed.), § 676; 4 Crim. Law Magazine (March, 1883), 171 &c.

If any one of the jurors of the grand jury which finds an indictment is disqualified, he vitiates the whole, though all the other jurors should be unexceptionable. 2 Hawkins, P. C., c. 25, § 28; 1 Bishop Crim. Pro., § 749, § 3884 (3d ed.); 1 Chitty Crim. Law, 307; *State* v. *Rockafellow*, 1 Halstead, 332;

State v. *Hoffman*, 42 Vroom, 285; *Crowley* v. *United States*, 194 U. S. 461; *United States* v. *Gale*, 109 U. S. 65.

Equal protection of the laws requires that no person shall be indicted without having had an opportunity to challenge members of the grand jury who are disqualified. *Gulf &c. R. R.* v. *Ellis*, 165 U. S. 150; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 560; *Ohio ex rel. Lloyd* v. *Dollison*, 194 U. S. 445, 447; 1 Bishop Crim. Pro. (3d ed.), §§ 877–879; *United States* v. *Gale*, 109 U. S. 65, 67; *Carter* v. *Texas*, 177 U. S. 442, 447.

The construction of the law in question, as expounded by the Court of Errors and Appeals, imposes upon this defendant a constructive waiver of this feature of the protection of the laws, in advance of the exigency which renders the protection desirable. But it is not in the power of the State to do this. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Rogers* v. *Alabama*, 192 U. S. 226; *Crowley* v. *United States*, 194 U. S. 461, 474; *Boyd* v. *United States*, 116 U. S. 616, 635; *Carter* v. *Texas*, 177 U. S. 442; *State* v. *Rockafellow*, 1 Halstead, 343; *Gibbs* v. *State*, 16 Vroom, 379; *State* v. *Hoffman*, 42 Vroom, 285.

Mr. George Berdine for defendant in error:

The statute of New Jersey herein in question does not deprive the defendant of any fundamental or all-important right. See *Brown* v. *State*, 33 Vroom, 666; *Gibbs* v. *State*, 16 Vroom, 382; *State* v. *Hoffman*, 42 Vroom, 285.

The forty-seventh section of the jury act does not in the case *sub judice* violate the Fourteenth Amendment. A state law is not within the amendment if it does not infringe "fundamental and all-important rights," or if it be based on "municipal considerations" alone, if the class upon whom the law operates is not made by an arbitrary and unreasonable classification. First, the right to principal challenge is not a fundamental and all-important right. *Hayes* v. *Missouri*, 120 U. S. 68; Proff. Jury Trial, § 106; 12 Ency. Pl. & Prac., 475; 1 Bishop Crim. Pr., 941; *Howard* v. *Kentucky*, 200 U. S. 173.

Second, the statute is based on "municipal consideration" alone. *Lewis* v. *Missouri*, 101 U. S. 22; *McQuellin* v. *State*, 8 S. & M. 587, 597; *Kane* v. *State*, 86 Mississippi, 505. Third, if there be a class favored by the statute, it is not an arbitrarily made class. *Bachtel* v. *Wilson*, 204 U. S. 41; *Lewis* v. *Missouri*, 101 U. S. 22; *Brown* v. *State*, 175 U. S. 175; *West* v. *Louisiana*, 194 U. S. 263.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Plaintiff in error was convicted in the Court of Oyer and Terminer of Middlesex County, N. J., of the crime of murder. His conviction was successively affirmed by the Supreme Court of the State and the Court of Errors and Appeals. 68 Atl. Rep. 210. He attacks the judgment on the ground that he has been deprived of the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States, in that his motion to quash the indictment was denied, a plea in abatement overruled, and that he was required to answer the indictment.

The crime for which plaintiff in error was indicted was committed after the grand jury was impanelled, and two of its members were over the age of sixty-five years. The object of his motion and plea was to avail himself of the limitation of age of grand jurors prescribed by the statutes of the State and avoid that part of the section which provides that the exception on that ground must be taken before the jury is sworn.[1]

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1 That every person summoned as a grand juror in any court of this State, and every petit juror returned for the trial of any action or suit of a civil or criminal nature, shall be a citizen of this State and resident within the county from which he shall be taken, and above the age of twenty-one and under the age of sixty-five years; and if any person, who is not so qualified, shall be summoned as a grand juror, or as a juror on the trial of any such action in any of the courts of this State, or if any person shall be summoned as a petit juror at any stated term of any court of this State, who has served as such at any of the three stated terms next preceding that to which he

This provision, plaintiff in error contends, as applied by the courts of the State, separates criminal defendants into classes, to wit, those who are accused before the finding of the indictment and those who are accused afterwards, giving to the first a privilege of challenge which is denied to the second. And, it is contended, that there is no substantial reason for the classification, and, therefore, the provision of the Fourteenth Amendment, which secures to all persons the equal protection of the laws, is violated.

The Court of Errors and Appeals met this contention by denying that the statute made the classification asserted. The court observed that the contention rested "fundamentally upon the proposition that the right to have the grand jury discharged upon the statutory grounds stated in section 6 of the jury act is for the benefit or protection of a particular class of persons," whom, the court said, "to avoid constant paraphase," it would "call putative criminals." And "putative criminals," the court defined, to be all who actually committed crime before the grand jury had been sworn, or who were charged or suspected, or, being wholly innocent, were ignorant of the fact that they were suspected, as well as those who were charged with the crime during the sitting of the grand jury. But to none of these, the court said, was the protection of the statute addressed; that its purpose was the "furtherance of the due and efficient administration of justice for the protection of those against whom crimes might be committed as well as those who might be charged with the commission of such crimes." The object sought to be attained, it was further said, by the disabilities expressed in the statute, "was to secure an efficient and representative

may be summoned, it shall be good cause of challenge to any such juror, who shall be discharged upon such challenge being verified according to law, or on his own oath or affirmation in support thereof; provided, that no exception to any such juror on account of his citizenship or age, or any other legal disability, shall be allowed after he has been sworn or affirmed. Act of April 21, 1876, P. L. 360; 2 General Statutes of New Jersey, 1896, p. 1853, § 47.

body of citizens to take part in the due administration of the law for the benefit of all who were entitled to its protection, and not specially or even primarily for the benefit of those charged with its violation."

This we accept as the proper construction of the statute, and see no unconstitutional discrimination in it. It is to the effect that certain qualifications have been deemed advisable in order to make the grand jury a more efficient instrument of justice—qualifications which have no relation to any particular defendant or class of defendants. And the practical is regarded. Objection may be taken before a jury is sworn, but not afterwards, and the statute uses for its purpose the Prosecutor of Pleas, those who stand accused of crime and even, the court says, an *amicus curiæ*. A grand jury thus secured will have all the statutory qualifications in most cases for all defendants; and besides the discrimination is very unsubstantial, as was pointed out in *Gibbs et al.* v. *State*, 16 Vroom, 382.

Counsel has not been able to point out what prejudice results to defendants from the enforcement of the statute. He urges a verbal discrimination, and invokes the Fourteenth Amendment against it. The statute, he in effect says, fixes the limit of service at twenty-one and sixty-five years, and confesses the latter is "somewhat early," but seeks to sustain his contention as follows: "And though it may not be possible in any case to show that the fact of the juror being above the lawful age has worked injustice to the defendant, he is not required to show it. It is enough that a statute has been transgressed which was enacted, in some measure at least, for his benefit. The due observance of that statute is part of the protection of the laws, to which, equally with all others in like circumstances, he is entitled under the guaranty of the Fourteenth Amendment."

But this proceeds upon a misconception of the purpose of the statute, as was pointed out by the Court of Errors and Appeals, and of the power of the State.

Let it be granted, in deference to the argument of counsel, that the statute makes two classes—those who are accused of crime and those that may be accused—there is certainly no discrimination within the classes, and the only question can be whether, in view of the purpose of the statute, is the classification justified? In other words, whether the persons constituting the classes are in different relations to the purpose of the law. That they are we think is obvious; and, as we have said, the law neither offers or withholds substantial rights. It constitutes one of its instrumentalities of persons having certain qualifications which cannot affect essentially the charge against or the defense of any defendant. It is the conception of the State that a grand jury so constituted would be more efficient in the administration of justice than one not so constituted, but that there would be counteracting disadvantages if the right of challenge should be extended beyond the date of the empanelment of the jury. We think it is competent for the State to have so provided.

It will be observed that the provision of the statute is that no exception to a juror "on account of his citizenship or age *or any other legal disability* [italics ours] shall be allowed after he has been sworn." It is hence contended that "the principle of the decision" under review is not limited to the "statutory disqualifications." The court said, however, "whether the words of the statute, 'any other disability,' include the common law grounds of prejudice, malice and the like, and, if so, what would be the rights and remedies of an indicted person who had had no opportunity to challenge a given juror upon these personal grounds is not involved in the facts of the present case or in the line of reasoning upon which, in our judgment, its decision should be placed." In connection with this comment see *Lee* v. *State of New Jersey*, 207 U. S. 67.

Judgment affirmed.

CENTRAL RAILROAD COMPANY OF NEW JERSEY *v.* JERSEY CITY.

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

No. 203. Argued April 15, 16, 1908.—Decided April 27, 1908.

"Jurisdiction" as generally used in compacts between States has a more limited sense than "sovereignty."

Under the agreement of 1833 between the States of New York and New Jersey, 4 Stats. 708, while exclusive jurisdiction is given to New York over the waters of the Hudson River west of the boundary line fixed by the agreement, the land under such waters remained subject to the sovereignty of New Jersey and the jurisdiction given to New York over the waters does not exclude the sovereign power of New Jersey to tax such land,—nor does an exercise of that power deprive the owner of the land of his property without due process of law.

This court in construing a compact between States will hesitate to reach a conclusion different from that reached by the highest courts of both States.

43 Vroom, 311, affirmed.

THE facts are stated in the opinion.

Mr. Frank Bergen and *Mr. William D. Edwards*, with whom *Mr. George Holmes* was on the brief, for plaintiff in error:

Prior to the execution of the compact New Jersey did not have jurisdiction for any purpose over the land under the waters of Hudson River and New York Bay and has no jurisdiction now below low-water mark of the river and bay or over the property of the plaintiff in error except that conferred by the compact. *Corfield* v. *Coryell*, 4 Wash. C. C. R. 371, cited and approved in *State* v. *Davis*, 25 N. J. Law, 387; *Handley's Lessee* v. *Anthony*, 5 Wheat. 374; *Shively* v. *Bowlby*, 152 U. S. 1, 13; *Martin* v. *Waddell*, 16 Pet. 345; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592.

By the compact exclusive jurisdiction was granted or conceded to New York over the land of the plaintiff in error, sub-

ject only to the right of New Jersey to regulate fisheries in the waters covering the same, provided navigation be not obstructed. It is admitted that if any docks, wharves or improvements had been made on the property they would be subject to taxation by New Jersey and (in this instance) as part of the upland. There are, however, no improvements on the property. *State* v. *Babcock*, 1 Vroom, 29; *Kiernan* v. *The Norma*, 32 Fed. Rep. 411; *Ferguson* v. *Ross*, 126 N. Y. 459.

Authority to regulate fisheries in the waters covering the property of the plaintiff in error does not involve the power to tax it.

The word "jurisdiction" is used in the compact in its broad common sense; that is, the power to govern—to exercise executive, legislative and judicial authority. We think the word was not used for the limited purpose of conferring merely judicial authority or the right to exercise partial or indefinite police power. The term "exclusive jurisdiction" is repeatedly used, and whenever qualified the exceptions are specified as definitely as possible. *United States* v. *Cornell*, 2 Mason, 60, 64, 91; *Loughborough* v. *Blake*, 5 Wheat. 317.

Taxation cannot be imposed except by authority of a government having jurisdiction over the property assessed broad enough to include the power to tax. *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385, 396; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *D., L. & W. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341; Ops. Mass. Justices, 1 Metc. 580; *United States* v. *Ames*, 1 Woodbridge & Minot, 76, 80; *Mitchell* v. *Tibbets*, 17 Pick. 298, and *United States* v. *Rice*, 4 Wheat. 246.

New Jersey does not possess the power to tax the property of the plaintiff in error. That State has no jurisdiction below the low-water mark on its shore over Hudson River and New York Bay south of Spuyten Duyvil creek except over wharves, docks and improvements made and to be made thereon and over vessels aground thereon or fastened to any dock or wharf and the right to regulate fisheries; but even this measure of

jurisdiction is diminished by the provision that such vessels shall be subject to the quarantine or health laws and laws in relation to passengers of the State of New York, and the right to regulate fisheries cannot be exercised so as to hinder or obstruct navigation.

Mr. Warren Dixon for defendants in error:

It is the settled law of the State of New Jersey that lands under water within the state limits originally belonged to the State, and that title by holders other than the State is acquired from the State. The title to lands under water within the present limits of the State were vested in the King of Great Britain at and before the Revolution of 1776, and became vested by the law of nations and by the right of conquest in the people of the then Colony and now State of New Jersey by the War of Independence. *Martin* v. *Waddell*, 17 Peters, 367; *Arnold* v. *Munday*, 1 Halstead, 1; *Stevens* v. *Railroad Co.*, 5 Vroom, 540; *McCready* v. *Virginia*, 94 U. S. 391.

The State of New Jersey was seized in fee simple absolute in the soil covered by the waters of the Hudson River; and the said lands, being within the boundaries of the said State, were subject only to the paramount easement of navigation and to the power of regulating such easement possessed by the United States.

The State of New Jersey has always claimed ownership of the lands under water out to the middle of the Hudson River and the Bay of New York.

By the law of nations where an arm of the sea or a river is the boundary between two nations or states, if the original right of jurisdiction is in neither, in the absence of any convention respecting it, each holds to the middle of the stream. Angell on Tide-waters, p. 7; Vattel, B. 1, c. 22, § 266; Marten, B. 4, c. 3, 4, 5.

Article 4 of the compact between the States of New York and New Jersey, as construed by the courts, gives to New York merely the power of executing its quarantine law and laws re-

lating to passengers as to vessels passing over the waters of the Hudson River, and by necessary implication reserves to New Jersey every other political or governmental jurisdiction and dominion, and all prerogative, proprietary, and sovereign rights in and over the waters of the Hudson River and the lands lying thereunder and with the boundary fixed by the agreement. *People* v. *Central R. R. Co. of N. J.*, 42 N. Y. 283.

The action of the State of New Jersey in respect to its lands lying under its navigable waters within its boundaries, through various statutes passed by the legislature, constitutes a continued exercise and assertion of its ownership. (See "An act for preserving oysters in the Province of New Jersey," passed in the fifth year of George I, Nevill's Laws, p. 86; "An act for the preservation of oysters," passed January 26, 1789; "An act for the preservation of clams and oysters," passed June 9, 1820, p. 758; act of April 14, 1846, Rev. of 1847, p. 492, Rev. of 1877, p. 138; the wharf act, passed March 18, 1851, Rev. of 1877, p. 1240; the various riparian statutes, Gen. Stat. p. 2785.)

Lands under water formerly belonging to the State and granted by the State to property owners are subject to taxation. *Morris Canal Co.* v. *Jersey City*, 6 Vroom, 178; *State* v. *Pratt*, 4 Zab. 108; *State* v. *Sippl*, 1 Dutcher, 530; and see also 14 Vroom, 121; 17 Vroom, 341.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error prosecuted to review a judgment sustaining taxes levied by Jersey City upon lands of the plaintiff in error lying between the middle of New York Bay and its low water line on the New Jersey shore. It is argued that this land, although it belonged to New Jersey until conveyed, is not within its jurisdiction, and cannot be taxed under the authority of that State. The Supreme Court upheld the tax, 41 Vroom, 81, and its judgment was affirmed by the Court of Errors and Appeals for the reasons given by the Supreme Court. 43 Vroom, 311.

The plaintiff in error contended that, as New Jersey had not the right to tax, the attempt was to deprive the prosecutor of its property contrary to the Fourteenth Amendment, and brought the case here.

The decision depends upon the construction of an agreement made between New Jersey and New York for the purpose of settling the territorial limits and jurisdiction of the two States, which previously had been the subject of dispute. This agreement was made by commissioners appointed for the purpose, was confirmed by New York on February 5, 1834, Laws of 1834, ch. 8, p. 8, and by New Jersey on February 26, 1834, Laws of 1834, p. 118, and was approved by Congress by act of June 28, 1834, c. 126. 4 Stat. 708. By Article I, the boundary line between the two States from a point above the land in dispute is to be the middle of the Hudson River, of the Bay of New York, of the water between Staten Island and New Jersey, etc., "except as hereinafter otherwise particularly mentioned." By Article II, New York retains its present jurisdiction over Bedlow's and Ellis Islands, and exclusive jurisdiction over certain other islands in the waters mentioned. By Article III, New York is to have "exclusive jurisdiction of and over all the waters of the Bay of New York, and of and over all the waters of the Hudson River lying west of Manhattan Island and to the south" of the above mentioned point, "and of and over the land covered by the said waters to the low water mark on the westerly or New Jersey side thereof, subject to the following rights of property and jurisdiction of the State of New Jersey, that is to say: 1. The State of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the Bay of New York and west of the middle of that part of the Hudson River which lies between Manhattan Island and New Jersey." 2. New Jersey is to have exclusive jurisdiction over wharves, docks and improvements made or to be made on its shore and over vessels aground or fastened there, subject to the quarantine and passenger laws of New York. 3. New Jersey is to have the exclusive right of

regulating the fisheries on the west of the middle of said waters, providing that navigation be not obstructed or hindered.

The other articles need but brief mention. Article IV gives New York "exclusive jurisdiction" over the waters of the Kill van Kull "in respect to such quarantine laws and laws relating to passengers &c. and for executing the same," and over certain other waters. Article V gives New Jersey exclusive jurisdiction over certain other waters subject to New York's exclusive property and exclusive jurisdiction over wharves, docks and improvements within certain limits, and exclusive right of regulating the fisheries on its side, as above in the case of New Jersey. Articles VI and VII provide for the service of criminal and civil process of each State on the waters within the exclusive jurisdiction of the other. Article VIII and last calls for the confirmation of the agreement by the two States and approval by the Congress of the United States.

Thus the land which has been taxed is on the New Jersey side of the boundary line but under the "exclusive jurisdiction" of New York, subject to the exclusive right of property in New Jersey and the limited jurisdiction and authority conferred by the paragraphs summed up. The question is which of these provisions governs the right to tax. It appears to us plain on the face of the agreement that the dominant fact is the establishment of the boundary line. The boundary line is the line of sovereignty, and the establishment of it is not satisfied but is contradicted by the suggestion that the agreement simply gives the ownership of the land under water on the New Jersey side to that State as a private owner of land lying within the State of New York. On the contrary, the provision as to exclusive right of property in the compact between States is to be taken primarily to refer to ultimate sovereign rights, in pursuance of the settlement of the territorial limits, which was declared to be one purpose of the agreement, and is not to be confined to the assertion and recognition of a private claim, which, for all that appears, may have been inconsistent with titles already accrued and which would lose significance the

moment that New Jersey sold the land. We repeat that boundary means sovereignty, since in modern times sovereignty is mainly territorial, unless a different meaning clearly appears.

It is said that a different meaning does appear in the Article (III) that gives New York exclusive jurisdiction over this land as well as the water above it. But we agree with the state courts that have been called on to construe that part of the agreement that the purpose was to promote the interests of commerce and navigation, not to take back the sovereignty that otherwise was the consequence of Article I. This is the view of the New York as well as of the New Jersey Court of Errors and Appeals, and it would be a strange result if this court should be driven to a different conclusion from that reached by both the parties concerned. *Ferguson* v. *Ross*, 126 N. Y. 459, 463; *People* v. *Central R. R. Co.*, 42 N. Y. 283. This opinion is confirmed by the judgment delivered by one of the commissioners in *State* v. *Babcock*, 1 Vroom, 29. Again, as was pointed out by the state court, the often expressed purpose of the appointment of the commissioner and of the agreement to settle the territorial limits and jurisdiction must mean by territorial limits sovereignty, and by jurisdiction something less. It is suggested that jurisdiction is used in a broader sense in the second article, and that may be true so far as concerns Bedlow's and Ellis Islands. But the provision there is that New York shall retain its "present" jurisdiction over them, and would seem on its face simply to be intended to preserve the *status quo ante*, whatever it may be.

Throughout nearly all the articles of the agreement, other than those in controversy, the word jurisdiction obviously is used in a more limited sense. The word has occurred in other cases where a river was a boundary, and in the Virginia Compact was held to mean, primarily at least, *Jurisdictio*, authority to apply the law to the acts of men. *Wedding* v. *Meyler*, 192 U. S. 573, 584. Whether in the case at bar some power of police regulation also was conferred upon New York, as held in *Ferguson* v. *Ross*, need not be decided now. That New Jersey

retained the sovereignty, however, seems to be assumed in Article III (2), giving her exclusive jurisdiction over wharves, docks and improvements, made and "to be made," on the shore. This does not grant the right to make such improvements, but assumes it to exist. But the right would need the permission of New York, except on the hypothesis that New Jersey had sovereign power over the place.

The conclusion reached has the very powerful sanction of the conduct of the parties and of the existing condition of things. See *Moore* v. *McGuire*, 205 U. S. 214, 220. The decisions of the courts have been referred to. It was admitted at the bar that the record of transfers of such lands was kept in New Jersey, not in New York. New York never has attempted to tax the land, while New Jersey has levied more or less similar taxes for many years without dispute. See, *e. g. State* v. *Collector of Jersey City*, 4 Zabr. 108, 120; *State* v. *Jersey City*, 1 Dutcher, 530; *State* v. *Jersey City*, 6 Vroom, 178; *S. C.*, 7 Vroom, 471. New Jersey, not New York, regulates the improvements on the shore. Act of March 18, 1851, P. L. 1851, p. 335; Rev. 1877, p. 1240; Act of April 11, 1864, P. L. 1864, p. 681; March 31, 1869, P. L. 1869, p. 1017; 3 Gen. Stat. 2784, 2786; *New York, Lake Erie & Western R. R. Co.* v. *Hughes*, 46 N. J. 67. Without going into all the details that have been mentioned in the careful and satisfactory discussion of the question in the state courts we are of opinion that the land in question is subject to the sovereignty of the State of New Jersey, and that the exclusive jurisdiction given to the State of New York does not exclude the right of the sovereign power to tax.

Judgment affirmed.

SCULLY *v.* BIRD.

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

No. 353. Submitted April 20, 1908.—Decided May 4, 1908.

This court will not assume an inconsistency to exist between the opinion of the Circuit Court and its certificate.

On certificate that the bill was dismissed solely because the suit was against the State within the meaning of the Eleventh Amendment and therefore not within the jurisdiction of the Federal court as such, this court cannot determine whether the bill should have been dismissed because not presenting a case for equitable relief.

A suit by a citizen of another State to restrain a state officer from improperly enforcing a state statute, where no criminal prosecution has been commenced, *held*, in this case, not to be an action against the State within the meaning of the Eleventh Amendment.

THE facts are stated in the opinion.

Mr. E. T. Fenwick, for appellants:

The prohibition of the Eleventh Amendment does not apply where a suit is brought against defendants who, claiming to act as officers of the State, and under color of a statute which is valid and constitutional, but wrongfully administered by them, commit, or threaten to commit, acts of wrong or injury to the rights and property of the plaintiff, or make such administration of the statute an illegal burden and exaction upon the plaintiff. Bates Fed. Eq. Pro. (1901 ed.), § 560, Subd. 4; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 388.

Nor where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. In this class of cases, the defendant is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that

his authority in law was sufficient to protect him. *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 451.

The State is a political corporate body, can act only through its agents, and can command only by laws. It is necessary, therefore, for a defendant who seeks to substitute the State in his place, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. Bates, § 560, Subd. 8; *Poindexter* v. *Greenhow*, 114 U. S. 288.

Whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. Bates, § 560, Subd. 9; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 391.

The suit at bar might have been maintained in the state courts of Michigan against said defendant. *Pratt Food Co.* v. *Bird*, 148 Michigan, 631.

The statutes of Michigan confer no authority upon the defendant to do the acts of which complaint is made against him in this case. Comp. Laws Michigan, § 4978.

The suit at bar should not have been dismissed under § 5 of the act of 1875. U. S. Comp. Stat., § 639; *Farmington* v. *Pillsbury*, 114 U. S. 138; *Williams* v. *Mattawa*, 104 U. S. 212; *Mattocks* v. *Baker*, 2 Fed. Rep. 457.

The question whether the suit at bar is, in legal effect, a suit against the State is one on the merits of the case, and it was error for the trial court to hold that it was a question of jurisdiction, and to dismiss the bill on that account for want of jurisdiction. *Ill. Cent. R. R. Co.* v. *Adams*, 180 U. S. 28.

Mr. John E. Bird, Attorney General of the State of Michigan, and *Mr. George S. Law*, for appellee:

A decree denying the temporary injunction and dismissing the bill of complaint, was the only decree that could have been rendered by the Circuit Court. *Arbuckle* v. *Blackburn*, 113 Fed. Rep. 616; *S. C.*, 191 U. S. 405.

Pratt Food Co. v. *Bird*, 148 Michigan, 641, relied upon by

complainants, is rather an authority for the contention of defendant. It gives complainants ample remedy by proceedings in the state courts. *Freeney* v. *First National Bank*, 16 Fed. Rep. 433.

Whether or not this proceeding is a suit against the State, the decision of the Circuit Court was correct. *Penna. Ry. Co.* v. *Wabash Ry. Co.*, 157 U. S. 225; *Moffatt* v. *Smith*, 101 Fed. Rep. 771; 3 Cyc. 221, and cases cited.

The Circuit Court had the right at any stage of the proceedings, and upon its own motion, to dismiss the bill for want of jurisdiction. 11 Cyc., p. 701, and cases cited; *Heriot* v. *Davis*, Fed. Cases, No. 6,404 (2 Woodb. & M. 229).

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an appeal directly from the Circuit Court from a decree dismissing the bill of appellants for want of jurisdiction.

The bill sought an injunction against certain acts of the appellee, who is the dairy and food commissioner of the State of Michigan, and who, it is alleged, under cover of his office is injuriously affecting the reputation and sale of certain products manufactured by appellants. The acts complained of will be detailed more fully hereafter. It is enough to say preliminarily that appellants alleged in their bill that their business is the manufacturing, refining and selling of various food products, and more particularly the manufacturing, blending and selling of syrups used for food products; that their principal place of business is in Chicago, and that their business is "commonly recognized and known as an honorable and legitimate commercial industry and a legal and necessary adjunct to organized society;" and that they have large quantities of their products in Michigan "which prior to the acts complained of, found a ready sale in that State, which sales resulted in fair and continuous profit" to them.

The court dismissed the bill, and recites in its certificate that the decree "was made and entered by the court on its own motion and without notice to any of the parties to this suit or

their attorneys, except that the question of jurisdiction was argued on the motion for preliminary injunction, it appearing to the court from the face of the bill that this suit is, in effect, a suit against the State of Michigan within the meaning of the Eleventh Amendment to the Constitution of the United States, and that, therefore, this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of a Federal court."

The court expressed its reason for its action in an opinion as follows:

"Upon examination of the authorities cited upon the arguments had in this cause upon the matters above related, it is clear that the case of *Arbuckle* v. *Blackburn, Dairy and Food Commissioner of Ohio,* 113 Fed. Rep. 616 (C. C. A.), is conclusive against the jurisdiction of a court of equity over the matters set forth in the bill. It is argued in behalf of complainants that the case at bar is differentiated from that decision of the Court of Appeals in the case just cited. It is not perceived that there is any substantial difference in the facts of the two cases which would exclude the application of *Arbuckle* v. *Blackburn.* That case is conclusive that this court has no jurisdiction to entertain a suit of this nature, and the only order which can be made in this case, notwithstanding the entry of the order *pro confesso,* is one for a dismissal of the bill for want of jurisdiction."

Arbuckle v. *Blackburn* was appealed to this court, but the appeal was dismissed, on the ground that the jurisdiction of the Circuit Court was " 'dependent entirely upon the opposite parties to the suit or controversy being . . . citizens of different States,' and the decree of the Circuit Court of Appeals was final." The questions passed on by the latter court were not considered or decided. 191 U. S. 405.

The Attorney General of the State, who appears as counsel for the appellee, does not contend that this is a suit against the State. He says: "Counsel for defendant did not claim in the Circuit Court, and do not now claim, that this proceeding is a suit against the State. It is our contention that under the de-

cision of the Circuit Court of Appeals in the case of *Arbuckle* v. *Blackburn, supra,* a Federal court of equity has no jurisdiction of the subject-matter of the bill of complaint, viz., that it has no jurisdiction to restrain the dairy and food commissioner of a State from issuing bulletins or circulars claiming that an article of food is in violation of the criminal laws of a State."

And it is urged that such was the reason given by the court in its opinion and order dismissing the bill, and that as the decision of the court was right it should not be reversed, because the reason given for it in the certificate was not the correct reason. But we cannot assume that there is inconsistency between the opinion and order of the court and its certificate. We, therefore, accept the latter as expressing the ground of the court's action. We would have no jurisdiction on this appeal unless the jurisdiction of the Circuit Court was in question as a Federal court; and whether the bill presented a case for equitable relief does not present a question of the jurisdiction of the court as a court of the United States. *Blythe* v. *Hinckley,* 173 U. S. 501; *Illinois Central R. R. Co.* v. *Adams,* 180 U. S. 28, 35. Indeed, it is urged by appellant that whether a suit is one against a State is not a question of jurisdiction, but a question on the merits, and *Illinois Central R. R. Co.* v. *Adams, supra,* is cited.

That suit was brought by the railroad company against Adams, who was a revenue agent of the State of Mississippi, and the railroad commission of the State, to enjoin the latter from certifying an assessment for taxes on a railroad in which the Illinois Central had an interest and to enjoin the revenue agent from beginning any suit or advising any of the municipalities along the line of the road to bring suit for the recovery of such taxes. The bill was dismissed for want of jurisdiction and the case was appealed to this court. One of the grounds for the dismissal was, as certified, "that there was no jurisdiction in this matter because the bill was a suit against the State of Mississippi and in violation of the Eleventh Amendment to the Constitution of the United States." We said, by Mr. Jus-

tice Brown, that such a question is "one which we think belongs to the merits rather than to the jurisdiction." And further: "If it were a suit directly against the State by name, it would be so palpably in violation of that Amendment that the court would probably be justified in dismissing it upon motion; but the suit is not against the State, but against Adams individually, and if the requisite diversity of citizenship exist, or if the case arise under the Constitution or laws of the United States, the question whether he is so identified with the State that he is exempt from prosecution, on account of the matters set up in the particular bill, are more properly the subject of demurrer or plea than of motion to dismiss. This seems to have been the opinion of Chief Justice Marshall in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 858, wherein he makes the following observation: 'The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendant; whether they are to be considered as having a real interest, or as being only nominal parties.' " Again, 180 U. S. 38: "But where the suit is against an individual by name, and he desires to plead an exemption by reason of his representative character, he does not raise a question of jurisdiction in its proper sense. . . . But whether this is a question of jurisdiction or not, we think it should be raised either by demurrer to the bill or by other pleadings in the regular progress of the cause. Motions are generally appropriate only in the absence of remedies by regular pleadings and cannot be made available to settle important questions of law." Cases were cited, and it was further observed that in *Fitts* v. *McGhee*, 172 U. S. 516, the question whether the officers proceeded against "were representatives of the State was disposed of upon answers filed."

The suit at bar has not the "palpable" evidence of being a suit against the State by being against the State by name. Do the allegations of the bill make it such?

The suit is brought against appellee, described as a citizen of Michigan, by appellants, described as citizens of Illinois. It is true it is alleged that appellee is the state dairy and food commissioner of Michigan, and that by an act of the general assembly of the State, passed the second of June, 1893, the office of dairy and food commissioner was created, and that it was by such act and amendatory acts made the duty of appellee as commissioner "to attend to the enforcement of all the laws of the State of Michigan against the unlawful labeling, fraud, adulteration or impurity of foods, sold, offered for sale, exposed for sale or had in possession with intent to sell in the State of Michigan," and that it is the duty of the commissioner is clearly set forth in the acts.

It is alleged that it is his duty to prosecute violators of the act. That it came to the notice of the appellants that the appellee questioned the legality of some of the food products manufactured by them and sold in Michigan, and that they represented, through their attorney, that they were manufacturers of certain brands of maple and cane syrups which they were desirous of having properly labeled, that appellee refused to accept the statement of the attorney as being made in good faith, and stated that none of the syrups manufactured by appellants contained any maple syrup whatever, but were mixtures of inferior syrups containing substances which produced "imitation maple flavors," and accused appellants of not being desirous of "obtaining a wise and just interpretation of the food laws of the State of Michigan," and refused to give appellants' attorney "any information as to how a brand of maple syrup and cane syrup should be properly and legally labeled under said food laws," and refused to consider how such syrups should be labeled, and insisted that he would only permit appellants' syrups "to be sold simply as 'syrup,' without any qualifying words whatever to inform purchasers of the same of the nature of such syrups." The bill sets forth efforts made by appellants to have the question of the legal labeling of their products decided by the Assistant Attorney General of the State,

and asked the latter officer to bring a test case in the courts of Michigan or "arbitrate the question at issue." To which the Assistant Attorney General replied "that they did not arbitrate matters in Michigan, but that they were 'fighters.' "

It is alleged that appellants were advised by their attorney that the proper course for them to pursue would be to label their "Westmoreland" and "Triumph" brands of syrups as nearly as possible in accordance with the laws of Michigan, and in compliance with that opinion they devised labels which described the "Westmoreland" as a brand of pure maple syrup and pure rock candy syrup, and the "Triumph" as a "delicious brand" of the same syrups. And it is alleged that both brands are composed of maple syrup and cane syrup, "and no other ingredients whatever," and that rock candy syrup is the purest kind of cane syrup, and is the only cane syrup used by appellants.

It is alleged that appellants have shipped into the State of Michigan said brands of syrups labeled and branded as aforesaid and that shortly after such shipment the appellee "assumed a hostile attitude towards all of said syrups and contended and persists in contending that the labeling upon said syrups does not comply with the laws of the State, and that he and his inspectors "at once commenced a systematic crusade" against the sale of the syrups, and appellant is informed that appellee contends that "the words 'maple syrup' should not appear on any of the said labels in any manner or form whatever, even though said syrups actually contained a representative proportion of pure maple syrup." The bill contains the following paragraph:

"Your orators further represent that they are informed and believe that the said crusade, waged against their said brands of syrup by the said Arthur C. Bird and his inspectors, is not in good faith, but that the same is actuated by malice and ill will on the part of said Arthur C. Bird towards your orator, growing out of the conference between your orators' said attorney and the said Arthur C. Bird hereinbefore referred to,

and that the activity of said Arthur C. Bird to prevent the sale of said brands of syrups is caused by the malicious desire on the part of Arthur C. Bird to ruin your orators' business in the State of Michigan."

It is further alleged that "the crusade against said brands of syrups" is conducted by appellee and his food inspectors, acting under his direction, by visiting all grocers, merchants and dealers in the syrups, and informing them that by selling said syrups they would subject themselves to criminal prosecution. And that it has been the custom and practice of appellees since the shipment of the syrups to the State to write numerous letters to dealers in the State, warning them that the syrups were illegally labeled, and directing them to return all such syrups to appellants, and directing such dealers to make prompt reply "as to what course they had pursued in relation to said syrups," and what action they had taken to return the same.

It is also alleged that the food inspectors, under the direction of appellee, forcibly removed appellants' brands of syrups from the shelves of dealers, against the consent of said dealers. And "that in no case, so far as your orators are informed and believe, was any sample taken of such syrups so taken from the shelves as aforesaid, nor were the said syrups sealed as required by the statutes of the State of Michigan, nor were any prosecutions ever commenced against said grocers or dealers, although ample time has elapsed since the acts complained of as aforesaid."

The bill sets forth the efforts of appellants to have appellee commence prosecution against their agents and jobbers and against grocers and dealers handling their syrups, so that they might have an opportunity of defending the legality of their syrups "in the proper courts of the State of Michigan, and in a proper manner." These efforts, it is alleged, have failed; and it is further alleged that in all the acts and doings of the appellee complained of he was and is acting as a private citizen of the State, but "under cover of his said office of dairy and food commissioner." That his powers and duties as such of-

ficer are clearly defined in the statutes to which reference is made.

The intimidating effect of the acts of appellee upon the dealers in the syrups is set out and the detriment resulting therefrom to appellants detailed.

It is manifest from this summary of the allegations of the bill that this is not a suit against the State. *Cunningham* v. *M. & B. Rd. Co.*, 109 U. S. 446; *Pratt Food Co.* v. *Bird*, 148 Michigan, 631. It is not a suit, as was *Arbuckle* v. *Blackburn*, *supra*, to restrain a criminal prosecution. Indeed, the bill alleges that a criminal prosecution was invited by appellant and refused by appellee, and refused, it is alleged, to serve the purpose of what the bill denominates a "crusade" against the syrups of appellants, and in dereliction of duties enjoined by the statutes of the State.

Decree reversed and the case remanded for further proceedings.

MR. JUSTICE HARLAN concurs in the decree.

MATTER OF ALBERT N. MOORE, AN INFANT PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 17, Original. Argued March 9, 1908.—Decided April 20, 1908.

In either case, the filing by the defendant of a petition for removal, the filing by the plaintiff after removal of an amended complaint or the giving of a stipulation for continuance, amounts to the acceptance of the jurisdiction of the Circuit Court.

A next friend may select one of several tribunals in which the infant's case shall be tried, and may elect to accept the jurisdiction of the Federal court to which the case may be removed.

While consent cannot confer on a Federal court jurisdiction of a case of which no Federal court would have jurisdiction, either party may waive

the objections that the case was not brought in, or removed to, the particular Federal court provided by the statute.

Nothing in *Ex parte Wisner*, 203 U. S. 449, changes the rule that a party may waive the objection to the jurisdiction in respect to a particular court where diversity of citizenship actually exists.

THIS is an application by petitioner for a writ of mandamus to compel the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri to remand the case of this petitioner *v.* The Louisville and Nashville Railroad Company to the state court, from whence it came.

The facts are these: On November 16, 1906, Albert Newton Moore, an infant, over the age of fourteen years, presented his petition to the Circuit Court of the city of St. Louis, Missouri, stating that he desired to institute a suit in that court against the Louisville and Nashville Railroad Company, and praying for the appointment of a next friend, whereupon George Safford, of St. Louis, was duly appointed such next friend. Thereupon a petition was filed in said state court in the name of Moore, by his next friend, against the Louisville and Nashville Railroad Company, to recover damages for personal injuries. After service of summons, but before answer was due, the railroad company filed its application for removal to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. This application for removal was based on the ground of diverse citizenship, and alleged that the plaintiff Moore was a citizen and resident of the State of Illinois; that Safford, the next friend, was a resident and citizen of the State of Missouri, and the defendant, a corporation created and existing under the laws of the State of Kentucky and a citizen and resident of that State. The petition and bond were in due form, and the case was transferred to the United States Circuit Court. Thereafter, and on March 22, 1907, the plaintiff filed in that court an amended petition. On March 25, by stipulation of the parties, the defendant was given time to plead to the plaintiff's amended petition. Three or four times thereafter stipu-

lations for continuances were entered into by the counsel for both sides. At the September term, 1907, a motion to remand, made by the plaintiff, was overruled, and a subsequent application to reconsider this ruling was also overruled. Thereupon this application for mandamus was presented.

Mr. Thomas T. Fauntleroy and *Mr. Shepard Barclay,* for petitioner, submitted:

The petition for removal discloses by affirmative facts that the case was not removable, and hence the jurisdiction of the state court was not divested, but continues. The Federal law ordains that where the foundation of jurisdiction in the Federal court rests upon diverse citizenship "suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 25 Stat. c. 366, p. 434; 4 Fed. Stats. An., p. 366.

This is a prohibition as well as an authority. It excludes (by use of the word "only") Federal jurisdiction in cases where suit is brought otherwise than as authorized, in the district of residence of either plaintiff or defendant.

When the removal petition was filed in the state court this cause was not removable on the facts therein alleged. Those facts made a clear showing that the cause was not subject to be removed. Hence the jurisdiction of the state court was not divested. It continues, despite the filing of the insufficient and totally deficient petition for removal. *Crehore* v. *Ohio &c. Ry.,* 131 U. S. 244; *Ayres* v. *Wiswall,* 112 U. S. 190, 191; *Young* v. *Parker,* 132 U. S. 267, 271; *La Confiance Comp'ie* v. *Hall,* 137 U. S. 61; *Stevens* v. *Nichols,* 130 U. S. 230; *Kellam* v. *Keith,* 144 U. S. 568; *Graves* v. *Corbin,* 132 U. S. 571; *Jackson* v. *Allen,* 132 U. S. 34; *Mattingly* v. *Railroad,* 158 U. S. 53.

A plaintiff, by appearing in the Federal court after the removal of the cause, and obtaining leave to file an amended complaint, does not thereby waive his right to move to remand. *Endy* v. *Ins. Co.,* 24 Fed. Rep. 657; *State* v. *Potter,*

16 Kansas, 80; *Robinson* v. *Walker*, 45 Missouri, 120; *Moulder* v. *Anderson*, 63 Mo. App. 39; *Latham* v. *Edgerton*, 9 Cow. 229; *Cameron* v. *Hodges*, 127 U. S. 325; *Turnbull* v. *Ross*, 141 Fed. Rep. 649; *Crane Co.* v. *Guanica Centrale*, 132 Fed. Rep. 713; *Cella* v. *Brown*, 144 Fed. Rep. 724; *Mitchell Co.* v. *Worthington*, 140 Fed. Rep. 947; *Stevens* v. *Nichols*, 130 U. S. 230; *Mattingly* v. *Railroad*, 158 U. S. 53; *Graves* v. *Corbin*, 132 U. S. 585; *Merchants Co.* v. *Ins. Co.*, 151 U. S. 384; *Railway* v. *Twitchell*, 59 Fed. Rep. 727; *Crasswell* v. *Belanger*, 56 Fed. Rep. 529; *MacNaughton* v. *Railway*, 19 Fed. Rep. 881; *Indiana* v. *Lake Erie &c. R. Co.*, 85 Fed. Rep. 2; *Frisbie* v. *Chesapeake &c. R. Co.*, 57 Fed. Rep. 1; *Southworth* v. *Reid*, 36 Fed. Rep. 451; *Bronson* v. *St. Croix Lumber Co.*, 35 Fed. Rep. 634; *Indiana* v. *Tolleston Club*, 53 Fed. Rep. 18; *Wabash R. Co.* v. *Barbour*, 73 Fed. Rep. 513; *Mexican Nat. R. Co.* v. *Davidson*, 157 U. S. 201; *Ayers* v. *Watson*, 113 U. S. 598; *Mansfield &c. R. Co.* v. *Swan*, 111 U. S. 379; *Martin* v. *Baltimore &c. R. Co.*, 151 U. S. 690; 18 Enc. Pl. & Pr. 369.

The right of removal is determined by the facts as disclosed by the removal petition, and if the latter is defective in substance (and, for stronger reason, if it affirmatively shows, as in the case at bar, that the cause is not removable), neither consent nor failure to raise the issue of jurisdiction can impart life to the attempt at removal. *Baxter Co.* v. *Mfg. Co.*, 154 Fed. Rep. 992; *Yellow Aster Co.* v. *Crane Co.*, 150 Fed. Rep. 580; *Goldberg Co.* v. *Ins. Co.*, 152 Fed. Rep. 834; *In re Hohorst*, 150 U. S. 653; *Cochran* v. *Montgomery County*, 199 U. S. 260.

If it were possible for a competent party to "waive the question of jurisdiction," such a rule could not apply to the case of an infant plaintiff, whose incapacity to waive any substantial right the courts should always protect. *Coal Co.* v. *Hays*, 97 Alabama, 201 (12 So. Rep. 98); R. S. Mo., 1899, § 556; 10 Ency. Pl. & Pr., p. 613 and cases; *Nagel* v. *Schilling*, 14 Mo. App. 576; *Ingersoll* v. *Mangam*, 84 N. Y. 622; *Carver* v. *Carver*, 64 Indiana, 194; *Martin* v. *Starr*, 7 Indiana, 224; *Gray* v. *Palmer*, 9 California, 616; *Frazier* v. *Pankey*, 1 Swan (Tenn.),

75; *Clark* v. *Thompson*, 47 Illinois, 25; *Bonnell* v. *Holt*, 89 Illinois, 72; *Dickison* v. *Dickison*, 124 Illinois, 483; *Fitch* v. *Cornell*, 1 Sawy. (U. S.) 157; *Greenman* v. *Harvey*, 53 Illinois, 386.

The rule in Missouri on this subject is unquestionable. *Hendricks* v. *McLean*, 18 Missouri, 32; *Gibson* v. *Chouteau*, 39 Missouri, 537; *Shaw* v. *Gregoire*, 41 Missouri, 407; *Railroad* v. *Campbell, Nelson & Co.*, 62 Missouri, 585; *Campbell* v. *Laclede Gas Light Co.*, 84 Missouri, 352; *Fischer* v. *Siekmann*, 125 Missouri, 165; *Bogart* v. *Bogart*, 138 Missouri, 419; *Wright* v. *Hink*, 193 Missouri, 130; *McMurtry* v. *Fairly*, 194 Missouri, 502; *S. C.*, 91 S. W. Rep. 90.

Mr. Harold R. Small, with whom *Mr. Harvey L. Christie* and *Mr. P. Taylor Bryan* were on the brief, for respondent:

Mandamus will not serve as a writ of error to review an exercise of judicial discretion by the United States Circuit Court in determining that a cause should not be remanded to the state court, unless the Circuit Court of the United States has abused its discretion. *In re Pollitz*, 206 U. S. 323 (1906); *Ex parte Hoard*, 105 U. S. 578; Taylor's Jurisdiction and Procedure in the U. S. Sup. Ct. § 316.

Where plaintiff and defendant are citizens of different States and are non-residents of the State and district in which a suit is brought in the state court and the amount involved is over $2,000, the jurisdiction of the United States Circuit Court attaches on removal thereto by defendant if a voluntary general appearance is made therein by plaintiff without objection by him that he is not a resident of the district. *Whelan* v. *New York &c. R. Co.*, 35 Fed. Rep. 858; *Gordon* v. *Longest*, 16 Pet. 97; *Pollard et al.* v. *Dwight et al.*, 4 Cranch, 421; *Gracie* v. *Palmer*, 8 Wheat. 699; *Toland* v. *Sprague*, 12 Pet. 300; *Ex parte Schollenberger*, 96 U. S. 369; *Claflin* v. *Ins. Co.*, 110 U. S. 81, 88; *First Nat. Bank* v. *Morgan*, 132 U. S. 141; *McCormick Co.* v. *Walthers*, 134 U. S. 41; *St. Louis &c. Ry.* v. *McBride*, 141 U. S. 127; *Empire Wire Co.* v. *Empire Mining Co.*, 150 U. S. 159; *Central Trust Co.* v. *McGeorge*, 151 U. S. 129; *Mar-*

tin's Admr. v. *B. & O. R. R. Co.*, 151 U. S. 673; *Mexican Nat. R. R. Co.* v. *Davidson*, 157 U. S. 201; *Interior Construction &c. Co.* v. *Gibney*, 160 U. S. 217; *Ex parte Wisner*, 203 U. S. 449, discussed and distinguished.

A next friend, a citizen of Missouri, appointed under the laws of Missouri to prosecute a suit for an infant of Illinois against a defendant of Kentucky, can, on removal of the suit to the Circuit Court of the United States by the non-resident defendant on the ground of diverse citizenship, elect to submit to the jurisdiction of the Circuit Court of the United States or to have the cause remanded to the state court on the ground that the infant is not a resident of the district.

As the plaintiff chose to and did submit to the jurisdiction of the court, and as the jurisdiction of the court thereby attached, the next friend cannot thereafter reconsider his choice and have the court divested of its jurisdiction by his motion to remand the cause to the state court. Revised Statutes of Missouri, 1899, §§ 551, 552, 554, 556 and 557; *Dillon* v. *Bowles*, 77 Missouri, 603; Moon on Removal of Causes, § 70, p. 118; *Raming* v. *Metropolitan Street Ry.*, 157 Missouri, 477, 514; *Kingsbury* v. *Buckner*, 134 U. S. 650.

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

It was held in *Ex parte Wisner*, 203 U. S. 449, that:

"Under sections 1, 2, 3 of the act of March 3, 1875, 18 Stat. 470, as amended by the act of March 1, 1887, 24 Stat. 552, corrected by the act of August 13, 1888, 25 Stat. 433, an action commenced in a state court, by a citizen of another State, against a non-resident defendant, who is a citizen of a State other than that of the plaintiff, cannot be removed by the defendant into the Circuit Court of the United States."

On the authority of this case it is contended by petitioner that as in this action none of the parties were citizens of the State of Missouri, it could not be removed by the defendant

into the Circuit Court of the United States, and that upon the failure of the United States Circuit Court to remand the case to the state court in which it was originally brought mandamus from this court is an appropriate remedy. But in that case the plaintiff never consented to accept the jurisdiction of the United States court, while in this case it is contended that both parties did so consent, and that therefore the decision in that case is not controlling.

This brings up two questions, first, whether both parties did consent to accept the jurisdiction of the United States court; and, second, if they did, what effect such consent had upon the jurisdiction of the United States court.

That the defendant consented to accept the jurisdiction of the United States court is obvious. It filed a petition for removal from the State to the United States court. No clearer expression of its acceptance of the jurisdiction of the latter court could be had. After the removal the plaintiff, instead of challenging the jurisdiction of the United States court by a motion to remand, filed an amended petition in that court, signed a stipulation giving time to the defendant to answer; and then both parties entered into successive stipulations for a continuance of the trial in that court. Thereby the plaintiff consented to accept the jurisdiction of the United States court, and was willing that his controversy with the defendant should be settled by a trial in that court. The mere filing of an amended petition was an appeal to that court for a trial upon the facts averred by him as they might be controverted by the defendant. And this, as we have seen, was followed by repeated recognitions of the jurisdiction of that court.

That a next friend may select the tribunal in which the suit shall be brought is clear. While he may do nothing prejudicial to the substantial rights of the minor, yet the mere selection of one out of many tribunals having jurisdiction cannot be considered as an act to the latter's prejudice. Certainly the election to accept the jurisdiction of a court of the United States is not an act prejudicial to substantial rights. In *Kings-*

bury v. *Buckner*, 134 U. S. 650, where the next friend consented that a case on a writ of error might be heard in some other grand division of the Supreme Court of Illinois than the one in which it was decided, and at a term of that court earlier than such writ of error could ordinarily be heard, and also waived the execution of an appeal bond by the opposite party, it was held that the infant was bound by such action, the court saying (p. 680):

"Now it is contended that the Supreme Court of the State, sitting in the Central Grand Division, could not, except by consent, entertain jurisdiction of those appeals, and that the next friend and guardian *ad litem* was incapable, in law, of giving such consent. It is undoubtedly the rule in Illinois, as elsewhere, that a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of the infant. The court, whose duty it is to protect the interests of the infant, should see to it that they are not bargained away by those assuming or appointed to represent him. But this rule does not prevent a guardian *ad litem* or *prochein amy* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved."

Again, in *Thompson* v. *Maxwell Land Grant Company*, 168 U. S. 451, where the question was whether the infant was bound by a consent decree, it was said (p. 462):

"That infants are bound by a consent decree is affirmed by the authorities, and this notwithstanding that it does not appear that a prior inquiry was made by the court as to whether it was for their benefit. In 1 Dan. Ch. Pl. & Pr. 163, it is said: 'Although the court usually will not, where infants are concerned, make a decree by consent, without an inquiry whether it is for their benefit, yet when once a decree has been pronounced without that previous step, it is considered as of the same authority as if such an inquiry had been directed, and a certificate thereupon made that it would be for their benefit.'

* * * * * * * *

"In *Walsh* v. *Walsh*, 116 Massachusetts, 377, a decree had

been entered as follows: 'And the plaintiff and the defendants, . . . Thomas Keys, . . . and also in his capacity of guardian *ad litem* of Bridget Walsh and William Walsh, consenting to the following decree: And this court being satisfied upon the representations of counsel that the decree is fit and proper to be made as against the said Bridget and William; it is thereupon ordered, and adjudged, and decreed,' etc.

"On a bill of review, filed by the minors, this decree was challenged, among other reasons, on the ground that it appeared to have been made by consent of their guardian *ad litem* and upon the representations of counsel without proof. The court decided against the contention, and speaking in reference thereto, through Mr. Chief Justice Gray, said:

" 'An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age. *Tillotson* v. *Hargrave*, 3 Madd. 494; *Levy* v. *Levy*, 3 Madd. 245. And a compromise, appearing to the court to be for the benefit of an infant, will be confirmed without a reference to a master; and, if sanctioned by the court, cannot be afterwards set aside except for fraud. *Lippiat* v. *Holley*, 1 Beav. 423; *Brooke* v. *Mostyn*, 33 Beav. 457, and 2 De C. J. & S. 373.

" 'If the court does pronounce a decree against an infant by consent, and without inquiry whether it will be for his benefit, he is as much bound by the decree as if there had been a reference to a master and a report by him that it was for the benefit of the infant. *Wall* v. *Bushby*, 1 Bro. Ch. 484; 1 Dan. Ch. Pr. 164. The case falls within the general rule, that a decree made by consent of counsel, without fraud or collusion, cannot be set aside by rehearing, appeal or review. *Webb* v. *Webb*, 3 Swanst, 658; *Harrison* v. *Rumsey*, 2 Ves. Sen. 488; *Bradish* v. *Gee*, Ambl. 229; *S. C.*, 1 Keny. 73; *Downing* v. *Cage*, 1 Eq. Cas. Ab. 165; *Toder* v. *Sansam*, 1 Bro. P. C. (2d ed.) 468; *French* v. *Shotwell*, 5 Johns. Ch. 555.' "

This also seems to be the settled law of Missouri. *Raming* v.

Metropolitan Street Railway, 157 Missouri, 477. In that case it was held that the next friend was the party to make application and affidavit for a change of venue from one state court to another, and the court said (p. 514):

"Section 2261, Revised Statutes 1889, requires the application and affidavits to be made by the party, and it has been held that this means the party in his own person and not by agent or attorney. *Squire* v. *Chillicothe*, 89 Missouri, 226. But it has never been decided in case of an infant suing by his next friend that the application cannot be made by the next friend.

"A next friend is neither the agent nor attorney for his ward. An agent or attorney derives his authority as such from his principal, but an infant cannot appoint an agent and empower him to do an act which in contemplation of law he is himself incapable of doing. The next friend does not derive his authority from the infant, and his office does not rest on such authority, either express or implied.

* * * * * * * *

"It is because the law regards an infant incapable of conducting a law suit in his own behalf that it has made provisions for the appointment of a next friend to act for him. The next friend derives his authority from the court which appoints him, and as he is appointed to institute and conduct the suit it follows that he has authority to do every act which the interest of the infant demands and the law authorizes. If this statute is to be considered so strictly as to deny the next friend the authority to make an application for a change of venue, then we necessarily deny to infants who are unable to act for themselves the equal protection with other litigants that the statute was designed to afford. Not only would this be rank injustice to a class for whose interests the law has always been watchful, but it would raise a serious question as to the validity of the statute itself. . . . It is intended here to say that in the suit of an infant by his next friend, the next friend is the proper person to make the application for a change of venue."

Turning now to the other question, the Constitution, Art. III, § 2, provides that the judicial power of the United States shall extend to controversies "between citizens of different States." Section 11 of the Judiciary Act of 1789 (1 Stat. 78) granted to the Circuit Courts original cognizance "of all suits of a civil nature at common law or in equity . . . where the suit is between a citizen of the State where the suit is brought, and a citizen of another State," and added: "And no civil suit shall be brought before either of said courts (Circuit or District) against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Section 12 (p. 79) provided "that if a suit be commenced in any state court . . . by a citizen of the State in which the suit is brought against a citizen of another State," a removal might be had of the case to the next Circuit Court to be held in the district where the suit is pending. The first section of the act of August 13, 1888, c. 866, 25 Stat. 433, like the Judiciary Act, invested the Circuit Courts of the United States with original cognizance of suits in which there is a controversy between citizens of different States, provided that no civil suit should be brought before either of said courts (Circuit or District) against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, and closed with these words, "but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." The second sentence of § 2 prescribed, in respect to removals, that "any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the Circuit Courts of the United States for the proper district by the defendant or defendants therein, being non-residents of that State." It will thus be

seen that by both the act of 1789 and that of 1888 there is a general grant to Circuit Courts of jurisdiction over controversies between citizens of different States, and in each of them there is a limitation as to the district in which the action must be brought. In the light of this similarity between these two acts must the second question be considered.

The contention is that as this action could not have been originally brought in the Circuit Court for the Eastern District of Missouri by reason of the last provision quoted from § 1, it cannot under § 2 be removed to that court, as the authorized removal is only of those cases of which by the prior section original jurisdiction is given to the United States Circuit Courts. But this ignores the distinction between the general description of the jurisdiction of the United States courts and the clause naming the particular district in which an action must be brought.

It may be well to examine the authorities touching this matter. In *Gracie* v. *Palmer*, 8 Wheat. 699, the court, by Mr. Chief Justice Marshall, held that:

"The exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process, was the privilege of the defendant, which he might waive by a voluntary appearance."

In *Toland* v. *Sprague*, 12 Pet. 300, 330, Mr. Justice Barbour thus stated the rule:

"Now, if the case were one of a want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties, by any act of theirs, to give it. But that is not the case. The court had jurisdiction over the parties and the matter in dispute; the objection was, that the party defendant, not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him; and that the process of attachment could only be properly issued against a party under circumstances which subjected him to process *in personam*. Now this was a personal privilege or exemption, which it was competent for the party to waive.

Pollard v. *Dwight*, 4 Cranch, 421; *Barry* v. *Foyles*, 1 Pet. 311."

In *Ex parte Schollenberger*, 96 U. S. 369, 378, Mr. Chief Justice Waite said:

"The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

In *First National Bank of Charlotte* v. *Morgan*, 132 U. S. 141, 145, Mr. Justice Harlan thus referred to a kindred question:

"This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process. . . . If it (the exemption) had been claimed by the defendant when appearing in the Superior Court of Cleveland County, it must have been recognized. The defendant did not, however, choose to claim immunity from suit in that court. It made defense upon the merits, and, having been unsuccessful, prosecuted a writ of error to the Supreme Court of the State, and in the latter tribunal, for the first time, claimed the immunity granted to it by Congress. This was too late. . . . We are of opinion that its exemption from suits in other courts of the same State was a personal privilege that it could waive, and which, in this case, the defendant did waive, by appearing and making defense without claiming the immunity granted by Congress."

In *McCormick Harvesting Machine Company* v. *Walthers*, 134 U. S. 41, 43, Mr. Chief Justice Fuller, quoting the provisions of § 1 of the act of 1888, said:

"The jurisdiction common to all Circuit Courts of the Uni-

ted States in respect to the subject-matter of the suit and the character of the parties who might sustain suits in those courts is described in the section, while the foregoing clause [the last clause in the section] relates to the district in which a suit may be originally brought."

In *St. Louis &c. Railway Company* v. *McBride*, 141 U. S. 127, 131, it was said:

"Assume that it is true, as defendant alleges, that this is not a case in which jurisdiction is founded only on the fact that the controversy is between citizens of different States, but that it comes within the scope of that other clause, which provides that 'no civil suit shall be brought before either of said courts, against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant,' still the right to insist upon suit only in the one district is a personal privilege which he may waive and he does waive it by pleading to the merits.

* * * * * * * *

"Without multiplying authorities on this question, it is obvious that the party who in the first instance appears and pleads to the merits waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit had been brought in the wrong district. *Charlotte Nat. Bank* v. *Morgan*, 132 U. S. 141; *Fitzgerald Construction Company* v. *Fitzgerald*, 137 U. S. 98."

In *Shaw* v. *Quincy Mining Company*, 145 U. S. 444, 453, a case arising after the act of 1888, and in which the defendant promptly raised the question of jurisdiction, Mr. Justice Gray referred to this matter in these words:

"The Quincy Mining Company, a corporation of Michigan, having appeared specially for the purpose of taking the objection that it could not be sued in the Southern District of New York, by a citizen of another State, there can be no question of waiver, such as has been recognized where a defendant has appeared generally in a suit between citizens of different States, brought in the wrong district. *Gracie* v. *Palmer*, 8

Wheat. 699; *St. Louis &c. Ry.* v. *McBride*, 141 U. S. 127, 131, and cases cited."

See also *Southern Pacific Company* v. *Denton*, 146 U. S. 202.

In *Central Trust Co.* v. *McGeorge*, 151 U. S. 129, 132, an action after the act of 1888 was in force, and in which neither party was a citizen of the State or resided in the district in which the action was brought, Mr. Justice Shiras used this language:

"Undoubtedly, if the defendant company which was sued in another district than that in which it had its domicil, had, by a proper plea or motion, sought to avail itself of the statutory exemption, the action of the court (in dismissing the complaint) would have been right. But the defendant company did not choose to plead that provision of the statute, but entered a general appearance and joined with the complainant in its prayer for the appointment of a receiver, and thus was brought within the ruling of this court, so frequently made, that the exemption from being sued out of the district of its domicil is a personal privilege which may be waived, and which is waived by pleading to the merits."

In *Martin's Administrator* v. *Baltimore & Ohio Railroad Company*, 151 U. S. 673, where objection was made to a removal on the ground that the removal petition was filed too late, Mr. Justice Gray, on page 688, observed:

"The time of filing a petition for the removal of a case from a state court into the Circuit Court of the United States for trial is not a fact in its nature essential to the jurisdiction of the national court under the Constitution of the United States, like the fundamental condition of a controversy between citizens of different States. But the direction as to the time of filing the petition is more analogous to the direction that a civil suit within the original jurisdiction of the Circuit Court of the United States shall be brought in a certain district, a non-compliance with which is waived by a defendant who does not seasonably object that the suit is brought in the

wrong district. *Gracie* v. *Palmer*, 8 Wheat. 699; *Taylor* v. *Longworth*, 14 Pet. 172, 174; *St. Louis & San Francisco Railway* v. *McBride*, 141 U. S. 127; *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593; *Central Trust Company* v. *McGeorge*, 151 U. S. 129."

In *Mexican National Railroad Company* v. *Davidson*, 157 U. S. 201, 208, Mr. Chief Justice Fuller, after stating that the action could not have been originally brought in the Circuit Court of the United States because both parties were, in the eyes of the law, citizens of the same State, added:

"It is true that by the first section, where the jurisdiction is founded on diversity of citizenship, suit is to be brought 'only in the district of residence of the plaintiff or the defendant,' and this restriction is a personal privilege of the defendant and may be waived by him. *St. Louis & San Francisco Ry.* v. *McBride*, 141 U. S. 127. Section 2, however, refers to the first part of section 1, by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought. *McCormick Machine Co.* v. *Walthers*, 134 U. S. 41."

In *Interior Construction & Improvement Company* v. *Gibney*, 160 U. S. 217, 219, Mr. Justice Gray thus stated the law:

"Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance, without taking the objection."

In *Ex parte Wisner, supra*, Mr. Chief Justice Fuller, referring

to *St. Louis &c. Railway Company* v. *McBride*, 141 U. S. 127, said:

"As the defendant appeared and pleaded to the merits, he thereby waived his right to challenge thereafter the jurisdiction of the court over him on the ground that the suit had been brought in the wrong district. And there are many other cases to the same effect."

Several other cases in this court, as well as many in the Circuit Courts and Circuit Courts of Appeal, might be noticed, in which a similar ruling as to the effect of a waiver was announced. It is true that in most of the cases the waiver was by the defendant, but the reasoning by which a defendant is precluded by a waiver from insisting upon any objection to the particular United States court in which the action was brought compels the same conclusion as to the effect of a waiver by the plaintiff of his right to challenge that jurisdiction in case of a removal. As held in *Kinney* v. *Columbia Saving & Loan Association*, 191 U. S. 78, a petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the state to the Federal court, and if when the defendant is brought into a Federal court by the service of original process he can waive the objection to the particular court in which the suit is brought, clearly the plaintiff, when brought into the Federal court by the process of removal, may in like manner waive his objection to that court. So long as diverse citizenship exists the Circuit Courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a Circuit Court or one subsequently removed from a state court, and if any objection arises to the particular court which does not run to the Circuit Courts as a class that objection may be waived by the party entitled to make it. As we have seen in this case, the defendant applied for a removal of the case to the Federal court. Thereby he is foreclosed from objecting to its jurisdiction. In like manner, after the removal had been ordered, the plaintiff elected to remain in

that court, and he is, equally with the defendant, precluded from making objection to its jurisdiction.

Special reliance is placed by petitioner upon this statement in the *Wisner case* (p. 460):

"But it is contended that Beardsley was entitled to remove the case to the Circuit Court, and as by his petition for removal he waived the objection so far as he was personally concerned that he was not sued in his district, hence that the Circuit Court obtained jurisdiction over the suit. This does not follow, inasmuch as in view of the intention of Congress by the act of 1887 to contract the jurisdiction of the Circuit Courts, and of the limitations imposed thereby, jurisdiction of the suit could not have obtained, even with the consent of both parties."

It is said that here is a distinct declaration that "jurisdiction of the suit could not have obtained, even with the consent of both parties." There was no pretense of any consent on the part of the plaintiff in that case, and therefore this statement was unnecessary. In order, however, to prevent future misconception we add that nothing in the opinion in the *Wisner case* is to be regarded as changing the rule as to the effect of a waiver in respect to a particular court.

It may not be amiss to note that in several of the Circuit Courts and Courts of Appeal the *Wisner case* has been considered, and in all held that no change was intended by it. *Corwin M. Company* v. *Henrici Washer Company,* opinion by Lowell, Circuit Judge, 151 Fed. Rep. 938; *Louisville & Nashville Railroad Company* v. *Fisher,* 155 Fed. Rep. 68, Circuit Court of Appeals (Sixth Circuit), opinion by Lurton, Circuit Judge; *Shanburg* v. *F. & C. Co.,* Circuit Court of Appeals (Eighth Circuit), opinion by Riner, District Judge; *McPhee & McGinnity Company* v. *Union Pacific R. R. Co.,* Circuit Court of Appeals (Eighth Circuit), opinion by Sanborn, Circuit Judge. These two opinions are not yet published.

We might also refer to the several text books in which is affirmed the general doctrine of the effect of the waiver of an

objection to a particular court in which the suit has been brought or to which it has been removed. We have made these many quotations and references, not simply to establish the doctrine itself, but to emphasize the widespread injurious results which may be expected to follow from now enforcing a different rule; for, if in a case between citizens of different States, of which the Circuit Courts of the United States are given general jurisdiction, an objection to the jurisdiction of a particular one of those courts cannot be waived and no consent can give jurisdiction, it is clear that many judgments have been rendered by those courts in reliance upon such a waiver, which will necessarily be held to be absolutely void, and the litigation must be had over again in some other courts, resulting, possibly, in different decisions through the disappearance of witnesses, the loss of testimony, or the running of the statute of limitations.

The jurisdiction of the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri was settled by the proceedings had by the two parties, and the application for a writ of mandamus is

Denied.

THE CHIEF JUSTICE dissenting.

The right of action was not vested in the next friend and the citizenship of the infant controls. The case is one, therefore, in which the plaintiff was a citizen and resident of the State of Illinois and the defendant a corporation created and existing under the laws of the State of Kentucky, and a citizen and resident of that State. The action was brought in the Circuit Court of the city of St. Louis, Missouri, of which State neither of the parties was a citizen. The fact that the next friend, who also acted as attorney-at-law for the minor, was a citizen of Missouri, is immaterial.

The question is whether, where neither of the parties is a citizen of the State in which the action is brought, the juris-

diction of the Circuit Court can be maintained if both parties consent to it. Jurisdiction of the Circuit Courts depends upon some act of Congress, *Stevenson* v. *Fain*, 195 U. S. 165, 167; *Turner* v. *Bank*, 4 Dall. 8, 10; *McIntire* v. *Wood*, 7 Cranch, 504, 506; and I quote at length from the opinion of Mr. Justice Gray in *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, because he therein examines the statutory provisions bearing on the question before us, saying (p. 446):

"In carrying out the provision of the Constitution which declares that the judicial power of the United States shall extend to controversies 'between citizens of different States,' Congress, by the Judiciary Act of September 24, 1789, c. 20, § 11, conferred jurisdiction on the Circuit Court of suits of a civil nature, at common law or in equity, 'between a citizen of the State where the suit is brought and a citizen of another State,' and provided that 'no civil suit shall be brought' 'against an inhabitant of the United States,' 'in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.' 1 Stat. 78, 79.

"The word 'inhabitant,' in that act, was apparently used, not in any larger meaning than 'citizen,' but to avoid the incongruity of speaking of a citizen of anything less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in the State, like the districts of Maine and Massachusetts in the State of Massachusetts, and the districts of Virginia and Kentucky in the State of Virginia, established by § 2 of the same act. 1 Stat. 73. It was held by this court from the beginning that an averment that a party resided within the State or the district in which the suit was brought was not sufficient to support the jurisdiction, because in the common use of words a resident might be a citizen, and therefore it was not stated expressly and beyond ambiguity that he was a citizen of the State, which was the fact on which the jurisdiction depended under the provisions of the Constitution and of the Judiciary Act. . . .

"By the act of May 4, 1858, c. 27, § 1, it was enacted that,

in a State containing more than one district, actions not local should 'be brought in the district in which the defendant resides,' or 'if there be two or more defendants residing in different districts in the same State,' then in either district. 11 Stat. 272. The whole purport and effect of that act was not to enlarge, but to restrict and distribute jurisdiction. It applied only to a State containing two or more districts; and directed suits against citizens of such a State to be brought in that district thereof in which they or either of them resided. It did not subject defendants to any new liability to be sued out of the State of which they were citizens, but simply prescribed in which district of that State they might be sued.

"These provisions of the acts of 1789 and 1858 were substantially reënacted in sections 739 and 740 of the Revised Statutes.

"The act of March 3, 1875, c. 137, § 1, after giving the Circuit Courts jurisdiction of suits 'in which there shall be a controversy between citizens of different States,' and enlarging their jurisdiction in other respects, substantially reënacted the corresponding provision of the act of 1789 by providing that no civil suit should be brought 'against any person,' 'in any other district than that whereof he is an inhabitant or in which he shall be found' at the time of service, with certain exceptions not affecting the matter now under consideration. 18 Stat. 470.

"The act of 1887, both in its original form and as corrected in 1888, reënacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: 'But where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' 24 Stat. 552; 25 Stat. 434. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit

to be brought in any other district than that whereof the defendant is an inhabitant; and the effect is that 'where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit may be brought in the district in which either the plaintiff or the defendant resides.' *McCormick Co.* v. *Walthers*, 134 U. S. 41, 43. And the general object of this act, as appears upon its face, and has been often declared by this court, is to contract, not to enlarge, the jurisdiction of the Circuit Courts of the United States. *Smith* v. *Lyon*, 133 U. S. 315, 320; *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Fisk* v. *Henarie*, 142 U. S. 459, 467.

"As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the same subject, and of the judicial construction thereof, is that the phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant,' and cannot be construed as giving jurisdiction, by reason of citizenship, to a Circuit Court held in a State of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the State of which he is a citizen; and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district 'in which he shall be found,' requires any suit, the jurisdiction of which is founded only on its being between citizens of different States, to be brought in the State of which one is a citizen, and in the district therein of which he is an inhabitant and resident."

Treating the clause that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant" as by way of proviso, that proviso must be regarded as excluding from the enacting clause "some possible ground of misinterpretation of it, as

extending to cases not intended by the legislature to be brought within its purview." *Minas* v. *United States*, 15 Pet. 445; *Austin* v. *United States*, 155 U. S. 417, 431.

Jurisdiction of the subject-matter is given only by law and cannot be conferred by consent, and, therefore, the objection that a court is not given such jurisdiction by law, if well founded, cannot, of course, be waived by the parties.

In my judgment, § 1, in cases where litigants are citizens of different States, confers jurisdiction only on the Circuit Court of the district of the plaintiff's residence and the Circuit Court of the district of the defendant's residence. And it is not conferred on the Circuit Court of the district of neither of them, and cannot be even by consent. If this were not so, as Mr. Justice Harlan said in *Bors* v. *Preston*, 111 U. S. 255, "it would be in the power of the parties by negligence or design to invest those courts with a jurisdiction expressly denied to them;" or where it may also be said, such jurisdiction was not expressly conferred. This view was expressed in *Ex parte Wisner*, 203 U. S. 449, and although it is true that the proposition need not have been there announced, because in that case it was correctly decided that there was not a consent to the jurisdiction by both parties, yet the rule was so laid down, and the result of the opinion in this case is to disapprove of and overrule *In re Wisner*, so far as that proposition is concerned. And as I adhere to that view I dissent.

But it should be added that this case was brought in a state court and removed by the defendant into the Federal court under the second section of the act of August 13, 1888, which provided "any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, which are now pending, or which may hereafter be brought in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein being non-residents of that State." And it is settled that in order to make a suit removable under this part of the act it must be one

which the plaintiff could have brought originally in the United States Circuit Court. The right of removal given to the non-resident defendant or defendants by the second clause of § 2, removing the cause from the state court to the United States Circuit Court, is subject to the limitations of that clause that it must be a suit within the jurisdiction of such Circuit Court, and that it must be removed to the proper district, and therefore the act does not authorize him or them to remove it to the United States Circuit Court held in a district wherein that court was not given jurisdiction of the suit removed, or to any other judicial district in which the suit is not pending, as provided in § 3. Plaintiff brought his suit in a district wherein the defendant could not be sued in the Federal court within the meaning of the act. *Hill* v. *Woodland Amusement Company*, 158 Fed. Rep. 530.

The proper district within the meaning of the second clause of the second section means either of the districts made "proper districts" by the first section of the act, and when the third section requires the petition to be "for the removal of such suit into a Circuit Court to be held in the district where such suit is pending," it must have been contemplated that the suit would be pending in a "proper district." It is plain that the entire act is not to be construed as giving jurisdiction by reason of citizenship to a Circuit Court held in a State of which neither party is a citizen, but, on the contrary, that it restricts the jurisdiction to the district in which one of the parties resides within the State of which he is a citizen.

COMMONWEALTH OF VIRGINIA *v.* STATE OF WEST VIRGINIA.

IN EQUITY.

No. 4, Original: Forms of decree appointing special master, submitted April 7, 1908.—Form of decree announced May 4, 1908.

Order referring cause to master and directing conditions under which testimony shall be taken and master shall report to this court.

Defendant's demurrer having been overruled, 206 U. S. 290, 322, and defendant having answered, both complainant and defendant submitted and sustained by argument forms of decree referring the cause to a master.[1]

Mr. William A. Anderson, Attorney General of the State of Virginia, and *Mr. Randolph Harrison*, for complainant:

The differences go rather to matters of procedure than to

[1] Complainant's draft of decree referring the cause to a master.

This cause coming on this day to be heard upon the complainant's bill and the exhibits filed therewith, the answer of the defendant, with the exhibits filed therewith, and the general replication filed by the complainant thereto, was argued by counsel. On consideration whereof it is adjudged, ordered, and decreed that this cause be referred to —— ——, who is hereby appointed a special master herein, who, after giving not less than ten days' notice to the parties of the times and places fixed by him, from time to time, for executing this decree, will without delay ascertain and report to the court:

I.

The amount of the public debt of the Commonwealth of Virginia as of the first day of January, 1861, stating specifically, how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidences of said indebtedness.

II.

What amount and proportion of said indebtedness and of the interest accrued thereon should in equity be apportioned to and be now paid by the State of West Virginia.

(Complainant subsequently suggested the following substitute for paragraph II.)

II.

What is the just amount and proportion of said debt, including the interest thereon, which should now be apportioned to, and paid by, the State

any question of principle, as between pars. III and IV, complainant's draft, and par. VII, defendant's draft.

Complainant asks that the provisions expressed in pars. III,

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of West Virginia? Such amount and proportion of said debt the master will ascertain by charging against West Virginia:

(1) All expenditures made by the State of Virginia within the territory which now constitutes the State of West Virginia since any part of said debt was contracted.

(2) Such proportion of the ordinary expenses of the government of Virginia since any part of said debt was contracted as was fairly assignable to the counties which were erected into the State of West Virginia.

In ascertaining this, the master will take as the basis or criterion upon which the apportionment of said expenses shall be made the average total population of Virginia, excluding slaves, as nearly as the same can be determined from the United States Census for each of the decades in which such expenses were incurred and paid.

(3) The amount and value of all money, property, stocks, and credits which West Virginia received from the Commonwealth of Virginia, not embraced in any of the preceding items and not including any property, stocks, or credits which were obtained or acquired by said Commonwealth after the 19th day of June, 1861, the date of the organization of the restored government of Virginia.

(5) From the aggregate of the amounts thus ascertained, the master will deduct all moneys paid into the treasury of said Commonwealth from the counties included within the State of West Virginia during said period.

(6) The balance thus ascertained, with interest thereon from the 1st day of January, 1861, until the same shall be paid, will be the amount and proportion of the debt of the Commonwealth of Virginia existing before that date, assignable to West Virginia and which that State should pay.

III.

He will make and return with his report any special or alternative statements of the accounts between the complainant and the defendant in the premises which either may desire him to state or which he may deem to be desirable to present to the court.

It is further adjudged, ordered, and decreed as follows:

(1) To the end that full and complete information may be afforded the master as to all matters involved in the inquiries with which he is charged by this decree, the Commonwealth of Virginia and the State of West Virginia shall each of them respectively produce before the master, or give him access to, all such records, books, papers, and public documents as may be in their possession or under their control and which may, in his judgment, be pertinent to the said inquiries and accounts or any of them.

And the master is authorized to visit the capitals of Virginia and West Virginia, and to make or cause to be made such examinations as he may

IV and V, its draft, be embodied in the decree for reasons which will be apparent on reading those paragraphs.

The serious objections to the defendant's draft of decree

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deem desirable of the books of account, documents, and public records of either State relating to the inquiries he is directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All published records published by authority of the Commonwealth of Virginia prior to the creation of the State of West Virginia and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the partition of her territory which, in the judgment of the master, may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master. The public acts and records of the two States since the creation of the State of West Virginia shall be evidence if pertinent and duly authenticated; but all such testimony tendered by either party shall be subject to proper legal exception as to its competency.

The master is empowered to summon any persons whose testimony he or either party may deem to be material, and to cause their depositions to be taken before him or by a notary public or other officer authorized to take the same, after reasonable notice to the adverse party.

(2) The master is authorized and empowered to employ such accountants, stenographers, or other clerical assistance as he may find it desirable to employ, and to secure such rooms or offices as he may require, in order to the prompt and efficient execution of this order of reference, and to agree with such accountants and stenographers, typewriters, and the owner of such room or rooms for such compensation to be made to them as the master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

(3) The complainant will cause the sum of three thousand dollars to be deposited with the marshal of this court to the credit of this cause, on account of the costs and expenses of executing this decree and of this suit, and the complainant will cause such further sums as may be necessary to defray the costs and expenses of executing this decree to be from time to time in like manner deposited with said marshal. In the event that the defendant shall desire any special statement or accounts to be made, she shall in like manner, before the taking of any such account or the making of such special statement, cause the sum of —— dollars to be deposited with the marshal.

And the master is authorized from time to time to draw upon the funds so deposited by Virginia for the compensation of the accountants and other clerical assistants whom he may employ, and for any other costs or expenses, including stationery, printing, and room rent, which it may in his judgment be necessary to be incurred in promptly and efficiently executing this order of reference or making up any special statement or accounts asked for by the plaintiff, and the same will be charged up as part of the complainant's

are particularly to par. II, but also to pars. III, IV and V thereof.

Complainant's draft directs the master to take an account ascertaining:

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costs; and he will draw upon the fund deposited by the defendant for any costs which may be incurred in making up any special statement or accounts which may be desired by the defendant to be specially stated, which drafts, accompanied by proper vouchers, the marshal of this court will pay, and the same will be charged up as part of the defendant's costs in the cause.

And the said marshal is allowed to have and retain a commission of five per centum for his services in receiving and disbursing the funds so deposited with him, and he will make a report of his transactions, receipts, and disbursements in the premises to the court.

IV.

The first notice of the time and place fixed by the master for beginning the taking of the accounts directed by this decree shall be given at least thirty days before the date fixed by him therefor, provided that the date so fixed by the master for beginning the taking of said accounts shall not be a day earlier than February 20, 1907. The master may adjourn his sittings from time to time and place to place without notice to the parties. He will cause to be kept, in a minute book to be provided for the purpose, a journal or minutes of his sittings in the execution of this decree, showing the counsel present, if any, any adjournments which may be taken by him from time to time or place to place, and any other matters which the master may deem it proper to mention therein, which minute book or journal he will return with his report.

V.

Any notices to be given in connection with the execution of this decree may be given to the Attorneys-General of the respective States.

Defendant's draft of decree referring the cause to a master.

This cause came on this day to be heard upon the complainant's bill and the exhibits filed therewith; the answer of the defendant, with the exhibits filed therewith; the general replication thereto by the complainant, and was argued by counsel, and on consideration of which it is adjudged, ordered, and decreed that this cause be, and the same is hereby, referred to —— ——, who is appointed a special master herein, who, after giving — days' notice to the parties of the times and places fixed by him, from time to time, for executing this decree, will ascertain and report to the court:

I.

The amount of the public debt of the Commonwealth of Virginia on the first day of January, 1861, stating specifically how and in what form the

"The amount of the public debt of the Commonwealth of Virginia as of the first day of January, 1861, stating specifically, how and in what form the same was evidenced, by what

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same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidences of said indebtedness.

II.

(*a*) The amount of state expenditures made by the Commonwealth of Virginia prior to the first day of January, 1861, within the territory now included within the State of West Virginia since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of Virginia at Wheeling, August 20, 1861.

(*b*) The aggregate ordinary expenses of the state government of the Commonwealth of Virginia prior to January 1, 1861, and since any part of said indebtedness was contracted.

(*c*) All moneys paid into the treasury of the Commonwealth of Virginia from the counties included within the State of West Virginia during said period.

III.

Whether any agreements, contracts, or arrangements, other than those appearing from the exhibits filed with the bill herein, have been made by the Commonwealth of Virginia with her creditors since January 1, 1861, with reference to said public debt created prior to said date, or to the satisfaction or discharge of said indebtedness or any part thereof.

IV.

The amount of certificates relating to said indebtedness issued by the Commonwealth of Virginia under the acts of her General Assembly, approved March 30, 1871, March 28, 1879, February 14, 1882, and February 20, 1892; and what amount, if any, of said certificates have been deposited since January 4, 1906, with the commission appointed under the joint resolution of the General Assembly of the Commonwealth of Virginia approved March 6, 1894; and he will also ascertain and report what amount of said certificates so deposited since said date were issued under the act of March 30, 1871; what amount were issued under the act of March 28, 1879; what amount were issued under the act of February 14, 1882, and what amount were issued under the act of February 20, 1892.

V.

The master will ascertain and report to what extent said certificates issued by the Commonwealth of Virginia represented the principal of one-third of said public debt and to what extent they represented the interest thereon, and the rate at which the interest was reckoned; and he will also ascertain

authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidences of said indebtedness."

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and report whether there is included in said certificates, or in any of them, the interest, or any part of the interest, which had accrued on the portion of said public debt refunded by the Commonwealth of Virginia, and if so, what was the total amount of such interest and at what rate it was reckoned.

VI.

It is further ordered and decreed that the master shall ascertain and report what amount, if any, of the bonds or other evidences of debt issued by the Commonwealth of Virginia under the act of March 30, 1871, was subsequently surrendered by the holders thereof and exchanged for other bonds or evidences of debt issued under the acts of 1879, 1882, and 1892, and if such exchanges were made, the master will ascertain and report what rate of interest was agreed to be paid upon such new bonds or evidences of debt.

VII.

It is further ordered and decreed that the Commonwealth of Virginia and the State of West Virginia shall each produce before the master all such records, books, papers, and public documents as may be in their possession or under their control, and which may, in his judgment, be pertinent to the said inquiries and accounts or any of them.

And the master is authorized to make or cause to be made such examination as he may deem desirable of the books of account, vouchers, documents, and public records of either State relating to the inquiries he is herein directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All public records published by authority of the Commonwealth of Virginia prior to the seventeenth day of April, 1861, and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the date aforesaid which in the judgment of the master may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master, but all such evidence shall be subject to exceptions to its competency. The public acts and records of the two States since the admission of West Virginia into the Union shall be evidence, if pertinent and duly authenticated, but all such evidence tendered by either party shall be subject to proper legal exceptions to its competency.

The master is empowered to summon any persons whose testimony he or either party may deem to be material, and to cause their depositions to be taken before him, or by a notary public or other officer authorized to take the same, after reasonable notice to the adverse party.

The master is authorized and empowered to employ such stenographers and other clerical assistants as he may find it desirable to employ in order

The defendant's draft adopts this paragraph.

Par. II, plaintiff's draft, directs the master to take the following accounts:

"What amount and proportion of said indebtedness and of the interest accrued thereon, should in equity be apportioned to and be now paid by the State of West Virginia."

Par. II, defendant's draft, directs the master to take the following accounts:

(*a*) "The amount of state expenditures made by the Commonwealth of Virginia prior to the first day of January, 1861, within the territory now included within the State of West Virginia since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of Virginia at Wheeling, August 20th, 1861.

(*b*) "The aggregate ordinary expenses of the state government of the Commonwealth of Virginia, prior to January 1st, 1861, and since any part of said indebtedness was contracted.

(*c*) "All moneys paid into the treasury of the Commonwealth of Virginia from the counties included within the State of West Virginia during said period."

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to the prompt and efficient execution of this order of reference, and to agree with such stenographers and typewriters and clerical assistants upon such compensation to be made to them as the master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

The complainant shall cause the sum of three thousand dollars to be deposited with the marshal of this court to the credit of this cause, and such further sums as from time to time may be required, on account of the costs and expenses of executing this decree; and the master is authorized from time to time to draw upon the fund so deposited by Virginia for the compensation of the stenographers, typewriters, and other clerical assistants whom he may employ, and for any other costs and expenses, including stationery and printing, which may in his judgment be necessary to be incurred in executing this order of reference.

The said marshal is allowed to have and retain a commission of 5 per centum for his services in receiving and disbursing the funds so deposited with him, and he will make a report of his transactions, receipts, and disbursements in the premises to the court.

Any notices to be given in connection with the execution of this decree may be given to the Attorneys General of the respective States.

Par. III, plaintiff's draft, directs that the master "will make and return with his report any special or alternative statements of the accounts between the complainant and the defendant in the premises which either may desire him to state or which he may deem to be desirable to present to the court."

Complainant objects to par. II, defendant's draft, on the ground that it seems to lend the sanction of the court in advance to a basis or scheme for the statement of the account, which is not shown by anything as yet in the cause to be either equitable or just.

Before any such question can be fairly adjudicated, it is necessary that the evidence in the case be taken and have the aid of its master in collating and thoroughly digesting it.

There is not enough in the record to enable the court to come to any just or definite conclusion as to the precise scheme which it would be equitable to adopt in stating the account. To do so at this stage of the litigation, would be to decide an important question in the case before the evidence is taken. The effect of par. II would be to have the court prejudge the case as to the basis on which the account shall be stated.

The case is now only submitted for a decree referring it to a master, to state and report to the court the data necessary to enable the court to justly decide it upon its merits.

If it should then appear that the basis prescribed by the Wheeling ordinance is binding upon the parties, and must be followed as the basis upon which the account shall be made up, that basis would be adopted. But if it should be then manifest that that arbitrary basis of settlement is not the one on which the account should be stated, because it would, if applied to the facts of the case as they shall appear in the evidence, lead to absolutely unconscionable results and operate to impair the obligation of the contracts by which the common debt was created, contracts which were and are alike obligatory upon Virginia and upon West Virginia, or for any other valid reason, then the scheme of settlement indicated in the

Wheeling ordinance would have to be discarded, and an equitable basis and scheme of settlement adopted.

Complainant contends that, while the Wheeling ordinance upon its face, prescribes an absolutely arbitrary basis of settlement, the representatives of Virginia are satisfied that upon a fair, reasonable and just construction of the language of that ordinance, and of the subsequent supplemental enactments, the scheme of settlement therein defined will, when applied to the facts as stated in the bill, and as it is believed they can be established by proofs, result in fixing the proportion of the debt of Virginia which West Virginia should assume and pay, inclusive of interest, at a very large sum, though not so large a sum as it would be equitable for West Virginia to pay.

The debt, a portion of which she was to pay, was an interest-bearing debt. It would be manifestly "just" and "equitable" that West Virginia should be required to pay interest as well as principal. Indeed, any settlement which does not require that State to pay interest during the long period of her default and refusal to pay anything, would be not only unjust, and inequitable, but iniquitous.

West Virginia came into the Union upon the distinct condition expressed in her constitution, that she would assume an equitable proportion of the common debt of the undivided State, as it existed prior to January 1, 1861, and would provide for the payment of the accruing interest and the redemption of the principal thereof.

While it is believed that, upon the facts stated in the bill and accompanying exhibits, and upon the proofs hereafter to be adduced in support thereof, West Virginia will owe a very large sum, even under the arbitrary scheme of the Wheeling ordinance, we submit that we should not, in the present status of the litigation, be tied down to the terms of that ordinance.

Another palpable objection to the defendant's draft is, that it excludes from the account the value of the property, assets, and money which West Virginia has received from the Com-

monwealth. Upon any basis of just accounting, these items should be brought into the account.

If the account should be stated on the basis of the Wheeling ordinance, these items would manifestly be proper charges against West Virginia. By the terms of that ordinance, Virginia's title to, and ownership of, all of the property and assets theretofore belonging to the Commonwealth remain intact.

By it, West Virginia would acquire no title to any of those assets or of that property. Framed as that ordinance was, by Western Virginians, and arbitrary, and on its face unjust, as were the criteria by which it undertook to provide that West Virginia's proportion of the common debt should be computed, its authors were not so conscienceless as to also propose that the new State, after making such an inadequate contribution to its share of a debt which had been chiefly contracted by the votes of the representatives of its people and for their benefit, should also have a share of the property and assets of the Commonwealth, free of charge.

All that was, by the terms of that ordinance, to be ceded by the Commonwealth to the new State, was political dominion, and jurisdiction over the people and territory embraced in the new State.

The meaning and effect of the ordinance was to leave the title to, and ownership of, the assets and property of the Commonwealth in the Commonwealth.

Another objection to the account called for by defendant's draft, is that it does not direct any account to be taken ascertaining the amount and proportion of the debt of Virginia on and prior to January 1, 1861, which West Virginia should assume and pay, but contents itself with merely directing the arbitrary and inconsequential accounts defined in par. II, defendant's draft.

Complainant's principal insistance is that defendant's draft of a decree prejudges the case in advance of a hearing upon the merits, while that tendered for the plaintiff cannot operate to the prejudice of either party, upon any material question in

the cause; by this draft the adjudication of these questions being left to await a hearing after the master's report shall be filed, upon the evidence then fully in the cause.

The precise accounts called for by par. II, defendant's draft, will be taken by the master if he shall find it necessary and proper to take them in order to ascertain the amount and proportion of the Virginia debt which West Virginia should pay; and if the master shall for any reason deem it unnecessary to take those accounts, the defendant can, under par. III, complainant's draft, have them stated as special accounts, if she shall be so advised.

Par. III of complainant's draft is designed to enable each party, or the master, to have alternative, or special statements of the accounts made up on any basis on which either party or the master may deem it proper or desirable that the same shall be stated.

By having the respective views and contentions of the complainant and the defendant thus presented in contrast in such concrete form, the court, with the assistance of the findings of the master, will be enabled more readily and intelligently to reach a just conclusion.

If the inquiries defined in pars. III, IV, V and VI, defendant's draft, have any pertinency to any question in the case, it must be because of something not yet in the record.

Complainant objects to them as being unnecessary and irrelevant.

There is nothing in the cause, or so far as we know out of it, to show that there is any foundation in fact for the inquiry mentioned in par. III, defendant's draft, as to whether Virginia has made any other contracts or arrangements with the public creditors, since January 1, 1861, in reference to the public debt. That inquiry, though harmless, is useless.

The accounts provided for in pars. IV and V, defendant's draft, are not pertinent to any issue in the cause.

Both relate to the certificates or receipts given by Virginia to the holders of the bonds issued by the Commonwealth be-

fore her dismemberment, who have deposited these bonds with her.

Those certificates are in the nature of a declaration of trust by Virginia, that she holds said bonds (so far as they have not been funded in the new securities which the Commonwealth has given for about two-thirds of the aggregate amount thereof, principal and interest), for the benefit of the owners of the bonds deposited with her.

Those transactions cannot in any way affect any question in the cause.

The only function of those certificates is to show who are now entitled to the bonds which were so deposited with Virginia, and which she holds in her treasury for the benefit of these certificate holders, awaiting a settlement with West Virginia. These inquiries are unnecessary and useless.

The same objection applies to par. VI, defendant's draft. That relates to the obligations which were issued by Virginia, as now constituted, in settlement of the two-thirds of the old bonds funded, and payment of which was assumed by her.

That is a matter with which West Virginia has nothing to do, and which does not affect the rights or obligations of either party in respect to the claims asserted in complainant's bill.

Those new bonds given by Virginia for the two-thirds of the old bonds assumed by her, and accepted by the owners of the old bonds so deposited with Virginia, operated as a payment and discharge of the old bonds to the extent of the two-thirds thereof so funded.

West Virginia is not sued here to pay any part of that two-thirds so settled by Virginia. She is sued to have her assume and pay so much of the remaining unfunded third of the common debt of the undivided State, as may be West Virginia's equitable portion of the whole of the debt represented by the bonds of the original State. It has never been claimed or suggested that there was any liability on West Virginia beyond said unfunded third of the bonds of the original State which have been funded; or that West Virginia should pay more than

one-third of the bonds issued by Virginia prior to the formation of West Virginia, which have not been funded.

The liability of West Virginia on account of the common public debt, has sometimes been estimated by Virginia or her representatives at one-third thereof, but never at more than one-third, and Virginia has undertaken to take care of the other two-thirds with which West Virginia has nothing to do.

It is true, that there are some millions of the debt of the undivided State, which Virginia has paid in full, and holds the obligations so taken up by her as a claim against the new State, to the extent of West Virginia's equitable liability for contribution therefor; and the extent of that liability can be ascertained and stated in the account directed by par. II, complainant's draft.

There is no occasion for any of the accounts directed by pars. III, IV, V and VI, defendant's draft. If West Virginia wants any of them to be stated, she can have that done as a special statement under par. III of complainant's draft.

Mr. John G. Carlisle and *Mr. John C. Spooner*, with whom *Mr. C. W. May*, Attorney General of the State of West Virginia, *Mr. Charles E. Hogg*, *Mr. W. Mollohan*, *Mr. George W. McClintic* and *Mr. W. G. Matthews* were on the brief, for defendant:

The difference between the two proposed decrees is radical, and presents to the court a question which in our view is fundamental and which West Virginia contends, respectfully and very earnestly, should be decided before any reference to a master to state the account between the parties.

The jurisdiction of the court over this case is settled by the decision overruling the demurrer. We are quite aware that the court has recognized a distinction between suits by private parties in respect of the application of the rules of pleading and of practice, and suits between States. *Rhode Island* v. *Massachusetts*, 13 Peters, 23; *Rhode Island* v. *Massachusetts*, 14 Peters, 256.

West Virginia does not and could not successfully here contest the principles thus laid down, but the principles of equity and the rules of chancery procedure so far as essential to protect the rights of parties litigating in this tribunal will, of course, be substantially enforced. The application of some of the rules of procedure are certainly essential to substantial justice. 2 Bates, Fed. Eq. Pro. 802, § 753.

Thus it stands alleged in the bill and admitted by the answer, and if it were not admitted by the answer, it is conclusively established by the bill and its exhibits, that there was a solemn agreement entered into in 1861 between the State of Virginia and the new State of West Virginia, with the consent of the Congress, by which the latter State assumed (as one of the conditions of the assent of Virginia to her becoming a State) a just proportion of the indebtedness of that Commonwealth as it existed prior to January 1, 1861, the manner of ascertaining which proportion was defined by the ordinance itself.

The ordinance was, as treated by this court in the case of *Virginia* v. *West Virginia*, 11 Wallace, 39, a proposition by the Commonwealth of Virginia to the people of the proposed new State. It was accepted by the constitutional convention of the proposed new State, carried into its constitution and adopted by the people; and when the State was admitted into the Union by the Congress, with the assent of Virginia, it became a completed compact between competent parties, upon adequate consideration, protected by the Constitution of the United States from impairment by either party.

The ordinance defines what would be a just proportion; for it provides not only for the assumption of a just proportion, but specifically in what manner that proportion shall be ascertained.

The obligation of a lawful compact between two States, justiciable in its nature, certainly is as binding in law upon both until abrogated by both in a constitutional way, as a contract between a State and an individual, or between two individuals, and a disregard or violation of it by one, certainly cannot thereby release it from its obligation.

From the averments of the bill and the admissions in the answer, and the argument at the bar, it cannot be an open question in this case that the only liability of West Virginia for an equitable proportion of the *ante-bellum* debt of Virginia is upon the basis of the ordinance.

The general rule stated in *Hartman* v. *Greenhow*, 102 U. S. 672, to the effect that where a State is divided into two or more States, in the adjustment of liabilities between each other, the debts of the parent State should be ratably apportioned among them, is essentially qualified by the authorities there quoted, in this, that a special agreement between the two States in respect of the assumption of a proportion of the debt as it existed before the separation, takes the case out of the general rule; so that the second ground alleged in the bill which specifically avers a special agreement, destroys the applicability of the rule to this case. This special agreement cannot be dismissed from this case as the decree proposed on behalf of Virginia would do. This court has sustained the validity of this ordinance in *Virginia* v. *West Virginia*, 11 Wallace, 39, in respect of the provision contained in it for the incorporation of the counties of Berkeley and Jefferson in the latter State conditioned upon a popular vote therefor.

If the ordinance was valid then in respect of the incorporation of these counties, it cannot be held to be invalid as to the specific provision contained in § 9 for the assumption by the new State of a just proportion of the indebtedness to be ascertained in the manner defined, clearly carried into the constitution of the new State and assented to by Congress by the admission of West Virginia into the Union.

Whether it was or was not the lawful government of Virginia was a political question. When the House of Representatives admitted the members of Congress from that State and the Senate admitted the senators elected by the legislature of the "Restored State," and the President recognized that government as the true government of Virginia, that forever settled

its legality and regularity beyond the power of judicial review and made valid its acts *ab initio*. But for that "Restored State of Virginia," and its recognition by the political departments of the Federal Government, there would have been no government of Virginia under the Constitution of the United States from April, 1861, to the close of the war. The ordinance of the Wheeling convention of 1861, which was the genesis of the State of West Virginia, and the adoption of its constitution, are, from the standpoint of law, as clearly acts of the Commonwealth of Virginia as if they had taken place in 1851 instead of in 1861.

An agreement between States, such as this special agreement in respect to the proportion of the debt of Virginia which was to be assumed by the State of West Virginia, when consented to by Congress, binds the citizens of both States, and is irrevocable by either party. Where the legislation of either has attempted to impair the obligation of a compact, it has been held void under the Constitution of the United States. *Greene* v. *Biddle*, 8 Wheat. 1; *Rhode Island* v. *Massachusetts*, 12 Peters, 748, and cases cited.

The Wheeling ordinance was carried into the constitution of West Virginia as follows:

"ARTICLE VIII. Section 8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and to redeem the principal within thirty-four years."

The convention assembled within ninety days after the adoption of the ordinance. Its sole warrant for assembling was the ordinance. Its authority to frame the constitution was derived from the ordinance. The ordinance as a whole was a proposition to that convention and, as a whole, was accepted by the convention. The convention complied with all the provisions of the ordinance. The constitution was framed to

meet all the requirements of the ordinance. It was the basis of the constitution.

The inconsistent attempt to eliminate the ordinance from the case—the present posture of counsel for Virginia—is in order that the ordinance may be eliminated, and § 8 of the first constitution is to be construed as the assumption by the new State of an equitable proportion of the public indebtedness of Virginia prior to January 1, 1861, upon the basis of population and territory. Such cannot be the law of this case. The assembling of the convention was an acceptance of § 9 of the ordinance. The ordinance embodied the conditions, and § 9 by no means the least important of them, of Virginia's consent to the erection of the new State out of her territory.

The suggestion that § 8 of Article 8 of the constitution had no reference to § 9 of the ordinance, assumes that the new State was taking upon herself an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, without definition or understanding as to the basis upon which it was to be ascertained, therefore leaving open the vital question as to what would constitute an equitable proportion, for future adjustment between the two States. This is not to be believed.

The debt of Virginia on January 1, 1861, was doubtless well known throughout the State of Virginia. It is alleged in the bill that about $33,000,000 of it were incurred in connection with the construction of works of internal improvement. If it had been the purpose of Virginia, in requiring as a condition of her assent, the assumption by the proposed new State of an equitable proportion of the public debt without specification as to the manner in which, and the basis upon which that proportion should be ascertained, it is inconceivable that the language of § 9 of the ordinance would have been what it was, and that the language of § 8 of Article 8 of the constitution would have been what it was. It was entirely for Virginia to dictate the terms, and if it had been her purpose to require an assumption of the debt upon the basis of territory and popu-

lation, West Virginia would have been required to assume "one-third of the debt as it existed prior to the first day of January, 1861," or "an equitable proportion to be ascertained upon the basis of territory and population."

If the ordinance be valid and binding, it cannot be disregarded by the court. While West Virginia could not by any suit prevent Virginia from disregarding it in the adjustment with her creditors of her debt or any portion of it, when Virginia invokes the original jurisdiction of this court in a suit against West Virginia to compel her to account for an equitable proportion of her debt prior to January 1, 1861, upon the basis of the ordinance and upon other and different bases, she may plead the ordinance as the only basis upon which the court can decree an accounting by her. The court will not make a new contract for the parties. They were competent to make one for themselves, and they did make one for themselves. It is unfortunate that the two States were unable many years ago to adjust the matter in accordance with the agreement which they had entered into and which subsists between them.

West Virginia is entitled to have the question whether or not the special agreement as to what shall constitute a just proportion of the debt solemnly entered into between the two States is binding, determined at this juncture by the court and, if it be held to be a binding agreement, Virginia is entitled to no accounting with West Virginia in this suit for her equitable proportion of the debt of the Commonwealth prior to January 1, 1861, except under the terms of that ordinance, carried into the constitution.

Complainant's draft directs that the master—"III. Make and return with his report any special or alternative statements of the account between the plaintiff and the defendant in the premises which either may desire him to state or which he may deem to be desirable to present to the court." This asks the court to leave the determination of the pivotal point in the case, which defendant contends should be decided by it in advance of an accounting, to a master, albeit only in

an advisory way, and it gives West Virginia permission to have an accounting made, if she desires it, on the basis of the ordinance at her own expense. She is defendant here. In that event we would have two lines of investigation proceeding before the master at the same time, each entirely distinct in basic principle from the other, each burdensome in labor, expense and the consumption of time. Neither would throw any light upon the other. An exhaustive accounting under the ordinance would not aid the court in determining whether it is binding and the only legal basis of settlement or not. An exhaustive investigation upon the international law basis would no more aid the court in determining whether the ordinance is binding and therefore the sole ground upon which the liability of West Virginia to an accounting at all can be based. If the compact is in force, any accounting save under that will be not only burdensome, but superfluous.

Defendant's draft is in literal execution of the contract of the parties, as evidenced by the ordinance and § 8 of the first constitution.

It directs the master to ascertain and report:

(*a*) The amount of state expenditures made by the Commonwealth of Virginia prior to the first day of January, 1861, within the territory now included within the State of West Virginia, since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of August 20, 1861.

Defendant agrees that the last clause need not be inserted.

(*b*) To ascertain the aggregate ordinary expenses of the state government of the Commonwealth prior to January 1, 1861, and since any part of said indebtedness was contracted.

(*c*) All moneys paid into the treasury of the Commonwealth of Virginia from the counties included within the State of West Virginia during the said period.

The items (*a*) and (*b*) are, under the ordinance, to be charged to West Virginia.

The item (*c*) is under the ordinance to be credited to the

State of West Virginia, and when these three steps shall have been taken, and the two items charged, and the one item credited, the sum which it was agreed between the two States should constitute a just proportion of the debt of the Commonwealth of Virginia prior to January 1, 1861, which West Virginia assumed, will have been ascertained. These provisions are not "arbitrary and inconsequential items."

They are the items which Virginia herself framed and required to be accepted by the proposed new State as a condition of assent to her separation and admission into the Union.

There is but one item in § 9—defining the manner in which the account should be taken in order to ascertain the proportion of the debt to be taken upon herself by the proposed new State—left at all indefinite, and that is item (*b*), "'a just proportion' of the ordinary expenses of the state government, since any part of said debt was contracted." This involves a determination of the basis upon which a "just proportion" of the aggregate ordinary expenses of the state government during the said period is to be ascertained. Shall it be population or territory, or both, or taxable values? Defendant contends that it should be based upon population, since "government"—including the administration of justice, the making and administering of the laws, the education of the children through a system of common schools, academies and a state university, the maintenance of state institutions, the support of prisoners, the care of the insane and paupers, and the like—is for people, not acres. Defendant suggests there should be added to defendant's draft, in respect of an ascertainment of the aggregate ordinary expenses of the State, a direction to the master to find alternatively certain facts substantially as follows: "For the purpose of enabling the court to determine the just proportion of the aggregate of the ordinary expenses of the state government of the Commonwealth of Virginia prior to January 1, 1861, and since any part of said indebtedness was contracted, said master shall ascertain and report the population during the said period of the counties now con-

stituting the Commonwealth of Virginia, and separately the population of the counties now constituting the State of West Virginia, as shown by the decennial censuses taken during the said period by the United States, and also the average population of Virginia during each of said periods of ten years."

The aggregate ordinary expenses being found, and the items suggested as to population, it will be easy to determine the "just proportion" if that is the proper basis.

This case should not be cast at large, with no definition of the principles to govern his action, into the hands of a master; that at least it should be settled before a reference for the purpose of taking an account, whether the liability of West Virginia to Virginia is upon the special agreement which preceded and accompanied her admission into the Union, or, because of the absence of a special agreement, upon the basis of population and territory.

It will be observed that in par. II, complainant's draft, the master is not only directed to ascertain the amount and proportion of said indebtedness, but "of the interest accrued thereon."

Defendant objects to this paragraph because there is no legal ground for directing the ascertainment of interest. West Virginia has not obligated herself in any manner for the payment of interest. A State is not liable to pay interest unless it has expressly contracted to do so. See *United States* v. *North Carolina*, 136 U. S. 211.

See also, following this principle, *Sawyer* v. *Colgan*, 102 California, 293; *Hawkins* v. *Mitchell*, 34 Florida, 421, 422; *Molineux* v. *State*, 109 California, 380; *Flint &c. R. R.* v. *Board of Auditors*, 102 Michigan, 502; *Carr* v. *State*, 127 Indiana, 204.

See also note, 22 American State Reports, 448.

By leave of court, *Mr. Holmes Conrad* made an argument herein as *amicus curiæ*.

On May 4, 1908, THE CHIEF JUSTICE announced the following decree:

This cause having been heard upon the pleadings and accom-

panying exhibits, it is, on consideration, ordered that it be referred to a special master, to be hereinafter designated,[1] to ascertain and report to the court:

1. The amount of the public debt of the Commonwealth of Virginia on the first day of January, 1861, stating specifically how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidence of said indebtedness.

2. The extent and value[2] of the territory of Virginia and of West Virginia June 20, 1863, and the population thereof, with and without slaves, separately.

3. All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted.

4. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States.

5. And also on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia.

6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union.

7. The amount and value of all money, property, stocks and credits which West Virginia received from the Commonwealth of Virginia, not embraced in any of the preceding items and

[1] On June 1, THE CHIEF JUSTICE announced the appointment of Mr. Charles E. Littlefield, a member of the bar of this court as special master.

[2] A motion having been made to modify the decree this paragraph was amended by the court of June 1 so as to read "The extent and assessed valuation &c." and in all other respects the motion was overruled.

not including any property, stocks or credits which were obtained or acquired by the Commonwealth after the date of the organization of the restored government of Virginia, together with the nature and description thereof.

The answers to these inquiries to be without prejudice to any question in the cause.

It is further ordered that the Commonwealth of Virginia and the State of West Virginia shall each, when required, produce before the master, upon oath, all such records, books, papers and public documents as may be in their possession or under their control, and which may, in his judgment, be pertinent to the said inquiries and accounts, or any of them.

And the master is authorized to make, or cause to be made, such examination as he may deem desirable of the books of account, vouchers, documents and public records of either State relating to the inquiries he is herein directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All public records published by authority of the Commonwealth of Virginia prior to the seventeenth day of April, 1861, and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the date aforesaid, which in the judgment of the master may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master, but all such evidence shall be subject to exceptions to its competency. The public acts and records of the two States since the admission of West Virginia into the Union shall be evidence, if pertinent and duly authenticated, but all such evidence tendered by either party shall be subject to proper legal exceptions to its competency.

The master is empowered to summon any persons whose testimony he or either party may deem to be material, and to cause their depositions to be taken before him, or by a notary public or other officer authorized to take the same, after reasonable notice to the adverse party.

The master is authorized and empowered, subject to the approval of the Chief Justice, to employ such stenographers and other clerical assistants as he may find it desirable to employ in order to the prompt and efficient execution of this order of reference, and to agree with such stenographers and typewriters and clerical assistants upon such compensation to be made to them as the master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

The complainant shall cause the sum of five thousand dollars to be deposited with the marshal of this court to the credit of this cause, and such further sums as from time to time may be required, on account of the costs and expenses of executing this decree; and the master is authorized from time to time to draw upon the fund so deposited by Virginia for the compensation of the stenographers, typewriters and other clerical assistants whom he may employ, and for any other costs and expenses, including stationery and printing, which may in his judgment be necessary to be incurred in executing this order of reference.

The said marshal shall receive such commission for his services in receiving and disbursing the funds so deposited with him as may be allowed by the court, and he will make a report of his transactions, receipts and disbursements in the premises.

Any notices to be given in connection with the execution of this decree may be given by and to the Attorneys General of the respective States.

The master will make his report with all convenient speed and transmit therewith the evidence on which he proceeds, and is to be at liberty to state any special circumstances he considers of importance, and to state such alternative accounts as may be desired by either of the parties, subject to the direction of the court.

And the court reserves the consideration of the allowance of interest; of the costs of this suit, and all further directions until after the master has made his report; either of the parties to be at liberty to apply to the court as they shall be advised.

OPINIONS PER CURIAM, ETC., FROM FEBRUARY 25, TO MAY 4, 1908.

No. 445. The United States Life Insurance Company in the City of New York, Plaintiff in Error, *v.* Harry Spinks. In error to the Court of Appeals of the State of Kentucky. Motion to dismiss submitted February 24, 1908. Decided March 2, 1908. *Per Curiam.* Dismissed for the want of jurisdiction. *Mr. William Marshall Bullitt, Mr. Charles E. Patterson* and *Mr. John G. Carlisle* for plaintiff in error. *Mr. J. H. Hazelrigg* for defendant in error.

No. 560. Northwestern Elevated Railroad Company, Plaintiff in Error, *v.* Peabody Coal Company et al. In error to the Supreme Court of the State of Illinois. Motion to dismiss or affirm submitted February 24, 1908. Decided March 2, 1908. *Per Curiam.* Dismissed for the want of jurisdiction. *Mr. Clarence A. Knight* for plaintiff in error. *Mr. Horace Kent Tenney* for defendants in error.

No. 151. John Boyd, Plaintiff in Error, *v.* The State of Texas. In error to the Court of Criminal Appeals of the State of Texas. Submitted March 5, 1908. Decided March 9, 1908. *Per Curiam.* Writ of error dismissed for the want of jurisdiction. *Leeper* v. *Texas,* 139 U. S. 462; *Duncan* v. *Missouri,* 152 U. S. 377, 382; *Gibson* v. *Mississippi,* 162 U. S. 565, 590; *Allen* v. *Georgia,* 166 U. S. 138; *Brown* v. *New Jersey,* 175 U. S. 172; *Layton* v. *Missouri,* 187 U. S. 356; *Rogers* v. *Peck,* 199 U. S. 425; case below, 96 S. W. Rep. 1079. *Mr. H. M. Garwood* for plaintiff in error. *Mr. Robert Vance Davidson* for defendant in error.

No. 554. The Roderick Lean Manufacturing Company, Plaintiff in Error, *v.* Reinhart Kuelling. In error to the Supreme Court of the State of New York. Motion to dismiss or affirm submitted March 9, 1908. Decided March 16, 1908. *Per Curiam.* Writ of error dismissed for the want of jurisdiction. *Kansas City, Fort Scott & Memphis Railroad Company* v. *Daughtry,* 138 U. S. 303; *Fisk* v. *Henaril,* 142 U. S. 459; *McDonnell* v. *Jordan,* 178 U. S. 229; *Pennsylvania Company* v. *Bender,* 148 U. S. 255; *In re Pennsylvania Company,* 137 U. S. 451; *Wilson* v. *North Carolina,* 169 U. S. 586, 595. *Mr. Sardius D. Bentley* for plaintiff in error. *Mr. Eugene Van Voorhis* for defendant in error.

No. 165. Richard H. Field et ux., Plaintiffs in Error, *v.* The Barber Asphalt Paving Company et al. In error to the Kansas City Court of Appeals of the State of Missouri. Submitted March 11, 1908. Decided March 16, 1908. *Per Curiam.* Writ of error dismissed for the want of jurisdiction. *Missouri, Kansas & Texas Railway Company* v. *Elliott,* 184 U. S. 530; *Sayward* v. *Denny,* 158 U. S. 180; *Corkran Oil and Development Company* v. *Arnaudet,* 199 U. S. 182; *Life Insurance Company* v. *McGrew,* 188 U. S. 291; *City and County of San Francisco* v. *Itsell,* 133 U. S. 65. *Mr. Richard H. Field* for plaintiffs in error. *Mr. W. C. Scarritt* for defendants in error.

No. 247. Osbern H. Wilson, Plaintiff in Error, *v.* Erie Railroad Company et al. In error to the Circuit Court of the United States for the Northern District of Ohio. Motion to dismiss submitted March 16, 1908. Decided March 23, 1908. *Per Curiam.* Dismissed for the want of jurisdiction. *Mr. Charles Koonce, Jr.,* and *Mr. E. H. Moore* for plaintiff in error. *Mr. William E. Cushing* for defendant in error.

No. —, Original. *Ex parte:* In the Matter of Michael Crarchilo, Petitioner. Submitted March 9, 1908. Decided April 6, 1908. Motion for leave to file petition for writ of mandamus denied. *Mr. James K. Jones* and *Mr. William J. Stone* for petitioner.

No. —, Original. *Ex parte:* In the Matter of Michael Crarchilo, Petitioner. Submitted March 9, 1908. Decided April 6, 1908. Motion for leave to file petition for writ of prohibition denied. *Mr. James K. Jones* and *Mr. William J. Stone* for petitioner.

No. —, Original. *Ex parte:* In the Matter of Smokeless Fuel Company, Petitioner. Submitted April 6, 1908. Decided April 13, 1908. Motion for leave to file petition for writ of mandamus denied. *Mr. Alexander H. Sands, Mr. William L. Royall* and *Mr. George Bryan* for petitioner.

No. 563. Thomas M. Fields, Appellant, *v.* Charles E. Haddox, Warden, etc. Appeal from the District Court of the United States for the Northern District of West Virginia. Motion to dismiss or affirm submitted March 23, 1908. Decided April 13, 1908. *Per Curiam.* Final order affirmed with costs. *Fields* v. *United States*, 205 U. S. 292; *S. C.*, 27 App. D. C. 433; *In re Eckart*, 166 U. S. 481; *In re Coy*, 127 U. S. 731. *Mr. Frank J. Hogan, Mr. Henry E. Davis* and *Mr. John C. Gittings* for appellant. *The Attorney General* and *The Solicitor General* for appellee.

No. 199. Charles W. Hunter et al., Petitioners, *v.* Rebecca A. Johnson et al. On a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. Argued

April 14, 1908. Decided April 20, 1908. *Per Curiam.* Decree of United States Circuit Court of Appeals reversed with costs and decree of Circuit Court of the United States for the Eastern District of Arkansas affirmed with costs and cause remanded to that court. *Ballard* v. *Hunter*, 204 U. S. 241. *Mr. A. B. Shafer*, *Mr. L. P. Berry* and *Mr. James K. Jones* for petitioners. No appearance for respondents.

No. 171. THE SAVINGS DEPOSIT BANK & TRUST COMPANY OF ELYRIA, OHIO, APPELLANT, *v.* NATHAN LOESER, TRUSTEE OF THE ESTATE OF CASSIE L. CHADWICK, BANKRUPT. Appeal from the United States Circuit Court of Appeals for the Sixth Circuit. Argued April 13 and 14, 1908. Decided April 27, 1908. *Per Curiam.* Appeal dismissed for the want of jurisdiction. *Chapman, trustee, &c.*, v. *Bowen*, 207 U. S. 89; and see *Bank* v. *Klug*, 186 U. S. 202. General Order XXXVI. *Mr. John C. Hale* and *Mr. W. W. Boynton* for appellant. *Mr. Amos Burt Thompson*, *Mr. Charles P. Hine*, *Mr. Nathan Læser*, *Mr. Frederick L. Taft* and *Mr. C. K. Arter* for appellee.

No. 680. JAMES S. YEATES, APPELLANT, *v.* GEORGE B. ROBERSON, SHERIFF, ETC. Appeal from the District Court of the United States for the Southern District of Georgia. Argued and submitted April 27, 1908. Decided May 4, 1908. *Per Curiam.* Final order affirmed. *Mr. John Randolph Cooper* for appellant. *Mr. John C. Hart* for appellee.

Decisions on Petitions for Writs of Certiorari from February 25 to May 4, 1908.

No. 571. CHARLES C. MAY, PETITIONER, *v.* THE UNITED STATES. March 2, 1908. Petition for a writ of certiorari to

the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles S. Voorhees* and *Mr. Reese H. Voorhees* for petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Sanford* for respondent.

No. 590. WALLACE P. COOK ET AL., PETITIONERS, *v.* TIMOTHY FOLEY ET AL. March 2, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George P. Wilson* for petitioners. *Mr. Harris Richardson* for respondents.

No. 598. MRS. ANNIE E. PENMAN, PETITIONER, *v.* ST. PAUL FIRE AND MARINE INSURANCE COMPANY. March 2, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. Frederic D. McKenney* and *Mr. A. J. Truitt* for petitioner. *Mr. W. K. Jennings* for respondent.

No. 600. J. H. FRIDAY ET AL., PETITIONERS, *v.* HALL & KAUL COMPANY. March 2, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. Richard A. Ford* for petitioners. No appearance for respondent.

No. 601. W. D. MUNSON, PETITIONER, *v.* STANDARD MARINE INSURANCE COMPANY (LIMITED). March 2, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Eugene P. Carver* and *Mr. G. Philip Wardner* for petitioner. *Mr. James Emerson*

Carpenter, Mr. Samuel Park and *Mr. James K. Symmers* for respondent.

No. 612. FRANKLIN H. SEELEY, PETITIONER, *v.* BLANCHE LOWE SEELEY. March 2, 1908. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Barry Mohun* and *Mr. H. Prescott Gatley* for petitioner. No appearance for respondent.

No. 632. EMILIE SAXLEHNER, PETITIONER, *v.* EDWARD WAGNER ET AL. March 2, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Antonio Knauth, Mr. Frank F. Reed* and *Mr. Arthur von Briesen* for petitioner. *Mr. Walter F. Murray* for respondents.

No. 634. THE COLORADO AND NORTHWESTERN RAILROAD COMPANY, PETITIONER, *v.* THE UNITED STATES. March 2, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. E. E. Whitted* and *Mr. John L. Thomas* for petitioner. No appearance for respondent.

No. 637. GEORGE C. LOCKLIN ET AL., PETITIONERS, *v.* GEORGE H. BUCK. March 2, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Otto Raymond Barnett, Mr. Ernest Wilkinson* and *Mr. Samuel T. Fisher* for petitioners. *Mr. William P. Martin* for respondent.

No. 646. RICKEY LAND & CATTLE COMPANY, PETITIONER, *v.* MILLER AND LUX; and No. 653. RICKEY LAND & CATTLE COMPANY, PETITIONER, *v.* HENRY WOOD ET AL. March 9, 1908. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Frederic D. McKenney* for petitioner. *Mr. W. B. Treadwell* for respondent in No. 646. No appearance for respondents in No. 653.

No. 519. HARPER M. ORAHOOD, PETITIONER, *v.* ARTHUR M. EPPSTEIN, TRUSTEE. March 9, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Harvey Riddell* for petitioner. *Mr. Simon Wolf* and *Mr. Myer Cohen* for respondent.

No. 613. THE CENTRAL COAL & COKE COMPANY, PETITIONER, *v.* DOC W. SUTTON. March 9, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Holmes Conrad* for petitioner. *Mr. N. W. Finley* for respondent.

No. 645. HENSON COLLIER, PETITIONER, *v.* MISSOURI, KANSAS & TEXAS RAILWAY COMPANY. March 9, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William Warner* for petitioner. *Mr. George P. B. Jackson* for respondent.

No. 636. SCRUGGS, VANDERVOORT AND BARNEY DRY GOODS COMPANY, PETITIONER, *v.* THE UNITED STATES. March 16,

1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Everit Brown* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 632. EMILIE SAXLEHNER, PETITIONER, *v.* EDWARD WAGNER ET AL. March 23, 1908. Order denying petition for writ of certiorari set aside and writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Antonio Knauth, Mr. Frank F. Reed* and *Mr. Arthur von Briesen* for petitioner. *Mr. Walter F. Murray* for respondents.

No. 659. EDGAR E. HEAVENRICH, TRUSTEE, ETC., PETITIONER, *v.* CARRIE W. HALEY. March 23, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Bernard B. Selling* for petitioner. *Mr. Alexander J. Groesbeck* for respondent.

No. 656. J. WILLCOX BROWN ET AL., PETITIONERS, *v.* WILLMORE COAL COMPANY. April 6, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. John G. Carlisle* for petitioner. *Mr. John G. Johnson* and *Mr. W. H. Ruppel* for respondent.

No. 668. MASON WILLIAMS, TRUSTEE, ETC., PETITIONER, *v.* THE NATIONAL BANK OF COMMERCE OF ST. LOUIS, MO. April 6, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edwin C. Brandenburg* for petitioner. *Mr. Charles W. Ogden* for respondent.

No. 669. J. T. WOODWARD, PETITIONER, *v.* JAMES D. DAVIDSON ET AL. April 6, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George R. Peck*, *Mr. H. H. Field* and *Mr. E. C. Hughes* for petitioner. *Mr. Edward Brady* for respondents.

No. 675. EVA T. BROUGH ET AL., PETITIONERS, *v.* CHARLES K. SEYMOUR. April 6, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Presley K. Ewing* for petitioners. *Mr. Roger W. Butterfield* and *Mr. Willard F. Keeney* for respondent.

No. 678. ROBERT H. KABOSCH, PETITIONER, *v.* WILLIAM H. HAND, TRUSTEE, ETC. April 6, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James L. Hopkins* for petitioner. *Mr. Edwin C. Brandenburg* and *Mr. F. W. Brandenburg* for respondent.

No. 665. LUTCHER AND MOORE LUMBER COMPANY ET AL., PETITIONERS, *v.* WILLIAM H. KNIGHT ET AL. April 6, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. A. P. Pujo* for petitioners. No appearance for respondents.

No. 681. E. H. MCCUTCHEN & CO. ET AL., PETITIONERS, *v.* A. N. BORT. April 13, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Elbert H. Hubbard* for petitioners. No appearance for respondent.

No. 684. ARMAND SCHMOLL, PETITIONER, *v.* THE UNITED STATES. April 13, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. W. Wickham Smith* and *Mr. John K. Maxwell* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 685. ROBERT DOLLAR ET AL., PETITIONERS, *v.* ST. PAUL FIRE and MARINE INSURANCE COMPANY ET AL. April 13, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles Page, Mr. Edward J. McCutchen* and *Mr. Samuel Knight* for petitioners. *Mr. Walter H. Robinson* for respondents.

No. 587. WILLIAM PORTER DAVIS, JR., TRUSTEE, ETC., PETITIONER, *v.* B. CROMPTON ET AL., ETC. April 20, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Samuel W. Cooper* for petitioner. *Mr. William A. Carr* for respondents.

No. 688. THE VILLAGE OF SARATOGA SPRINGS ET AL., PETITIONERS, *v.* THE CAMERON SEPTIC TANK COMPANY. April 20, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Melville Church* and *Mr. Charles L. Sturtevant* for petitioners. *Mr. Livingston Gifford* for respondent.

No. 691. FRANK T. W. PALMER, PETITIONER, *v.* FORDYCE G. BRADLEY ET AL. April 20, 1908. Petition for a writ of certi-

orari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John J. Lordan* and *Mr. John Barton Payne* for petitioner. *Mr. John J. Herrick* and *Mr. John P. Wilson* for respondents.

No. 693. THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, PETITIONER, *v.* THE STEAMSHIP WERDENFELS, ETC. April 20, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. James J. Macklin* and *Mr. LaRoy S. Gove* for petitioner. *Mr. Charles C. Burlingham* for respondent.

No. 701. GEORGE B. CHRISTIE ET AL., ETC., PETITIONERS, *v.* THE FANE STEAMSHIP COMPANY. April 20, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Duane E. Fox* for petitioners. *Mr. J. D. Rouse, Mr. William Grant* and *Mr. William B. Grant* for respondent.

No. 718. GUSTAV HOLMGREN, PETITIONER, *v.* THE UNITED STATES. April 27, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. William M. Madden* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 647. THE BOARD OF COUNTY COMMISSIONERS OF FREEBORN COUNTY, MINN., PETITIONER, *v.* THE INTERSTATE DRAINAGE INVESTMENT COMPANY. April 27, 1908. Petition for a

writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Norman E. Peterson* for petitioner. *Mr. Thomas D. Healy* for respondent.

No. 692. Victor A. Cook, Petitioner, *v.* Mobile, Jackson & Kansas City Railroad Company. April 27, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hannis Taylor* for petitioner. *Mr. William H. McIntosh* and *Mr. Joseph C. Rich* for respondent.

No. 717. Martin W. Stewart et al., Petitioners, *v.* The Board of Trustees of Park College et al. April 27, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. B. C. Brown* for petitioners. *Mr. Henry L. Alden* for respondents.

No. 699. Hygienic Chemical Company et al., Petitioners, *v.* Rumford Chemical Works. May 4, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Willard Parker Butler* for petitioner. *Mr. Philip Mauro* and *Mr. C. A. L. Massie* for respondent.

No. 714. Green County, Kentucky, Petitioner, *v.* Mary Amis Quinlan, Executrix, etc.; and No. 715. Green County, Kentucky, Petitioner, *v.* John Thomas' Executor et al. May 4, 1908. Petitions for writs of certiorari to the United

States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Ernest Macpherson* for petitioner. *Mr. Edmund F. Trabue, Mr. George DuRelle* and *Mr. Attilla Cox, Jr.*, for respondent in No. 714, and *Mr. Alexander Pope Humphrey* for respondents in No. 715.

No. 731. THE UNITED STATES, PETITIONER, *v.* JOHN W. DICKINSON. May 4, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted. *The Attorney General* and *The Solicitor General* for petitioner. *Mr. Frank W. Hackett* and *Mr. Samuel L. Powers* for respondent.

No. 719. G. & C. MERRIAM COMPANY, PETITIONER, *v.* GEORGE W. OGILVIE. May 4, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. W. B. Hale, Mr. Charles N. Judson* and *Mr. Frank F. Reed* for petitioner. No appearance for respondent.

No. 726. GRACE GLEASON ET AL., PETITIONERS, *v.* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY. May 4, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. John W. Griggs* for petitioners. *Mr. John G. Johnson* for respondent.

No. 732. LEMERT S. COOK, PETITIONER, *v.* THE UNITED STATES. May 4, 1908. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. A. M. Imbrie* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM FEBRUARY 25 TO MAY 4, 1908.

No. 186. ADOLFO SIXTO, PLAINTIFF IN ERROR, *v.* LAUREANO SARRIA. In error to the District Court of the United States for Porto Rico. March 2, 1908. Dismissed with costs on motion of counsel for plaintiff in error. *Mr. N. B. K. Pettingill* for plaintiff in error. *Mr. Frederic D. McKenney* for defendant in error.

No. 619. GEORGE L. STEARNS, APPELLANT, *v.* LEO V. YOUNGWORTH, UNITED STATES MARSHAL, ETC. Appeal from the Circuit Court of the United States for the Southern District of California. March 9, 1908. Final order reversed with costs and cause remanded with directions to discharge the petitioner, without prejudice to a renewal of the application to remove, on confession of error and motion of Mr. Solicitor General Hoyt for the appellee. *Mr. Will D. Gould* for appellant. *The Attorney General* and *The Solicitor General* for appellee.

No. 145. JOSEPH J. SLOCUM ET AL., TRUSTEE, ETC., APPELLANTS, *v.* THE UNITED STATES. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. March 9, 1908. Dismissed on motion of Mr. A. B. Browne for the appellants. *Mr. A. B. Browne* and *Mr. Alexander Britton* for appellants. *The Attorney General* for appellee.

No. 172. JOHN C. WANDS ET AL. *v.* WABASH RAILROAD COMPANY ET AL. On a certificate from the United States Circuit

Court of Appeals for the Eighth Circuit. March 9, 1908. Request of the United States Circuit Court of Appeals for the Eighth Circuit for leave to withdraw certificate herein granted. *Mr. Paul Bakewell* for Wands et al. *Mr. Charles C. Linthicum* and *Mr. Otto R. Barnett* for Wabash Railroad Company et al.

No. 276. Anderson Gray, Appellant, *v.* The Equitable Mortgage Company of Kansas City, Mo., et al. Appeal from the Circuit Court of the United States for the District of Kansas. March 13, 1908. Dismissed with costs on motion of counsel for the appellant. *Mr. Thomas F. Doran* for appellant. No appearance for appellees.

No. 200. L. Lechenger et al., Plaintiffs in Error, *v.* Merchants' National Bank of Houston et al. In error to the Court of Civil Appeals of the First Supreme Judicial District of the State of Texas. March 19, 1908. Dismissed with costs per stipulation. *Mr. Edgar Watkins, Mr. Frank C. Jones* and *Mr. James A. Baker* for plaintiffs in error. *Mr. A. L. Jackson, Mr. Jno. W. Parker* and *Mr. Hannis Taylor* for defendants in error.

No. 17. Edgar Jadwin et al., Plaintiffs in Error, *v.* The State of Texas. In error to the Court of Civil Appeals of the First Supreme Judicial District of the State of Texas. April 13, 1908. Dismissed with costs on motion of Mr. Solicitor General Hoyt for the plaintiffs in error. *The Attorney General* for plaintiffs in error. *Mr. Robert Vance Davidson* for defendant in error.

No. 239. THE PACIFIC EXPRESS COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* M. W. NEEDHAM. In error to the Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas. April 15, 1908. Dismissed with costs on motion of counsel for the plaintiffs in error. *Mr. J. M. McCormick* for plaintiffs in error. No appearance for defendant in error.

No. 291. GEORGE H. PENROSE, APPELLANT, *v.* THE UNITED STATES. Appeal from the Court of Claims. April 20, 1908. Dismissed on motion of Mr. Frederic D. McKenney for appellant. *Mr. Frederic D. McKenney* and *Mr. Henry C. Willcox* for appellant. *The Attorney General* for appellee.

No. 226. J. N. SEALE, PLAINTIFF IN ERROR, *v.* THE STATE OF GEORGIA. In error to the Supreme Court of the State of Georgia. April 24, 1908. Upon suggestion of death of plaintiff in error by Mr. W. A. Henderson of counsel for plaintiff in error, case abated and writ of error dismissed. *Mr. William A. Henderson* and *Mr. John J. Strickland* for plaintiff in error. *Mr. John C. Hart* for defendant in error.

No. 287. MORRIS ROSENFIELD ET AL., PLAINTIFFS IN ERROR, *v.* THE COMMONWEALTH OF KENTUCKY, by T. C. Albritton, revenue agent. In error to the Court of Appeals of the State of Kentucky. April 27, 1908. Dismissed with costs per stipulation. *Mr. John Marshall* for plaintiffs in error. *Mr. Jno. W. Ray* and *Mr. James Breathitt* for defendant in error.

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JURISDICTION.

A. Of this Court.

1. *Avoidance of.*

While this court will not take jurisdiction if it should not, it must take jurisdiction if it should. It cannot, as the legislature may, avoid meeting a measure because it desires so to do. *Ex parte Young*, 123.

2. *Amount in controversy; where judgment involves validity of other judgments, latter considered.*

While this court cannot review judgments of the Supreme Court of the Territory of Oklahoma unless the amount involved exceeds $5,000, where the judgment also directly involves the validity of other judgments the amount in controversy may be measured by the aggregate of such judgments. *Beadles* v. *Smyser*, 393.

3. *Under* § 709, *Rev. Stat.; denial of constitutional right.*

Where complainant is entitled to equitable relief against the enforcement by state officers of an unconstitutional state statute, the judgment of the state court dismissing the bill for lack of jurisdiction on the ground that the suit is one against the State gives effect to the statute, denies complainant a constitutional right and is reviewable by this court under § 709, Rev. Stat. *General Oil Co.* v. *Crain*, 211.

4. *Under* § 709, *Rev. Stat.; sufficiency of Federal question.*

In order to give this court jurisdiction under § 709, Rev. Stat., to review the judgment of a state court, the Federal question must be distinctly raised in the state court, and a mere claim, which amounts to no more than a vague and inferential suggestion that a right under the Constitution of the United States had been denied, is not sufficient—and so *held* as to an exception taken as to certain parts of the charge to the jury because in effect they deprived the accused of his liberty without due process of law. *Thomas* v. *Iowa*, 258.

5. *Limitation of review of judgment of reversal of Supreme Court of Territory.*

Where the Supreme Court of the Territory of Oklahoma reverses the judgment of the trial court, the reviewing power of this court is limited to determining whether there was evidence supporting the findings and whether the facts found were adequate to sustain the legal conclusions. *Shawnee Compress Co.* v. *Anderson*, 423.

6. *To review judgments of District Court for Porto Rico.*

The power of this court to review judgments of the District Court of the United States for Porto Rico given by § 35 of the act of April 12, 1900, 31 Stat. 85, is the same as that to review judgments of the Supreme Courts of the Territories and is controlled by § 2 of the act of April 7, 1874, 18 Stat. 27; on writ of error, therefore, this court is confined to such legal questions as necessarily arise on the face of the record, such as exceptions to rulings on the rejection and admission of testimony and

C. Of District Courts.

Jurisdiction of District Court for Porto Rico of action to set aside agreement of liquidation of community.

By art. 62, par. 5, of the Porto Rican Code, power to administer estates is exclusively vested in the judge of the last place of residence of the deceased, and this includes all actions incidental to the liquidation of a community existing between husband and wife, and the District Court of the United States for Porto Rico has not jurisdiction of an action to set aside an agreement of liquidation of a community where the estates are still open in, and subject to the power and authority of, the local court. *Garzot* v. *de Rubio*, 283.

D. Of the Federal Courts Generally.

1. *Exclusive jurisdiction to decide constitutionality of state statute.*

When the question of the validity of a state statute with reference to the Federal Constitution has been first raised in a Federal court that court has the right to decide it to the exclusion of all other courts. *Ex parte Young*, 123.

2. *Interference with criminal case pending in state court.*

While a Federal court cannot interfere in a criminal case already pending in a state court, and while, as a general rule, a court of equity cannot enjoin criminal proceedings, those rules do not apply when such proceedings are brought to enforce an alleged unconstitutional state statute, after the unconstitutionality thereof has become the subject of inquiry in a suit pending in a Federal court which has first obtained jurisdiction thereover; and under such circumstances the Federal court has the right in both civil and criminal cases to hold and maintain such jurisdiction to the exclusion of all other courts. *Ib.*

3. *Of offenses committed in post offices.*

Under § § 711 and 5339, Rev. Stat., the United States courts have exclusive jurisdiction of all offenses enumerated in § 5339, committed in a post office owned by the United States over which the State has ceded jurisdiction. *Battle* v. *United States*, 36.

4. *Of offenses committed in post offices.*

The language of the Constitution, being wide enough to authorize the purchase of land for post offices and the acceptance of a grant of jurisdiction, the language of the statute based thereon will not be taken in any narrower sense as excluding post offices. *Ib.*

5. *Right of next friend of infant to elect to accept.*

A next friend may select one of several tribunals in which the infant's case shall be tried, and may elect to accept the jurisdiction of the Federal court to which the case may be removed. *In re Moore*, 490.

6. *Restraint of instrumentalities of State.*

Under such conditions as are involved in this case the Federal court may

enjoin an individual or a state officer from enforcing a state statute on account of its unconstitutionality, but it may not restrain the state court from acting in any case brought before it either of a civil or criminal nature, or prevent any investigation or action by a grand jury. *Ex parte Young*, 123.

7. *Restraint of instrumentalities of State.*

An injunction by a Federal court against a state court would violate the whole scheme of this Government, and it does not follow that because an individual may be enjoined from doing certain things a court may be similarly enjoined. *Ib.*

8. *Injunction against enforcement of state rate statute.*

While injunctions against the enforcement of a state rate statute should not be granted by a Federal court except in a case reasonably free from doubt, the equity jurisdiction of the Federal court has been constantly exercised for such purpose. *Ib.*

9. *Waiver of objection to.*

While consent cannot confer on a Federal court jurisdiction of a case of which no Federal court would have jurisdiction, either party may waive the objections that the case was not brought in, or removed to, the particular Federal court provided by the statute. *In re Moore*, 490.

10. *Same.*

Nothing in *Ex parte Wisner*, 203 U. S. 449, changes the rule that a party may waive the objection to the jurisdiction in respect to a particular court where diversity of citizenship actually exists. *Ib.*

See STATES, 8.

E. EQUITY.

Adequate remedy at law to prevent jurisdiction.

No adequate remedy at law, sufficient to prevent a court of equity from acting, exists in a case where the enforcement of an unconstitutional state rate statute would require the complainant to carry merchandise at confiscatory rates if it complied with the statute and subject it to excessive penalties in case it did not comply therewith and its validity was finally sustained. *Ex parte Young*, 123.

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Contributory; effect of failure of one injured to avail himself of permission to occupy a safer place than that where injured.

A fireman, who, under the circumstances of this case, remains at his regular post where his ordinary duty calls him, is not guilty of contributory negligence because he does not avail himself of permission to occupy a different and, perhaps, safer place. *McCabe & Steen Co.* v. *Wilson*, 275.

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OFFICES.

Effect of extinction of sovereignty creating office on property rights therein.

The holder of a heritable office in Cuba which had been abolished prior to the extinction of Spanish sovereignty, but who, pending compensation for its condemnation, was receiving the emoluments of one of the grants of the office, *held* in this case to have no property rights that survived the extinction of such sovereignty. *O'Reilly de Camara* v. *Brooke*, 45.

PARTIES.

1. *Attorney General of State a proper party defendant to suit to prevent enforcement of state statute.*

The Attorney General of the State of Minnesota, under his common law power and the state statutes, has the general authority imposed upon him of enforcing constitutional statutes of the State and is a proper party defendant to a suit brought to prevent the enforcement of a state statute on the ground of its unconstitutionality. *Ex parte Young*, 123.

2. *State officer as party defendant to suit to prevent enforcement of state statute.*

It is not necessary that the duty of a state officer to enforce a statute be declared in that statute itself in order to permit his being joined as a party defendant from enforcing it; if by virtue of his office he has some connection with the enforcement of the act it is immaterial whether it arises by common general law or by statute. *Ib.*

See ACTIONS, 4; JURISDICTION, B 1, 5; LOCAL LAW (Oklahoma); MANDAMUS, 1, 2.

cannot be nullified by the State prohibiting suits in its own courts against state officers to prevent their enforcing unconstitutional statutes and contending that the National tribunals are also precluded from entertaining such suits under the Eleventh Amendment. *General Oil Co.* v. *Crain*, 211.

5. *Power to tax spirits in bonded warehouse.*

It is within the power of the State to tax spirits in bonded warehouses and require the warehouseman to pay the same with interest after the taxes due to the United States Government have been paid; and if the warehouseman is given a lien on the spirits for the taxes and interest paid by him he is not deprived of his property without due process of law. *Thompson* v. *Kentucky*, 340.

6. *Personal liability of officers in enforcing unconstitutional statute.*

The attempt of a state officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the State in its sovereign or governmental capacity, and is an illegal act and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to its officer immunity from responsibility to the supreme authority of the United States. *Ex parte Young*, 123.

7. *Suit against within meaning of Eleventh Amendment.*

A suit by a citizen of another State to restrain a state officer from improperly enforcing a state statute, where no criminal prosecution has been commenced, *held*, in this case, not to be an action against the State within the meaning of the Eleventh Amendment. *Scully* v. *Bird*, 481.

8. *Suit against State within meaning of Eleventh Amendment; enjoining state officer from enforcing unconstitutional state statute.*

While making a state officer who has no connection with the enforcement of an act alleged to be unconstitutional a party defendant is merely making him a party as a representative of the State, and thereby amounts to making the State a party within the prohibition of the Eleventh Amendment, individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence an action, either civil or criminal, to enforce an unconstitutional state statute may be enjoined from so doing by a Federal court. *Ex parte Young*, 123.

9. *Suit between; reference to master.*

Order referring cause to master and directing conditions under which testimony shall be taken and master shall report to this court. *Virginia* v. *West Virginia*, 514.

10. *Same.*

Defendant's demurrer having been overruled, 206 U. S. 290, 322, and defendant having answered, both complainant and defendant submitted