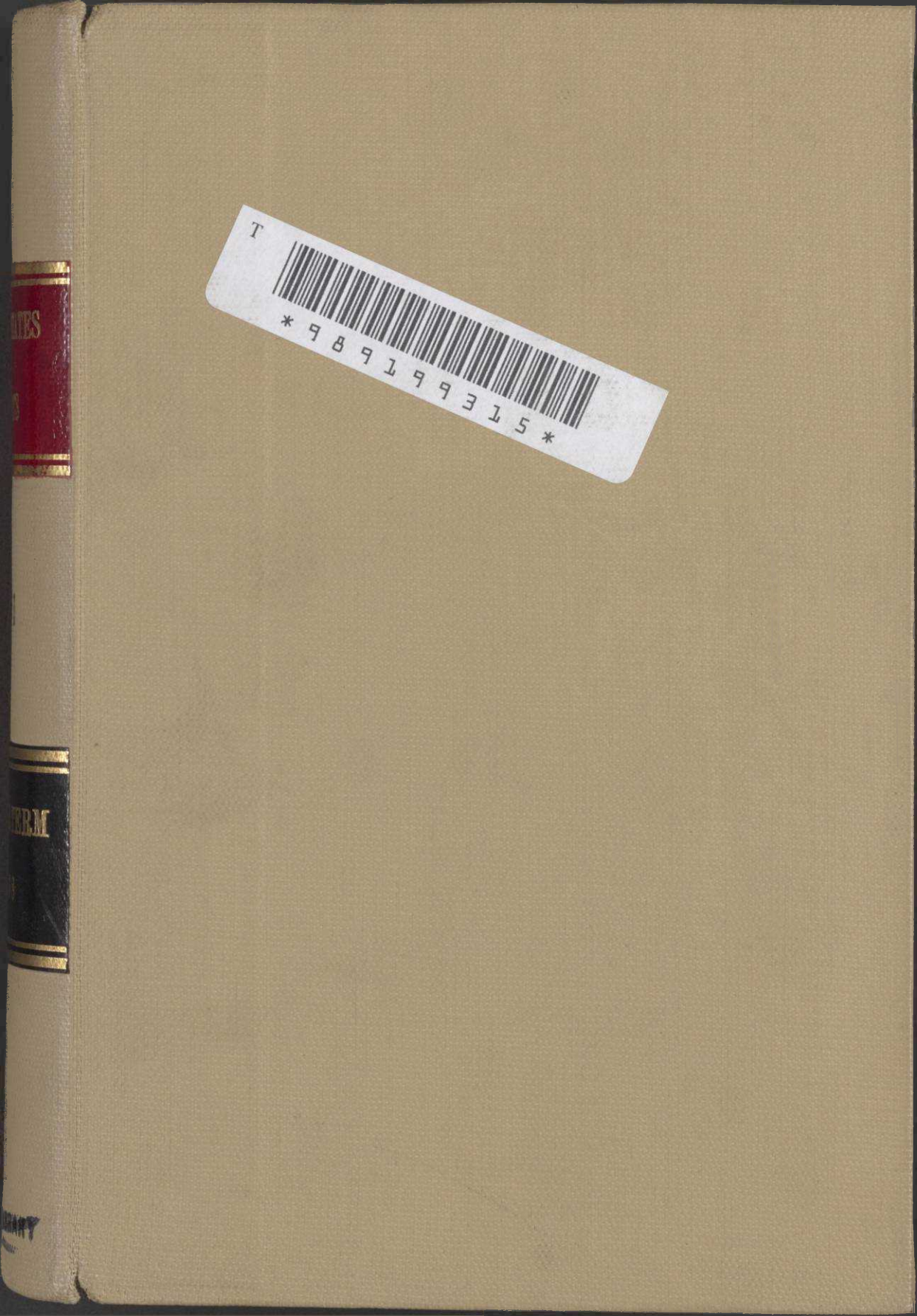

UNITED STATES REPORTS

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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1908

CHARLES HENRY BUTLER

REPORTER

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1909

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, 1908.

FRASCH *v.* MOORE.[1]

APPEAL FROM AND IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 14. Argued April 23, 24, 1908.—Decided October 19, 1908.

A decision of the Court of Appeals of the District of Columbia in an appeal from the Commissioner of Patents under Rev. Stat. §§ 4914, 4915, § 9 of the act of February 9, 1893, c. 74, 27 Stat. 434, and § 780, Rev. Stat., District of Columbia, is interlocutory and not final and is not reviewable by this court under § 8 of the act of February 9, 1893, either by appeal or writ of error. *Rousseau* v. *Browne*, 21 App. D. C. 73, approved.

Appeal from and writ of error to review, 27 App. D. C. 25, dismissed.

FRASCH applied for a patent for an invention of a new and useful improvement in the art of making salt by evaporation of brine. He expressed his alleged invention in six claims, three of which were for the process of removing incrustation of calcium sulphate from brine heating surfaces, and three of them were for an apparatus for use in the process.

[1] Commissioner of Patents and made party in place of Allen, Commissioner, resigned.

At the time when the application was filed, Rule 41 of the Patent Office did not permit the joinder of claims for process and claims for apparatus in one and the same application. The examiner required division between the process and apparatus claims, and refused to act upon the merits. An appeal was taken to the examiners in chief, but the examiner refused to forward it. A petition was then filed, asking the Commissioner of Patents to direct that the appeal be heard. The Commissioner held that the examiner was right in refusing to forward the appeal. From that decision appeal was taken to the Court of Appeals of the District, which held that it did not have jurisdiction to entertain it. Frasch then filed a petition in this court for a mandamus, directing the Court of Appeals to hear and determine the appeal, which petition was dismissed. *Ex parte Frasch*, 192 U. S. 566.

But in *United States ex rel. Steinmetz* v. *Allen*, 192 U. S. 543, it was held that Rule 41, as applied by the Commissioner, was invalid, and that the remedy for his action was by mandamus in the Supreme Court of the District to compel the Commissioner to act. Accordingly the proceedings in the present case were resumed in the Patent Office, and the applicant asked the Commissioner to direct that the appeal theretofore taken to the examiners in chief be heard by them. The Commissioner granted this petition. The primary examiner furnished the required statement and a supplementary statement of the grounds of his decision requiring division. The examiners in chief affirmed the decision of the primary examiner, "requiring a division of these claims for an art and for an independent machine used to perform the art;" one examiner in chief, dissenting, held that division should not be required. On appeal to the Commissioner, he affirmed the examiners in chief in part only; that is to say, he held that process claim No. 1 must be divided from the other process claims and the apparatus claims, but that process claims Nos. 2 and 3 and the apparatus claims Nos. 4, 5 and 6 might be joined in one application. Rehearing was denied, and an appeal was taken to the Court of Appeals for

the District of Columbia, which affirmed the decision of the Commissioner of Patents, for reasons given at large in an opinion, and directed the clerk of the court to "certify this opinion and proceedings in this court in the premises to the Commissioner of Patents, according to law."

An appeal and a writ of error were allowed, the court stating through Mr. Chief Justice Shepard: "We are inclined to the view that this case is not appealable to the Supreme Court of the United States, but as the question has never been directly decided, so far as we are advised, we will grant the petition in order that the question of the right to appeal in such a case may be directly presented for the determination of the court of last resort."

The record was filed January 25, 1907, and on February 4 a petition for certiorari.

Mr. Charles J. Hedrick for appellant and plaintiff in error:

The opinion and the reasons of appeal show the case is one in which is drawn in question the validity of a statute of, or an authority exercised under, the United States. § 233 of Code Dist. Col.

This court has jurisdiction in a case wherein the validity of a rule of the Patent Office is assailed. *United States* v. *Allen*, 192 U. S. 543. Here not only the rule, but the validity of the authority exercised apart from any rule, is called in question and also the validity of any statute authorizing said rule or in other respects having the effect which the Court of Appeals of the District of Columbia and the Commissioner of Patents have construed the patent acts to have.

In *Rousseau* v. *Browne*, 104 O. G. 1122, 21 App. D. C. 73, the Court of Appeals declined to allow a writ of error or an appeal, on the ground that its decision was not a final judgment or decree within the statute allowing appeals to this court; but it does not appear that the attention of the court had been called to the express opinion in *United States* v. *Duell*, 172 U. S. 576, that the remedy by appeal existed.

Although this court did not affirm the lower court solely for this reason, yet the expression of opinion was not *obiter* on that account; since it was in reference to a matter in issue and constituted an additional reason for the affirmance.

The decision of the Court of Appeals, when adverse (as in the present case), is the refusal of a patent (§ 4915, Rev. Stat.), and the effect of its decision whether adverse or favorable is not materially different from the corresponding judgment on a bill in equity under § 4915, under which the court may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear.

This court has entertained jurisdiction of appeals from such adjudication and reversed the Circuit Court's decision on the merits. *Morgan* v. *Daniels*, 153 U. S. 120; and see also *Gandy* v. *Marble*, 122 U. S. 432; *Hill* v. *Wooster*, 132 U. S. 693; *Durham* v. *Seymour*, 161 U. S. 235; and see *Butterworth* v. *Hoe*, 112 U. S. 50.

Inasmuch as the appeal deals with a question judicial in its nature, in respect of which the judgment of the court is final so far as the particular action of the Patent Office is concerned, such judgment is none the less a judgment "because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution." *United States* v. *Duell*, *supra*; *Interstate Comm. Comm.* v. *Brimson*, 154 U. S. 447.

The decision on appeal from the Commissioner under § 4914, Rev. Stat., and § 228, Code Dist. Col., is, therefore, a final judgment or decree of the Court of Appeals. See § 233, Code Dist. Col., allowing or refusing a patent. It gives or refuses to appellant the exclusive rights of a patentee.

It is not material that any patent allowed by the courts on direct appeal (§ 4914, Rev. Stat.), or on bill in equity (§ 4915, Rev. Stat.) can be controverted (§ 4920, Rev. Stat.). A final judgment or decree can be rendered in cases where rights of

possession only are involved, the judgment or decree not touching the fundamental title. A decree in equity for specific performance, as for delivery of a deed, is none the less a final decree, because the deed, when given, is not incontrovertible. It has a certain finality; but so does the grant of a patent.

In any legal sense, action, suit and cause are convertible terms.

A suit is any proceeding in a court of justice by which an individual pursues that remedy which the law affords him. *Ex parte Milligan*, 4 Wall. 112, 113; *Weston* v. *Charleston*, 2 Pet. 449. It is the prosecution of some demand in a court of justice. *Cohens* v. *Virginia*, 6 Wheat. 264.

Suits may arise out of appeals from administrative officers. As to appeal from a board of supervisors see *Bradley* v. *People*, 4 Wall. 459.

The Court of Appeals exercises functions strictly judicial in reviewing on appeal the decisions of the Commissioner of Patents. *United States* v. *Duell*, 172 U. S. 576.

The Solicitor General for appellee and defendant in error:

The court is without jurisdiction.

There is no money in dispute nor anything to which a pecuniary value has been given. To rest jurisdiction upon the act of February 9, 1893, 27 Stat. 434, in a case involving the validity of a patent or copyright, or drawing in question the validity of a treaty or statute or of an authority exercised under the United States, there must be some sum or value in dispute. *Steinmetz* v. *Allen*, 192 U. S. 543; *Chapman* v. *United States*, 164 U. S. 436; *United States* v. *More*, 3 Cr. 159; *Sinclair* v. *District of Columbia*, 192 U. S. 16; *New Mexico* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38; *Albright* v. *New Mexico*, 200 U. S. 9. If it should be held that the validity of a patent or copyright necessarily involves value, although the sum or value in any determinate sense is not in dispute, still it cannot possibly be predicated of the naked question of the validity of a

law or treaty or Federal authority that a sum or value is at stake as a concrete and measurable matter, but only contingently, indirectly and remotely.

The judgment of the Court of Appeals is not final; it merely ended an interlocutory stage of this controversy and sent the applicant back to the Patent Office to conform to the meaning and effect of Rule 41 on division of claims as construed by the Commissioner of Patents, and to pursue the application in the form required to final grant or rejection. See *Rousseau* v. *Browne*, 21 App. D. C. 73. Jurisdiction to hear and determine appeals from the Commissioner of Patents was formerly vested in the Supreme Court of the District of Columbia (§ 780, R. S. D. C.); it was transferred to and vested in the Court of Appeals by § 9 of the act of 1893 (*supra*), and in addition, decisions of the Patent Office on an interference between applications, which previously were final (§ 4911, Rev. Stat.), were made appealable to the Court of Appeals. The law applicable is § 4914, Rev. Stat. Section 4915 provides a remedy by bill in equity where a patent is refused, and the last line of that section refers to the "final decision," which evidently means the judicial decision upon a bill in equity. It is manifest from the language of these sections that in interference cases and in all others going up from the Commissioner to the Court of Appeals there is no final judgment in the cause, but one interlocutory in its nature and binding only upon the Commissioner to govern the further proceedings in the case. The opinion or decision of the court reviewing the Commissioner's decision is not final, because it does not preclude any person interested from contesting the validity of the patent in court. If the Commissioner refuses the patent and the Court of Appeals either sustains him or reverses him, that is the point at which finality could be alleged, and even then the decision of that court may be challenged generally and a refusal of patent may be reviewed and contested by bill in equity. It is at least certain that a judgment like this on an intermediate point of procedure and practice, the result of which is simply to send the case back

to the Patent Office, is not a "final judgment" under § 8 of the act of 1893.

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

Section 8 of the act of February 9, 1893, c. 74, 27 Stat. 434, 436, provides:

"That any final judgment or decree of the said Court of Appeals may be reëxamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the Supreme Court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States."

The decision of the Court of Appeals sought to be reviewed in the present case is not final, but merely ended an interlocutory stage of the controversy and sent the applicant back to the Patent Office to conform to the meaning and effect of the rule on division of claims as construed by the Commissioner of Patents, and to pursue the application in the form required to allowance or rejection.

Section 780 of the Revised Statutes of the District of Columbia reads thus:

"The Supreme Court, sitting in banc, shall have jurisdiction of and shall hear and determine all appeals from the decisions of the Commissioner of Patents, in accordance with the provisions of sections forty-nine hundred and eleven to forty-nine hundred and fifteen, inclusive, of Chapter one, Title LX, of the Revised Statutes, 'Patents, Trade-marks, and Copyrights.'"

Section 9 of the "Act to establish a Court of Appeals for the District of Columbia, and for other purposes," approved February 9, 1893, c. 74, 27 Stat. 434, 436, is:

"SEC. 9. That the determination of appeals from the decisions of the Commissioner of Patents, now vested in the general term of the Supreme Court of the District of Columbia, in pursuance of the provisions of section seven hundred and eighty of the Revised Statutes of the United States, relating to the District of Columbia, shall hereafter be and the same is hereby vested in the Court of Appeals created by this act; and in addition, any party aggrieved by a decision of the Commissioner of Patents in any interference case may appeal therefrom to said Court of Appeals."

Thus the special jurisdiction of the District Supreme Court in patent appeals was transferred to and vested in the Court of Appeals, and decisions in interference cases were also made appealable, which had not been previously the case. Rev. Stat. § 4911. The law applicable is § 4914, Rev. Stat., which provides:

"The court, on petition, shall hear and determine such appeal, and revise the decision appealed from in a summary way, on the evidence produced before the Commissioner, at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal. After hearing the case the court shall return to the Commissioner a certificate of its proceedings and decision, which shall be entered of record in the Patent Office, and shall govern the further proceedings in the case. But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question."

By § 4915 a remedy by bill in equity is given where a patent is refused, and reads as follows:

"SEC. 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme

Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

The final decision referred to is obviously the judicial decision on the bill in equity, while in interference cases and in all others going up from the Commissioner to the Court of Appeals there is no final judgment in the cause, but one interlocutory in its nature and binding only upon the Commissioner "to govern the further proceedings in the case." The opinion or decision of the court reviewing the Commissioner's decision is not final, because it does not preclude any person interested from contesting the validity of the patent in court, and if the decision of the Commissioner grants the patent that is the end of the matter as between the Government and the applicant; and if he refuses it and the Court of Appeals sustains him, that is merely a qualified finality, for, as we have seen, the decision of that court may be challenged generally and a refusal of patent may be reviewed and contested by bill as provided.

The appeal given to the Court of Appeals of the District from the decision of the Commissioner "is not," as Mr. Justice Matthews said in *Butterworth* v. *Hoe*, 112 U. S. 50, 60, "the exercise of ordinary jurisdiction at law or in equity on the part of that court, but is one step in the statutory proceeding under

the patent laws whereby that tribunal is interposed in aid of the Patent Office, though not subject to it. Its adjudication, though not binding upon any who choose by litigation in courts of general jurisdiction to question the validity of any patent thus awarded, is nevertheless conclusive upon the Patent Office itself, for, as the statute declares, Rev. Stat. § 4914, 'it shall govern the further proceedings in the case.'"

In *Rousseau* v. *Browne*, 21 App. D. C. 73, 80, which was an appeal from the Patent Office in the matter of an interference between two applications, the court affirmed the decision of the Commissioner of Patents, ruling against one of the claims on the ground that priority of invention must be awarded to the other claimant, declined to allow a writ of error or appeal, and said, through Chief Justice Alvey:

"There is no final judgment of this court rendered in such cases, nor is there any such judgment required or authorized to be rendered, not even for costs of the appeal. This court is simply required in such cases, after hearing and deciding the points as presented, instead of entering judgment here, to return to the Commissioner of Patents a certificate of the proceedings and decision of this court, to be entered of record in the Patent Office, to govern the further proceedings in the case. But it is declared by the statute that no opinion of this court in any such case shall preclude any person interested from the right to contest the validity of any patent that may be granted by the Commissioner of Patents. Rev. Stat. §§ 780, 4914.

"There is no provision of any statute, within our knowledge, that authorizes a writ of error or an appeal to the Supreme Court of the United States in such case as the present. It would seem clear that the case is not within the purview of section 8 of the act of Congress of February 9, 1893, providing for the establishment of this court. That section only applies to cases where final judgments by this court have been entered, and not to decisions to be made and certified to the Patent Office, under the special directions of the statute."

We consider these observations as applicable to the present case, and the result is

Appeal and writ of error dismissed, and certiorari denied.

MR. JUSTICE WHITE and MR. JUSTICE MCKENNA dissent.

MR. JUSTICE MOODY did not sit.

BRANDON *v.* ARD.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 24. Submitted April 29, 1908.—Decided October 19, 1908.

The policy of the Federal Government toward *bona fide* settlers upon the public lands is liberal and the law deals tenderly with them.

A homesteader who has done all that the law requires will not lose his rights on account of error of, or unauthorized action by, a public official. *Ard* v. *Brandon*, 156 U. S. 537.

Lands within indemnity limits of a railroad grant are not open for settlement under homestead laws until the map of definite location has been filed and their selection to supply deficiencies in place limits has been approved by the Secretary of the Interior; and their prior withdrawal by the Secretary from sale and settlement is unauthorized and does not affect the rights of *bona fide* settlers. So *held* as to grants under the act of March 3, 1863, c. 98, 12 Stat. 772.

The act of March 3, 1863, c. 98, 12 Stat. 772, did not actually grant lands to which any claim of a *bona fide* settler had attached prior to definite location of the road. *Sjoli* v. *Dreschel*, 199 U. S. 564.

In a suit brought by the Attorney General of the United States against a railroad company to cancel patents under the act of March 3, 1887, c. 376, 24 Stat. 556, the Attorney General represents only the United States; he cannot represent merely private parties.

A *bona fide* homesteader, not a party to an action brought by the Attorney General of the United States under the act of March 3, 1887, c. 376, 24 Stat. 556, against a railroad company to cancel the patent

issued to the company for the land entered by him is not a privy to or bound by the judgment against the United States; nor can the adjudication in such a case estop him from setting up his rights in the land for which the patent was issued. *United States* v. *M., K. & T. Ry. Co.*, 141 U. S. 358; *Ard* v. *Brandon*, 156 U. S. 537.

One not a party to an action brought by the United States to cancel patents and who is not otherwise a privy to, or bound by the judgment against the United States, is not made a privy thereto, or become bound thereby because he is a member of an association which urged the Government to bring the action.

74 Kansas, 424, affirmed.

THE facts are stated in the opinion.

Mr. T. A. Pollock, with whom *Mr. L. W. Keplinger* was on the brief, for plaintiffs in error:

The relations between the Government and Ard with respect to this land and Ard's relation to and connection with the suit were such as to render the decree in the case of *United States* v. *M., K. & T. Ry. Co.* conclusive against Ard as to the equities now claimed by him. *Graham* v. *Great Water Power Co.*, 76 Pac. Rep. 811; *Norton* v. *Evans*, 82 Fed. Rep. 804; *Kerrison* v. *Stewart*, 93 U. S. 155; *Manson* v. *Duncanson*, 166 U. S. 533; Freeman on Judgments (3d ed.), § 147; Black on Judgments, § 85; *Hornsly* v. *National Bank*, 60 S. W. Rep. 180; 24 Am. & Eng. Ency. Law (2d ed.), 737, 738; *Hanke* v. *Cooper*, 108 Fed. Rep. 738, 924; *Thaller* v. *Hershey*, 89 Fed. Rep. 576; *United States* v. *Beebe*, 127 U. S. 338 (Government a trustee). Ard could have appealed. 3 Daniels (6th ed.), *1461; *Sage* v. *Central Railroad Co.*, 93 U. S. 412.

The withdrawal of March 19, 1863, withdrew the land in question from the category of public lands. *Northern Lumber Co.* v. *O'Brien*, 134 Fed. Rep. 303; *S. C.*, 139 Fed. Rep. 614; *Wood* v. *Beach*, 156 U. S. 548; *Spence* v. *McDougal*, 159 U. S. 62; *Merrill* v. *Chicago Ry. Co.*, 70 Fed. Rep. 464; *Union Pacific Ry. Co.* v. *Atchison Ry. Co.*, 13 Fed. Rep. 106; *Wolcott* v. *Des Moines Co.*, 5 Wall. 681; *Wilcox* v. *Jackson*, 13 Pet. 498; *Leavenworth &c.* v. *United States*, 92 U. S. 745; *Railroad Co.*

v. *Freeman Co.*, 9 Wall. 94; see dissenting opinion, Brewer, J., *Nelson* v. *Nor. Pac. Railway Co.*, 188 U. S. 108.

The withdrawal of March 19, 1863, withdrew the land from the category of "public land" within the meaning of the words as used in the homestead preëmption acts and such withdrawal constituted a "reservation" within the meaning of said word as contained in said act. Same authorities as above. *Patterson* v. *Tatam*, 3 Sawy. 164; *Wolsey* v. *Chapman*, 101 U. S. 770; *Weaver* v. *Fairchild*, 50 California, 560; *Vicksburg* v. *Elmore*, 8 So. Rep. 727.

The rulings of the Land Department authorizing the decisions of this court sustaining withdrawals such as the one in question, and made prior to the time Brandon made his purchase constitute a rule of property in his favor. See cases cited in 13 Century Digest, c., 2163, § 336, and such rule having been established by Federal authority, it is the legal duty of the Government to uphold the title so acquired.

Mr. Oscar Foust for defendant in error:

The judgment against the United States in the case of *United States* v. *M., K. & T. Ry. Co.* is not conclusive in Brandon's favor in the case at bar. *Ard* v. *Brandon*, 156 U. S. 537; Black on Judgments, No. 540; 1 Freeman on Judgments (4th ed.), Nos. 188, 189; *Hall* v. *Finch*, 104 U. S. 261; *Patton* v. *Caldwell*, 1 Dall. 419; *Litchfield* v. *Crane*, 123 U. S. 551; *Apsden* v. *Nixan*, 4 How. 11; *Bank* v. *Stone*, 88 Fed. Rep. 413; *Australian Knitting Co.* v. *Gormley*, 138 Fed. Rep. 92; *Wilgus* v. *German*, 72 Fed. Rep. 773; *Pendleton* v. *Russell*, 144 U. S. 640; *Central Baptist Church* v. *Manchester*, 17 R. I. 492; *Jones* v. *Vert*, 121 Indiana, 140; *Cannon River &c. Assn.* v. *Rogers*, 42 Minnesota, 123; *Park* v. *Ensign*, 66 Kansas, 50; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *Stryker* v. *Crane* (or *Goodnow*), 123 U. S. 527; *Brandon* v. *Ard*, 74 Kansas, 424; *Wilkie* v. *Howe*, 27 Kansas, 578; *Keizer* v. *Paper Co.*, 71 Kansas, 305.

The Kansas Supreme Court properly held that the letter

of withdrawal of March 19, 1863, was ineffectual to withdraw the land from the class of lands subject to homestead preemption, and that Ard acquired equities, by his settlement, as against Brandon. *L., L. & G. R. R. Co.* v. *United States*, 92 U. S. 733, 760; *M., K. & T. Ry. Co.* v. *Kansas Pac. Ry. Co.*, 97 U. S. 491; *Ard* v. *Brandon*, 159 U. S. 537; *Clements* v. *Warner*, 24 How. 394; *Duluth Iron Range R. R. Co.* v. *Ray*, 173 U. S. 587; *Weeks* v. *Bridgman*, 159 U. S. 541; *United States* v. *M., K. & T. Ry. Co.*, 141 U. S. 358; *Kansas Pac. Ry. Co.* v. *A., T. & S. F. R. R. Co.*, 112 U. S. 414; *Hewitt* v. *Schultz*, 180 U. S. 139; *Nelson* v. *Nor. Pac. Ry. Co.*, 188 U. S. 108; *Sjoli* v. *Dreschel*, 199 U. S. 564; *Southern Pac. Ry. Co.* v. *Bell*, 183 U. S. 675; *Holmes* v. *United States* (9th Circuit), 55 C. C. A. 489; *S. C.*, 118 Fed. Rep. 995; *Moore* v. *Carmode*, 180 U. S. 167; *Northern Pac. R. Co.* v. *Miller* (Secretary Vilas), 7 Land Dec. 100; *Shepley* v. *Cowan*, 91 U. S. 330.

Mr. Justice Harlan delivered the opinion of the court.

This case involves the title to a tract of land in Allen County, Kansas, containing eighty acres. It is described in the record as the northeast quarter of section 11, township 26, range 20, and will hereafter be alluded to as the tract in section 11. Adjoining that tract, in the same township, is another tract of eighty acres which will be hereafter referred to as the tract in section 2. The present writ of error does not involve the title to the tract in section 2, but it will conduce to a clear understanding of the questions raised as to the tract in section 11 if we recall certain acts of Congress, as well as the proceedings in the Land Department and the litigation that arose in the state and Federal courts about both tracts.

By an act of March 3, 1863, c. 98, 12 Stat. 772, Congress granted to Kansas every alternate odd section of public lands, for ten sections in width on each side, to aid in the construction of railroads and branches, as follows: first, of a railroad and telegraph line from Leavenworth, Kansas, on a named

route, with a branch to the southern line of the State in the direction of Galveston, Texas; second, of a railroad from Atchison, via Topeka, to the western line of the State, with a branch extending to a named point on the first-named road; one of the roads becoming subsequently known as the Leavenworth road, and the other as the Missouri-Kansas road.

After making the grant in the usual words, the act proceeded: "But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of preëmption or homestead settlements have attached as aforesaid; which lands, thus indicated by odd numbers and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid: *Provided*, That the land to be so selected shall, in no case, be located further than twenty miles from the lines of said road and branches: . . ."

By a statute passed February 9, 1864, c. 79, p. 149, Kansas accepted this grant upon the conditions prescribed by Congress, and the Leavenworth and the Missouri-Kansas Companies became entitled to claim the benefit of its provisions as to the lands on their respective routes.

A few days after the act of 1863 was passed—indeed, before the State had formally accepted the benefit of its provisions—the Senators and Representatives from Kansas requested the General Land Office to withdraw the public lands

along the specified routes of the railroads and branches proposed to be constructed. Pursuant to that request the Commissioner of the Land Office, on March 19, 1863,—without having received any map of general route, much less of definite location—sent to the Register and Receiver, at Humboldt, Kansas, a diagram showing the *probable* lines of the roads and their respective branches, as well as the ten-mile or place limits on each side, and directed that officer to "withhold from ordinary private sale or location, and also from preemption and homestead . . . all the public lands in your [his] district and lying within the ten-mile limits *are* [as] designated in said diagram." After referring to the acts of 1853 and 1854 (preëmption and homestead acts) the Commissioner proceeded: "You will, therefore, understand from the foregoing: 1st. That the odd sections within the limits of said railroads and branches are absolutely withdrawn from sale, preëmption, or homestead entry, except so far as inceptive rights may have accrued prior to the receipt by you of this order. . . . This order will take effect from the date of its reception at your office, and you will advise this office of the precise time it may be received by you."

The order of withdrawal was approved by the Secretary of the Interior and was received at the local office May 5, 1863.

After this withdrawal, Congress, by an act approved July 26, 1866, 14 Stat. 289, c. 270, made a grant of lands to Kansas to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph Company from Fort Riley, Kansas, down the valley of the Neosho River to the southern line of Kansas. This act is referred to in the record, but it does not seem to have any special significance in the present case. Suffice it to say, that it contained provisions substantially like those in the act of 1863, which made it the duty of the Secretary of the Interior to select for the railroad company public lands nearest the place limits, equal to such amount as the United States appeared, at the time of the definite location of the road, to have "sold, reserved or other-

wise appropriated, or to which the right of homestead settlement or preëmption has attached."

Under date of April 30, 1867 the Land Office transmitted to the local land office at Humboldt, Kansas, a map of the actual location of the railroad for which the grant was made by Congress in the act of 1863. The diagram showed the ten-mile or granted limits of that road, and directed the withholding from sale or location, preëmption or homestead entries all the odd sections within the limits of twenty miles as laid down on that diagram.

After the above withdrawal—which, as we have stated, was made in 1863 solely at the request of the Kansas Senators and Representatives—Ard, who was admittedly qualified to take the benefits of the homestead laws, went upon the above two tracts, in June, 1866, intending, in good faith, to perfect a title to them under the homestead laws. He made substantial improvements upon them, and in July, 1866, in the accustomed way, made a homestead application at the local land office for the 160 acres. These two tracts of eighty acres each were so situated that they could have been legally embraced in one homestead entry. Ard's application was denied by the local office upon the ground, among others, that the land was within the place or granted limits of one of the aided roads. At that time the Missouri-Kansas Company—under whom the plaintiffs in error claim—had not filed any map of definite location. No such map was filed until December 6, 1866. In the spring of 1867 Ard did further work on the land, building a house thereon, and about July 1st of that year he again applied at the local land office, under the homestead laws, for the land. This application was also denied on the same grounds as were assigned in reference to his original application. In 1872 he made a more formal application, but was again repulsed by the Commissioner of the Land Office. Yet he did not abandon his claim, but held steadily to the purpose of obtaining the entire 160 acres under the homestead laws, and remained in open, notorious possession, assert-

ing his right to the land. And he has continuously occupied the land *ever since June*, 1866.

It should be stated in this connection that after the rejection of Ard's original homestead application upon the mistaken ground that the lands were within the place or granted limits of one of the roads, it was ascertained that neither of the tracts was within place limits, but both were within the overlapping indemnity limits of the respective roads. The tract in section 11 was selected as indemnity for lands lost jointly by the two companies, and was patented by the State to the Missouri-Kansas Company on May 19, 1873. The company knew when it selected the land to supply alleged deficiencies in place limits as well as when it took the patent from the State, that Ard was in actual possession, claiming the land under the homestead laws. The tract in section 2 was selected by the same company on April 14, 1873, and on November 3, 1873, it received a patent for it directly from the United States.

C. H. Pratt having purchased from the Missouri-Kansas Company the tract in section 2, and Brandon having purchased from the same company the tract in section 11, each commenced a separate action of ejectment against Ard in a state court. Judgment went against Ard in each case, and he was also unsuccessful in the Supreme Court of Kansas. *Ard* v. *Pratt*, 43 Kansas, 419; *Ard* v. *Brandon*, 43 Kansas, 425.

Ard then brought both cases here, and the judgments were reversed, further proceedings being ordered to be taken in accordance with the opinion of this court. *Ard* v. *Brandon*, 156 U. S. 537. What this court said bears directly upon the case as now presented. Mr. Justice Brewer, delivering the judgment of the court, referred to the testimony—and the same facts appear in the present record—and observed that by reason of his occupancy and improvement of the land for the purpose of a homestead and by his homestead application —all of which was prior to the withdrawal of the lands by the Land Department—Ard, who had admittedly the requisite qualifications under the homestead laws, acquired an equitable

right to the land that could not be displaced by the wrongful act of the local land office. After referring to the case of *Shepley* v. *Cowan*, 91 U. S. 330, 338, the court proceeded, p. 542: "Within the authority of that case we think the defendant has shown an equity prior to all claims of the railway company. He had a right to enter the land as a homestead; he pursued the course of procedure prescribed by the statute; he made out a formal application for the entry, and tendered the requisite fees, and the application and the fees were rejected by the officer charged with the duty of receiving them—and wrongfully rejected by him. Such wrongful rejection did not operate to deprive defendant of his equitable rights, nor did he forfeit or lose those rights because, after this wrongful rejection, he followed the advice of the register and sought in another way to acquire title to the lands. The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application. 'The policy of the Federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person.' *Clements* v. *Warner*, 24 How. 394, 397. There can be no question as to the good faith of the defendant. He went upon the land with the view of making it his home. He has occupied it ever since. He did all that was in his power in the first instance to secure the land as his homestead. That he failed was not his fault; it came through the wrongful action of one of the officers of the government."

Subsequently, after the return of the above cases to the inferior state court, Pratt, the claimant of the tract in section 2, abandoned his ejectment suit against Ard, and the

United States brought an action in the United States Circuit Court for Kansas against the Missouri-Kansas Company and other railroad companies to cancel certain patents that had been issued for lands in Allen County, Kansas, including the one issued to the Missouri-Kansas Company for the tract in section 11. *United States* v. *Missouri, K. & T. Ry. Co.*, 141 U. S. 358. Brandon was made a defendant in that action because he asserted rights in lands covered by some of the patents sought to be canceled. But Ard was not made a party, although some of the evidence in the case had reference to the tract in section 11, as well as to the circumstances under which he occupied it. That action was brought by the Attorney General of the United States at the request of the Secretary of the Interior, who proceeded under the act of Congress of March 3, 1887, 24 Stat. 556, c. 376. That act directed the Secretary "to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted." In that action the Government was unsuccessful in both the Circuit Court and in this court, but not, as we shall presently see, on any question determinative of the issue now presented as between Brandon's heirs and Ard.

Later on, the present case, so far as it involved the title to section 11, as between Brandon and Ard, was again heard upon its merits in the state court, and judgment went in favor of Ard. That judgment was affirmed by the Supreme Court of Kansas, which had before it the judgments in *Ard* v. *Brandon*, 156 U. S. 537, and in *United States* v. *M., K. & T. Ry. Co.*, 141 U. S. 358.

Subsequently, after the decision in *Ard* v. *Brandon*, 156 U. S. 537, Ard renewed his application, under the homestead laws, for both tracts. Having made the proper proofs, and paid the required fees, his application was approved and a patent issued to him by the United States on October 17, 1900, under the homestead law of 1862 and the acts supple-

mentary thereto. That patent was put in evidence at the last hearing of this cause in the inferior state court and was part of the record in this case when it was before the Supreme Court of Kansas, whose judgment is now here for review.

In our opinion the determination of the present case depends upon the conclusions that may be reached on two questions.

1. We cannot give to the withdrawal from sale, preëmption or settlement of the lands upon which Ard entered in 1866 the legal effect which the plaintiffs in error insist must be given to it. It is conceded that the lands were not within the place or granted limits of either railroad, but were within indemnity limits. According to the decisions of this court, they were therefore open to settlement under the homestead laws up to the time of their being selected to supply deficiencies in place limits, with the approval of the Secretary of the Interior after the filing of a map of definite location. The withdrawal of them from sale, or settlement, simply at the request of Senators and Representatives from Kansas, prior to the definite location of the road and before they were regularly selected to supply deficiencies in place or granted limits, was without authority of law. Such unauthorized withdrawal did not stand in the way of Ard, in virtue of his settlement on them in 1866 under the then existing homestead laws, from acquiring such an interest in the lands as would be protected against their subsequent selection by the railroad company. The acts of Congress cannot be construed as actually *granting* lands to which had attached, *before the definite location of the road,* any claim or right under the homestead laws. A claim or right did attach to these lands in favor of Ard before any map of definite location was made or filed and before they were selected for the railroad company to supply alleged deficiencies in place limits. What we have said is in conformity with numerous decisions of this court cited in the margin.[1]

[1] *Hewitt* v. *Schultz,* 180 U. S. 139; *Nelson* v. *Nor. Pac. Ry. Co.,* 188

The cases cited were referred to in a recent case in this court—*Sjoli* v. *Dreschel*, 199 U. S. 565. It was there held that those cases established, among other propositions, the following: "That the railroad company will not acquire a vested interest in particular lands, within or without place limits, merely by filing a map of general route and having the same approved by the Secretary of the Interior, although upon the definite location of its line of road and the filing and acceptance of a map thereof in the office of the Commissioner of the General Land Office, the lands within primary or place limits, not theretofore reserved, sold, granted or otherwise disposed of and free from preëmption or other claims or rights, become segregated from the public domain, and no rights in such place lands will attach in favor of a settler or occupant, who becomes such after definite location; that no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior; that up to the time such approval is given, lands within the indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States or to be settled upon and occupied under the preëmption and homestead laws of the United States; and that the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road."

U. S. 108; *United States* v. *Nor. Pac. R. R. Co.*, 152 U. S. 284, 296; *Nor. Pac. R. R. Co.* v. *Sanders*, 166 U. S. 620, 634, 635; *Menotti* v. *Dillon*, 167 U. S. 703; *United States* v. *Ore. & Cal. R. R. Co.*, 176 U. S. 28, 42; *St. Paul & P. R. R. Co.* v. *Nor. Pac. R. R. Co.*, 139 U. S. 1, 5; *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 720, 723; *M., K. & T. Ry. Co.* v. *Kansas P. Ry. Co.*, 97 U. S. 491, 501; *Cedar Rapids & Missouri River R. R. Co.* v. *Herring*, 110 U. S. 27, 28; *Grinnell* v. *Railroad Co.*, 103 U. S. 739; *Kansas Pacific R. R. Co.* v. *Atchison, T. & S. F. R. R. Co.*, 112 U. S. 414; *Wilcox* v. *Eastern Oregon Land Co.*, 176 U. S. 51.

It is true that the cases above referred to arose under acts of Congress that did not relate in terms to grants of lands to the State of Kansas to aid in the construction of railroads. But they are none the less in point here; for the provisions in them as to homestead rights attaching prior to definite location, are, in substance, the same as are found in the above acts of Congress relating to lands granted to Kansas.

2. When we recall what this court (as above quoted) said in *Ard* v. *Brandon*, 156 U. S. 537, about Ard's rights in respect of these identical lands, there is no room to doubt the correctness of the judgment of the Supreme Court of Kansas in his favor, unless we hold, as plaintiffs contend we should, that Ard is concluded by the decision of the Circuit Court of the United States in the action brought by the United States to cancel certain patents issued to the Missouri-Kansas Company. But we cannot so hold. As already stated, Ard was not, and was not sought to be made, a party to that action. He had no control of it and was not entitled of right to be heard or to adduce evidence in it. He was not in any legal sense represented in the case, nor can he be regarded as privy to the issue between the United States and those whom it sued. His membership in the Settlers' Protective Association —which association, it is said, induced the United States to bring the action referred to—did not so connect him, in law, with the litigation as that the judgment therein would bind him or be conclusive evidence against him. It must be assumed that the Attorney General of the United States sued the Missouri-Kansas Company only in the discharge of his official duty, and for the purpose of asserting the rights of the Government *as against that company*. He could not have represented merely private parties in that suit; he represented only the United States. Ard was not, in any legal sense, a privy to the issue of record between the United States and its opponents, although the validity of the patent received by the Missouri-Kansas Company for the land here in question—under which company the present plaintiffs in error claim—

was directly disputed by the Government in that case. It is said that Ard was an active member of the Settlers' Protective Association. But that is not a controlling fact. It may be, as alleged, that, in respect of the patents issued to it, the Government was induced to proceed against that company by the representations made and the facts brought to its attention by that association. But that circumstance did not so connect the association with the suit as to make the judgment binding upon its individual members in a suit between other parties. In suing the Missouri-Kansas Company the officers of the Government acted wholly upon their independent judgment as to the validity of the patents it had issued, and as to what was its duty to those who had previously acquired rights in the particular public lands covered by those patents. The issue in that case was only as to the respective rights of the United States and the Missouri-Kansas Company, *as between each other*. There was no issue between the company or those claiming under it and Ard, who was in actual possession, claiming equitable rights in the lands in dispute by reason of his occupancy of them under the homestead laws. In *United States* v. *Missouri-Kansas Company*, above cited, 141 U. S. 358, the bill referred to those acts of the land officers which had the effect to prevent settlers from acquiring rights which they were entitled to acquire under the homestead and preëmption laws. The court, alluding to those allegations, said: "If the facts are as thus alleged, it is clear that the Missouri-Kansas Company holds patents to land both within the place and indemnity limits of the Leavenworth road which equitably belong to *bona fide* settlers who acquired rights under the homestead and preëmption laws, which were not lost by reason of the Land Department having, by mistake or an erroneous interpretation of the statutes in question, caused patents to be issued to the company. The case made by the above admitted averments of the bill is one of sheer spoliation upon the part of the company of the rights of settlers, at least of those whose rights attached prior to the

withdrawal of 1867; whether of others, it is not necessary, at this time, to determine." And in *Ard* v. *Brandon*, 156 U. S. 537, 541, the court referring to the language just quoted, and to the transfer of the legal title by the patent of the United States to the Missouri-Kansas Company, said: "But it is equally clear under the authority of the last cited case [*United States* v. *Missouri, K. & T. R. R. Co.*], as well as of many others, that no adjudication against the Government in a suit by it to set aside a patent estops an individual not a party thereto from thereafter setting up his equitable rights in the land for which the patent was issued."

It results that, in the present case, involving only the title to the tract of eighty acres in section 11, that, by his rightful occupancy of that tract, under and in conformity with the homestead laws, before any interest therein was legally acquired by the railroad company, Ard's equitable rights, thus accruing and supported at the final hearing by a patent from the United States, must prevail.

For the reasons stated, the judgment of the Supreme Court of Kansas is

Affirmed.

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

STEELE *v.* CULVER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

No. 393. Submitted June 1, 1908.—Decided October 26, 1908.

Where jurisdiction of the Circuit Court depends on diversity of citizenship, the parties may be rearranged according to their real interests.

Where a party defendant should be aligned as a party plaintiff, is a necessary party, and is a citizen of the State of which the other defendants are citizens, the Circuit Court has not jurisdiction.

In order to confer jurisdiction on the Circuit Court, one who is a necessary party cannot be omitted merely on account of his insolvency.

A judgment against a surety cannot be impeached so long as the judgment against the principal on which it is based stands, and in a suit brought by the surety to set both judgments aside, the principal is a necessary party plaintiff.

THE facts are stated in the opinion.

Mr. Thomas J. Cavanaugh and *Mr. L. A. Tabor*, for appellees, in support of motion to dismiss or affirm:

The defendant railroad company should be the complainant in the case—in fact it is the party naturally burdened with the responsibility of applying for relief. It is not made a complainant in express terms, nor is any reason set forth in the bill why it was not made the sole complainant or at least one of the complainants. There is no reason assigned why it is made a defendant. No relief is asked against it. In fact, relief is asked for it. Therefore while it appears as a defendant, in reality it is a complainant, and there is no diversity of citizenship and no jurisdiction to entertain the bill. *Doctor* v. *Harrington*, 196 U. S. 579; *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178. See also *Groel* v. *United Electric Co. of N. J.*, 132 Fed.

Rep. 252; *McClellan* v. *Kane*, 154 Fed. Rep. 164; *Dodge* v. *Wolsey*, 18 How. 340.

In this case the railroad company is a necessary party and it, like the other defendants, is a resident of Michigan. While it is made a defendant the court will look beyond the pleadings and arrange the parties according to their sides in the dispute, *Dawson* v. *Trust Co.*, *supra*, and when that is done the railroad company is on the complainant's side. The fraud alleged in the bill of complaint is said to have been committed against it and not against any of the complainants. Its interests are not antagonistic to the complainants. In fact the complainants and the defendant railroad company are friends. No difference or collision of interests or action is alleged or even suggested and relief is asked in behalf of the defendant railroad company. It would seem, then, that the arrangement of the parties in this bill is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist and the device ought not to be allowed to succeed.

It is the corporation as a corporation which has to determine whether it will make anything that is a wrong to the corporation a subject-matter of litigation or whether it will take steps to prevent the wrong from being done. *Hawes* v. *Oakland*, 104 U. S. 450; *Corbus* v. *Alaska Mining Co.*, 187 U. S. 455.

Until it refuses to redress the wrong no person incidentally or otherwise injured or benefited, not even a stockholder, can maintain a suit.

In the present case the railroad company is very deeply interested in the litigation. If the judgment is set aside or enjoined it is benefited to that extent. It is a citizen of Michigan.

It can proceed in its own behalf now or if it refuses to act an interested stockholder might act for it in the state courts.

Mr. Edward Maher, *Mr. W. J. Barnard* and *Mr. Ernest Dale Owen*, for appellants, opposing the motion to dismiss or affirm:

The question sought to be raised by the motion is the fundamental one as to whether the lower court had jurisdiction to

entertain the bill. Such a question will come up only upon the final hearing.

Admitting that the court has the right to align the parties as complainant or defendant according to their real interest in the controversy and that if the railroad company is an indispensable party, being of the same citizenship as the defendants in this suit, the lower court had no jurisdiction to retain the bill, we maintain that the railroad was *not* an indispensable party.

If the result of the decree were to coerce the railroad company and the result of the decree should compel that company to do or not to do a certain thing it might, perhaps, with more propriety be said that it was indispensable to a final determination of the questions involved. This, however, is not the case.

We have the situation, then:

First, that no attempt is made to procure any control of the actions of the railroad company.

Second, from the inherent situation arising from the fact that the railroad company is insolvent, it cannot be made to pay the judgment.

That if it did pay the judgment Steele must repay the amount at once to the company. Indeed, must pay it in the first instance.

It would be permitting technical and empty considerations to control against substantial and important rights practically presented by the record, for the court to refuse to hear the case for Steele and the Maryland Company.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity to prohibit the collection of a judgment rendered by a Michigan state court against a railroad company, and also of a judgment against the plaintiff corporation upon a bond given by it as surety when the railroad took the case to the Supreme Court of the State. See *Culver* v. *South*

Haven & Eastern R. R. Co., 144 Michigan, 254; *Culver* v. *Fidelity & Deposit Co.*, 149 Michigan, 630. The ground is that the original judgment was got by fraud. The plaintiff Steele had contracted with the surety company and also with purchasers of the railroad to pay the judgment against the latter if recovered, and joins as plaintiff on the footing that he is the real party in interest. The railroad company is made a defendant, but it is a Michigan corporation, and, as the other defendants are citizens and residents of Michigan, if it should be aligned with the plaintiffs the necessary diversity of citizenship would not exist. The Circuit Court dismissed the bill on demurrer for want of jurisdiction and allowed an appeal with a certificate that the want of the requisite diversity of citizenship and consequently of jurisdiction was the sole ground of the decree. The case is before us upon a motion to dismiss or affirm.

The appellants candidly admit that for a decision upon jurisdiction the parties may be arranged according to their real interests and that if the railroad company is an indispensable party the decision below was right. But they urge that it is alleged that the railroad is insolvent, that no relief is asked against it, but it is left free to pay the judgment if it desires to and can, and that the real parties in interest are the plaintiffs, and especially Steele, upon whom, it is said, the burden ultimately must fall. These arguments do not seem to us to need an extended answer. With regard to the alleged insolvency it is a strange proposition that a defendant is not an indispensable party to an attempt to stop the collection of a judgment against him because at the moment his property is not sufficient to pay his debts. The railroad was sole master of the litigation against itself and we must assume is coöperating with the plaintiff in the present case. It seems to us equally strange to suggest that a contract of a stranger with a stranger can affect the interest of the party immediately concerned. The omission of any prayer for relief against the railroad simply shows that properly it is to be treated as a plaintiff in this case. *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 180, 181.

It is suggested that the controversy as to the judgment against the Security Company is separable, and that relief may be given against that at least without the presence of the railroad. But the only ground on which that judgment is complained of is that that against the railroad, upon which it is based, was obtained by perjury and fraud. So long as the judgment against the railroad stands, that against its surety cannot be impeached. By its bond the surety undertook to pay the judgment, if rendered, against its principal, whether right or wrong. If the principal remains liable under that judgment the surety is bound to pay. *Krall* v. *Libbey*, 53 Wisconsin, 292; *Piercy* v. *Piercy*, 1 Iredell Eq. 214, 218. But the principal cannot be relieved by a proceeding behind its back.

There is a further allegation in the bill that, pending the proceeding, Culver, the plaintiff in the original suits, was adjudged a spendthrift, and that a guardian was appointed but was not substituted for Culver in these suits. A hope is expressed that if the case proceed to oral argument some reason may occur for attributing more importance to these facts than is disclosed at present. But that is an illusion. The bill, as we have said, is founded solely on allegations of fraud in getting the first judgment, and must be maintained upon them if upon any. The railroad company is an indispensable party if that issue is to be tried. It is unnecessary to consider other objections to the suit.

This court has jurisdiction to declare the Circuit Court's denial of its own jurisdiction correct. But we regard the decision of the Circuit Court as so plainly right that the appeal should be dismissed as frivolous.

Appeal dismissed.

NEW YORK *ex rel.* SILZ *v.* HESTERBERG, SHERIFF OF KINGS COUNTY.

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

No. 206. Argued October 12, 1908.—Decided November 2, 1908.

Subject to constitutional limitations, the legislature of a State may pass measures for the protection of the people in the exercise of the police power and is the judge of their necessity and expediency.

It is within the police power of a State to prohibit possession of game during the closed season even if brought from without the State.

A police measure otherwise within the constitutional power of the State will not be held unconstitutional under the commerce clause of the Federal Constitution because it incidentally and remotely affects interstate commerce. *Plumley* v. *Massachusetts*, 155 U. S. 461, followed; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, distinguished.

The sections of the Forest, Fish and Game Law of the State of New York which prohibit possession of game during the closed season, are a valid exercise of the police power of the State and are not in conflict with the Constitution of the United States, either as depriving persons importing game of their property without due process of law, or as an interference with, or a regulation of, interstate commerce. *Geer* v. *Connecticut*, 161 U. S. 519.

Independently of the Lacey Act of May 25, 1900, c. 553, 31 Stat. 187, relating to transportation of game in interstate commerce, the provisions of the New York Forest, Fish and Game Law prohibiting possession of game in closed season is a valid exercise of the police power of the State; and *quære*, but not decided, whether the New York law is not also validated by such act of Congress.[1]

184 N. Y. 126, affirmed.

THE facts which involve the constitutionality of the sections of the Forest, Fish and Game Law of the State of New

[1] The Court of Appeals of New York, 184 N. Y. 126, held that the Lacey Act relieved the regulation from the objection that it was unconstitutional as an interference with interstate commerce within the principles upon which the Wilson Act was sustained by this court in *In re Rahrer*, 140 U. S. 545.

York of 1900, relating to the possession of game or fish during the closed season, are stated in the opinion.

Mr. Edward R. Finch and *Mr. John Burlinson Coleman* for plaintiff in error:

The provisions of the Forest, Fish and Game Law are unconstitutional, in that they deprive the individual of his liberty and property without due process of law.

A State may impose its conditions upon which its game may be captured, and no one who takes the privilege can question the conditions; when, however, game is obtained outside of the State and is brought into it as private property, this rule does not apply. The owner does not get his right to the game from the State; he holds it independently of the State, and is the absolute, unqualified owner of the property, which is protected by the Constitution, and is just as sacred from encroachment from the State as from others. The State may regulate its use, so that public health, morals and safety shall not suffer therefrom, or the citizen be defrauded thereby, but it cannot prohibit its mere possession or make him a criminal because he is able to own it.

It is sometimes assumed that because the State can prohibit the possession of state game during the close season, it can prohibit the possession of game coming from outside the State, but the right to the one is derived from the State and the title is conditional, while as to the other the title is absolute and unconditional, and it is property in every sense of the word. So long as it remains wholesome, and a valuable article of food, the property is sacred, and no person, not even the State, can question its possession or proper use.

Nor is this met by § 141 of the Forest, Fish and Game Law providing a method by which game imported by a citizen and possessed by him at the commencement of the close season can be lawfully kept by him until the next open season upon giving a bond. Deprivation of property without due process of law still exists, for the possessor of property is en-

titled to its beneficial use and free enjoyment which cannot be directly or indirectly affected except by due process of law. *Foster* v. *Scott*, 136 N. Y. 577.

The Forest, Fish and Game Law, containing, as it does, the drastic and severe penalties, attempted to be levied on the possessors of foreign game within the State of New York, is not a proper and reasonable exercise of the police power of the State, and therefore is not in that way taken without the prohibition of the Federal Constitution against depriving the individual of his liberty or property without due process of law. *Dobbins* v. *Los Angeles*, 195 U. S. 223, 236; *Lawton* v. *Steele*, 152 U. S. 133, 137; *Holden* v. *Hardy*, 169 U. S. 366, 398; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Lochner* v. *New York*, 198 U. S. 45.

The authorities do not tend to support the statement in the opinion of the Court of Appeals that in England and many of the States of this country legislation prohibiting the possession of foreign game during the close season has been upheld as being necessary to the protection of domestic game, on the ground that without such inhibition or restriction any law for the protection of domestic game could be successfully evaded.

The English case of *Whitehead* v. *Smithers*, L. R. 2 Common Pleas Division, 553, which Judge Cullen cites in support of the statement, has been overruled by the case of *Guyer* v. *The Queen*, decided April 13, 1889, in the Queen's Bench Division, High Court of Justice, and reported in English Law Reports, 23 Q. B. Div. 106. And see, in opposition to the doctrine contended for by Judge Cullen and cases cited by him, *Territory* v. *Evans*, 2 Idaho, 658; *Kansas* v. *Saunders*, 19 Kansas, 127; *Commonwealth* v. *Wilkinson*, 139 Pa. St. 304; *Commonwealth* v. *Hall*, 128 Massachusetts, 410; *People* v. *O'Neill*, 71 Michigan, 325; *In re Davenport*, 102 Fed. Rep. 540; *People* v. *Buffalo Fish Co.*, 164 N. Y. 93; *Commonwealth* v. *Paul*, 148 Pa. St. 559, 562; *Allen* v. *Young*, 76 Maine, 80;

State v. *Bucknam*, 88 Maine, 385, 392; *Dickhaut* v. *State*, 85 Maryland, 451; *Davis* v. *McNair* (June, 1885, Canada), 7 Crim. L. Mag. 213; *S. C.*, 21 Cent. L. J. 480; *State* v. *McGuire*, 24 Oregon, 366.

The provisions of the Forest, Fish and Game Law are unconstitutional in that they unjustifiably restrict and interfere with foreign commerce. *Bowman* v. *Chicago Ry. Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545; *Rhodes* v. *Iowa*, 170 U. S. 412; *Vance* v. *Vandercook*, 170 U. S. 438.

The provisions of the Forest, Fish and Game Law, making the possession of a pure and wholesome article of food, such as was the imported game in the case at bar, a crime, are not within the police power of the State, and in that way taken without the operation of the commerce clause of the Federal Constitution. *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 236; *Lawton* v. *Steele*, 152 U. S. 133, 137; *Holden* v. *Hardy*, 169 U. S. 366, 398; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558; *Lochner* v. *State of New York*, 198 U. S. 45, 53; Tiedeman on Limitations of Police Power, 4; *Brown* v. *Maryland*, 12 Wheat. 419; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Redman*, 138 U. S. 78; *Scott* v. *Donald*, 165 U. S. 58; *Railroad Co.* v. *Husen*, 95 U. S. 465.

Mr. James A. Donnelly, Deputy Attorney General of the State of New York, with whom *Mr. William Schuyler Jackson*, Attorney General of the State of New York, was on the brief, for defendant in error:

Traffic in game birds is not governed by the rules which affect ordinary articles of commerce, for the reason that what property may be acquired in them is so peculiarly a matter of state regulation that their possession is controlled by rules entirely different from those which apply to general articles of merchandise.

The right of the individual to acquire property in game birds must yield to the superior authority of the State to restrict their use and possession.

Laws passed for the protection of game do not interfere with private property.

Each State has the right to enact such laws for the protection of its game as to it shall seem best for the accomplishment of that purpose, and the methods observed by the state legislature for the protection of game are necessarily within its discretion.

A state statute prohibiting the possession of game during certain seasons, from whatever source derived, is a reasonable method of protecting the domestic game of the State making the prohibition.

Game can only be the subject of ownership in a qualified way and can never be the subject of commerce except with the consent of the State and subject to the conditions which it may deem best for the public good.

The New York Forest, Fish and Game Law is not a regulation of commerce within the meaning of the Federal Constitution; and the argument that its enactment was in violation of the powers confided exclusively to Congress fails. Case below, 184 N. Y. 135, 136; *People* v. *Bootman*, 180 N. Y. 1; *People* v. *O'Neil*, 110 Michigan, 324; *State* v. *Randolph*, 1 Mo. App. 15; *Stevens* v. *State*, 89 Maryland, 669; *State* v. *Schuman*, 58 Pac. Rep. 661; *Ex parte Maier*, 103 California, 479; *Magner* v. *People*, 97 Illinois, 331; *Merritt* v. *The People*, 48 N. E. Rep. 325; *Whitehead* v. *Smithers*, 2 Com. Pleas Div. 553; *Phelps* v. *Racey*, 60 N. Y. 10; *People* v. *Buffalo Fish Co.*, 164 N. Y. 93; *Geer* v. *Connecticut*, 161 U. S. 517, and cases cited.

Mr. Justice Day delivered the opinion of the court.

This case comes to this court because of the alleged invalidity, under the Constitution of the United States, of certain sections of the game laws of the State of New York.

Section 106 of chap. 20 of the Laws of 1900 of the State of New York provides:

"Grouse and quail shall not be taken from January first to October thirty-first both inclusive. Woodcock shall not be taken from January first to July thirty-first both inclusive. Such birds shall not be possessed in their closed season except in the city of New York, where they may be possessed during the open season in the State at large."

Section 25 of the law provides:

"The close season for grouse shall be from December first to September fifteenth, both inclusive." As amended by § 2, chap. 317, Laws of 1902.

Section 140 of the law provides:

"Grouse includes ruffed grouse, partridge and every member of the grouse family."

Section 108 of the law provides:

"Plover, curlew, jacksnipe, Wilsons, commonly known as English snipe, yellow legs, killdeer, willet snipe, dowitcher, shortnecks, rail, sandpiper, baysnipe, surf snipe, winter snipe, ringnecks and oxeyes shall not be taken or possessed from January first to July fifteenth both inclusive." As amended by § 2, chap. 588, Laws 1904.

Section 141 of the law provides:

"Whenever in this act the possession of fish or game, or the flesh of any animal, bird or fish is prohibited, reference is had equally to such fish, game or flesh coming from without the State as to that taken within the State. *Provided, nevertheless*, That if there be any open season therefor, any dealer therein, if he has given the bond herein provided for, may hold during the close season such part of his stock as he has on hand undisposed of at the opening of such close season. Said bond shall be to the people of the State, conditioned that such dealer will not during the close season ensuing, sell, use, give away, or otherwise dispose of any fish, game, or the flesh of any animal, bird or fish which he is permitted to possess during the close season by this section; that he

will not in any way during the time said bond is in force violate any provision of the forest, fish and game law; the bond may also contain such other provisions as to the inspection of the fish and game possessed as the commission shall require, and shall be subject to the approval of the commission as to amount and form thereof, and the sufficiency of sureties. But no presumption that the possession of fish or game or the flesh of any animal, bird or fish is lawfully possessed under the provisions of this section shall arise until it affirmatively appears that the provisions thereof have been complied with." Added by chap. 194, Laws of 1902.

Section 119 of the law makes a violation of its provisions a misdemeanor, and subjects the offending parties to a fine.

The relator, a dealer in imported game, was arrested for unlawfully having in his possession, on the thirtieth of March, 1905, being within the closed season in the borough of Brooklyn, city of New York, one dead body of a bird known as the golden plover, and one dead body of an imported grouse, known in England as blackcock, and taken in Russia. The relator filed a petition for a writ of *habeas corpus* to be relieved from arrest, and upon hearing before a justice of the Supreme Court of the State of New York the writ was dismissed, and the relator remanded to the custody of the sheriff. Upon appeal to the Appellate Division of the Supreme Court of the State of New York this order was reversed and the relator discharged from custody. The judgment of the Appellate Division was reversed in the Court of Appeals of the State of New York. *Sub nomine People ex rel. Hill* v. *Hesterberg*, 184 N. Y. 126. Upon remittitur to the Supreme Court of the State of New York from the Court of Appeals the final order and judgment of the Court of Appeals was made the final order and judgment of the Supreme Court, and a writ of error brings the case here for review.

The alleged errors relied upon by the plaintiff in error for reversal of the judgment below are: First, that the provisions of the game law in question are contrary to the Fourteenth

Amendment of the Constitution of the United States, in that they deprive the relator, and others similarly situated, of their liberty and property without due process of law. Second, that the provisions of the law contravene the Constitution of the United States, in that they are an unjustifiable interference with and regulation of interstate and foreign commerce, placed under the exclusive control of Congress by § 8, Art. 1, of the Federal Constitution. Third, that the court below erred in construing the act of Congress, commonly known as the Lacey Act, 1900, c. 553, 31 Stat. 187, which relates to the transportation in interstate commerce of game killed in violation of local laws. Act of May 25, 1900, ch. 553, 31 Stat. 187.

The complaint discloses that the relator, August Silz, a dealer in imported game, had in his possession in the city of New York one imported golden plover, lawfully taken, killed and captured in England during the open season for such game birds there, and thereafter sold and consigned to Silz in the city of New York by a dealer in game in the city of London. He likewise had in his possession the body of one imported blackcock, a member of the grouse family, which was lawfully taken, killed and captured in Russia during the open season for such game there, and thereafter sold and consigned to Silz in New York City by the same dealer in London. Such birds were imported by Silz, in accordance with the provisions of the tariff laws and regulations in force, during the open season for grouse and plover in New York. Such imported golden plover and imported blackcock are different varieties of game birds from birds known as plover and grouse in the State of New York; they are different in form, size, color and markings from the game birds known as plover and grouse in the State of New York, and can be readily distinguished from the plover and grouse found in that State. And this is true when they are cooked and ready for the table. The birds were sound, wholesome and valuable articles of food, and recognized as articles of commerce in

different countries of Europe and in the United States. These statements of the complaint are the most favorable possible to the relator, and gave rise to the comment in the opinion in the Court of Appeals that the case was possibly collusive. That court nevertheless proceeded to consider the case on the facts submitted and a similar course will be pursued here. While the birds mentioned, imported from abroad, may be distinguished from native birds, they are nevertheless of the families within the terms of the statute, and the possession of which, during the closed season, is prohibited.

As to the first contention, that the laws in question are void within the meaning of the Fourteenth Amendment because they do not constitute due process of law. The acts in question were passed in the exercise of the police power of the State with a clear view to protect the game supply for the use of the inhabitants of the State. It is not disputed that this is a well-recognized and often-exerted power of the State and necessary to the protection of the supply of game which would otherwise be rapidly depleted, and which, in spite of laws passed for its protection, is rapidly disappearing from many portions of the country.

But it is contended that while the protection of the game supply is within the well-settled boundaries of the police power of a State, that the law in question is an unreasonable and arbitrary exercise of that power. That the legislature of the State is not the final judge of the limitations of the police power, and that such enactments are subject to the scrutiny of the courts and will be set aside when found to be unwarranted and arbitrary interferences with rights protected by the Constitution in carrying on a lawful business or making contracts for the use and enjoyment of property, is well settled by former decisions of this court. *Lawton* v. *Steele*, 152 U. S. 133, 137; *Holden* v. *Hardy*, 169 U. S. 366; *Dobbins* v. *Los Angeles*, 195 U. S. 233, 236.

It is contended, in this connection, that the protection of the game of the State does not require that a penalty be im-

posed for the possession out of season of imported game of the kind held by the relator. It is insisted that a method of inspection can be established which will distinguish the imported game from that of the domestic variety, and prevent confusion in its handling and selling. That such game can be distinguished from domestic game has been disclosed in the record in this case, and it may be that such inspection laws would be all that would be required for the protection of domestic game. But, subject to constitutional limitations, the legislature of the State is authorized to pass measures for the protection of the people of the State in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted. In order to protect local game during the closed season it has been found expedient to make possession of all such game during that time, whether taken within or without the State, a misdemeanor. In other States of the Union such laws have been deemed essential, and have been sustained by the courts. *Roth* v. *State*, 51 Ohio St. 209; *Ex parte Maier*, 103 California, 476; *Stevens* v. *The State*, 89 Maryland, 669; *Magner* v. *The People*, 97 Illinois, 320. It has been provided that the possession of certain kinds of game during the closed season shall be prohibited, owing to the possibility that dealers in game may sell birds of the domestic kind under the claim that they were taken in another State or country. The object of such laws is not to affect the legality of the taking of game in other States, but to protect the local game in the interest of the food supply of the people of the State. We cannot say that such purpose, frequently recognized and acted upon, is an abuse of the police power of the State, and as such to be declared void because contrary to the Fourteenth Amendment of the Constitution.

It is next contended that the law is an attempt to unlawfully regulate foreign commerce which, by the Constitution of the United States, is placed wholly within the control of the Federal Congress. That a State may not pass laws directly regulat-

ing foreign or interstate commerce has frequently been held in the decisions of this court. But while this is true, it has also been held in repeated instances that laws passed by the States in the exertion of their police power, not in conflict with laws of Congress upon the same subject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws. *M., K. & T. Ry. Co.* v. *Haber,* 169 U. S. 613; *Pennsylvania Co.* v. *Hughes,* 191 U. S. 477; *Asbell* v. *Kansas,* 209 U. S. 251.

In the case of *Geer* v. *Connecticut,* 161 U. S. 519, the plaintiff in error was convicted for having in his possession game birds killed within the State, with the intent to procure transportation of the same beyond the state limits. It was contended that this statute was a direct attempt by the State to regulate commerce between the States. It was held that the game of the State was peculiarly subject to the power of the State which might control its ownership for the common benefit of the people, and that it was within the power of the State to prohibit the transportation of game killed within its limits beyond the State, such authority being embraced in the right of the State to confine the use of such game to the people of the State. After a discussion of the peculiar nature of such property and the power of the State over it, Mr. Justice White, who delivered the opinion of the court in that case, said, p. 534:

"Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected. *Kidd* v. *Pearson,* 128 U. S. 1; *Hall* v. *De Cuir,* 95 U. S. 485; *Sherlock* v. *Alling,* 93 U. S. 99, 103; *Gibbons* v. *Ogden,* 9 Wheat. 1. Indeed, the source of the police power as to game birds

(like those covered by the statute here called in question) flows from the duty of the State to preserve for its people a valuable food supply. *Phelps* v. *Racey*, 60 N. Y. 10; *Ex parte Maier*, 103 California, 476; *Magner* v. *The People*, 97 Illinois, 320, and the cases there cited. The exercise by the State of such power therefore comes directly within the principle of *Plumley* v. *Massachusetts*, 155 U. S. 461, 473. The power of a State to protect by adequate police regulation its people against the adulteration of articles of food, (which was in that case maintained), although in doing so commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the State, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the State and subject to the conditions which it may deem best to impose for the public good."

In the case of *Plumley* v. *Massachusetts*, referred to in the opinion just cited, 155 U. S. 461, 473, it was held that a law of the State of Massachusetts which prevented the sale of oleomargarine colored in imitation of butter was a legal exertion of police power on the part of the State, although oleomargarine was a wholesome article of food transported from another State, and this upon the principle that the Constitution did not intend, in conferring upon Congress an exclusive power to regulate interstate commerce, to take from the States the right to make reasonable laws concerning the health, life and safety of its citizens, although such legislation might indirectly affect foreign or interstate commerce, and the general statement in *Sherlock* v. *Alling*, 93 U. S. 99, 103, was quoted with approval: "And it may be said generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water,

or engaged in commerce, foreign or interstate, or in any other pursuit."

It is true that in the case of *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, it was held that a state law (act No. 25 of May 21, 1885, Laws, p. 22) directly prohibiting the introduction in interstate commerce of a healthful commodity for the purpose of thereby preventing the traffic in adulterated and injurious articles within the State, was not a legitimate exercise of the police power. But in that case there was a direct, and it was held unlawful, interference with interstate commerce as such. In the case at bar the interference with foreign commerce is only incidental and not the direct purpose of the enactment for the protection of the food supply and the domestic game of the State.

It is provided in the New York statutes that game shall be taken only during certain seasons of the year, and to make this provision effectual it is further provided that the prohibited game shall not be possessed within the State during such times, and owing to the likelihood of fraud and deceit in the handling of such game the possession of game of the classes named is likewise prohibited, whether it is killed within or without the State. Such game may be legally imported during the open season, and held and possessed within the State of New York. It may be legally held in the closed season upon giving bond as provided by the statute against its sale. Incidentally, these provisions may affect the right of one importing game to hold and dispose of it in the closed season, but the effect is only incidental. The purpose of the law is not to regulate interstate commerce, but by laws alike applicable to foreign and domestic game to protect the people of the State in the right to use and enjoy the game of the State.

The New York Court of Appeals further held that the so-called Lacey Act (31 Stat. 187) [1] relieved the regulation of the objection in question because of the consent of Congress to

[1] The object and purpose of this act, as stated in § 1 thereof, is to aid in the restoration of such birds in those parts of the United States adapted thereto, where the same have become scarce or extinct,

the passage of such laws concerning such commerce, interstate and foreign, within the principles upon which the Wilson Act [1] was sustained by this court. *In re Rahrer*, 140 U. S. 545.

In the aspect in which the game law of New York is now before this court we think it was a valid exertion of the police power, independent of any authorization thereof by the Lacey Act, and we shall therefore not stop to examine the provisions of that act. For the reasons stated, we think the legislature, in the particulars in which the statute is here complained of, did not exceed the police power of the State nor run counter to the protection afforded the citizens of the State by the Constitution of the United States.

Judgment affirmed.

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and also to regulate the introduction of American or foreign birds or animals in localities where they have not heretofore existed.

Section 5 of the act is as follows:

"That all dead bodies, or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies, or parts thereof, of any wild game animals, or game or song birds transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such State or Territory; and shall not be exempt therefrom by reason of being introduced therein in the original package or otherwise. This act shall not prevent the importation, transportation, or sale of birds or bird plumage manufactured from the feathers of barnyard fowls."

[1] Act of August 8, 1890, c. 728, 26 Stat. 313, which enacted, "That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

BEREA COLLEGE *v.* COMMONWEALTH OF KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 12. Argued April 10, 13, 1908.—Decided November 9, 1908.

This court will not disturb the judgment of a state court resting on Federal and non-Federal grounds if the latter are sufficient to sustain the decision.

The state court determines the extent and limitations of powers conferred by the State on its corporations.

A corporation is not entitled to all the immunities to which individuals are entitled, and a State may withhold from its corporations privileges and powers of which it cannot constitutionally deprive individuals.

A state statute limiting the powers of corporations and individuals may be constitutional as to the former although unconstitutional as to the latter; and, if separable, it will not be held unconstitutional at the instance of a corporation unless it clearly appears that the legislature would not have enacted it as to corporations separately.

The same rule that permits separable sections of a statute to be declared unconstitutional without rendering the entire statute void, applies to separable provisions of a section of a statute.

The prohibition in § 1 of the Kentucky statute of 1904, against persons and corporations maintaining schools for both white persons and negroes is separable, and even if an unconstitutional restraint as to individuals it is not unconstitutional as to corporations, it being within the power of the State to determine the powers conferred upon its corporations.

While the reserved power to alter or amend charters is subject to reasonable limitations, it includes any alteration or amendment which does not defeat or substantially impair the object of the grant or vested rights.

A general statute which in effect alters or amends a charter is to be construed as an amendment thereof even if not in terms so designated.

A state statute which permits education of both white persons and negroes by the same corporation in different localities, although prohibiting their attendance in the same place, does not defeat the object of a grant to maintain a college for all persons, and is not vio-

lative of the contract clause of the Federal Constitution, the state law having reserved the right to repeal, alter and amend charters.
123 Kentucky, 209, affirmed.

On October 8, 1904, the grand jury of Madison County, Kentucky, presented in the Circuit Court of that county an indictment, charging:

"The said Berea College, being a corporation duly incorporated under the laws of the State of Kentucky, and owning, maintaining and operating a college, school and institution of learning, known as 'Berea College,' located in the town of Berea, Madison County, Kentucky, did unlawfully and willfully permit and receive both the white and negro races as pupils for instruction in said college, school and institution of learning."

This indictment was found under an act of March 22, 1904 (acts Kentucky, 1904, chap. 85, p. 181), whose first section reads:

"Sec. 1. That it shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and negro races are both received as pupils for instruction, and any person or corporation who shall operate or maintain any such college, school or institution shall be fined $1,000, and any person or corporation who may be convicted of violating the provisions of this act shall be fined $100 for each day they may operate said school, college or institution after such conviction."

On a trial the defendant was found guilty and sentenced to pay a fine of one thousand dollars. This judgment was on June 12, 1906, affirmed by the Court of Appeals of the State (123 Kentucky, 209), and from that court brought here on writ of error.

Mr. John G. Carlisle and *Mr. Guy Ward Mallon* for plaintiff in error:

A legislative enactment depriving a person of the right to pursue his usual occupation or depriving a person of the right to attend a school or institution of learning of his own choice

is not due process of law, and if the person is a citizen of the United States such an enactment abridges his privileges and immunities as such.

The act is not separable; it relates to but one subject and has only one purpose—to prohibit the same person, corporation or association from receiving pupils of the two races for instruction; in order to accomplish this, penalties are imposed, not only upon the offending person, association, or corporation, but also upon all persons who teach for the institution, although they may teach the two races separately, and upon all pupils who attend such schools, although the two races may be taught separately by different teachers and in different rooms. It follows that if any provision is unconstitutional, the entire act is invalid.

A party has a right to rely upon the unconstitutionality of a statute where his rights are injuriously affected by the unconstitutional provision contained in the statute; and, where the unconstitutional provision would not of itself directly affect his rights, but is so connected with the constitutional provisions which do affect them that it invalidates the entire act. *Field* v. *Clark*, 143 U. S. 649; *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601.

The rule that a part of a statute may be unconstitutional, and other parts may be valid, only applies where the parts are clearly separable and may well stand alone. This rule does not apply to cases where the enforcement of the unconstitutional parts affects the complaining party just as much as the enforcement of the constitutional parts. The constitutional part of an act will not be enforced when other parts are unconstitutional, unless the court can assume that the legislature would have passed the act if the void part had been omitted.

The difference between the extent of legislative power over schools and other institutions established and maintained by the State and its power over private schools and institutions is obvious. In the case of public schools the legislature may regulate the hours of teaching, prescribe the text-books, the

qualifications of teachers, the ages at which pupils shall be admitted, classify the students who shall be instructed together, and in fact do almost anything which does not make unjust or unconstitutional discriminations among the people who contribute by taxation to the funds used in defraying the expenses of the system. But a private school stands upon exactly the same footing as any other private business, and the power of the State to prohibit it, or to interfere with the right to teach in it, or to attend it, is no greater than its power to prohibit any other ordinary occupation of the people. The statute is unnecessary and unreasonable, and therefore an arbitrary interference with the rights of the people in the conduct of their private business and in the pursuit of their ordinary occupations. The right to maintain a private school is no more subject to legislative control than the right to conduct a store, or a farm, or any other one of the various occupations in which the people are engaged. The right of the citizen to choose and follow an innocent occupation is both a personal and a property right. *Cummings* v. *Missouri*, 4 Wall. 321; *Allgeyer* v. *Louisiana*, 165 U. S. 591; *Schnair* v. *Navarro Hotel Imp. Co.*, 182 N. Y. 83; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Slaughter-House Cases*, 16 Wall. 36; *Colon* v. *Lisk*, 153 N. Y. 188; *People* v. *Gibson*, 101 N. Y. 389; *People* v. *Marx*, 99 N. Y. 377; *In re Jacobs*, 98 N. Y. 98; *Lochner* v. *State of New York*, 198 U. S. 45; *Corfield* v. *Coryell*, 4 Washington C. C. 371; *Maxwell* v. *Dow*, 176 U. S. 588, 589.

The nature or extent of legislative power cannot be affected by calling it the "police power." Absolute arbitrary power over the lives, liberties and property of the people cannot exist in this country, under any name or in any form, and it is always the duty of the courts to disregard mere names and forms in determining whether the legislature has or has not exceeded its authority. It is for the court to decide, not only whether the subject to which legislation relates is within the scope of the power attempted to be exercised, but also whether

the legislation itself is in violation of the personal or property rights of the citizen. The subject to which the legislation relates may be clearly within the scope of the police power, and yet the enactment may be so unreasonable, unnecessary or inappropriate for the accomplishment of the purpose ostensibly designed, that the courts, in the discharge of their duty to protect personal and property rights, will be bound to hold it null and void. *Ritchie* v. *People*, 155 Illinois, 98, 110; *Eden* v. *People*, 165 Illinois, 296, 318.

The Constitution makes no distinction between the different races or different classes of the people, and if a distinction is to be made, it must be done by the legislature in the exercise of the police power. All such legislation is necessarily injurious to the peace and prosperity of the people and its validity ought to be clearly established before it receives the sanction of the courts. The manufacture and sale of ardent spirits, gambling, the maintenance of nuisances, the keeping of disorderly houses, and many other vocations which are subject to regulation and control in the exercise of the police power, are in themselves injurious to the health, morals, and safety of the public; but even over these subjects the legislative authority is limited to the enactment of reasonable and necessary laws. *Lawton* v. *Steele*, 152 U. S. 133; *In re Jacobs*, 98 N. Y. 115; *Bertholf* v. *O'Reilly*, 74 N. Y. 515; *Butchers' Union* v. *Crescent City Co.*, 111 U. S. 756; *Lochner* v. *People of New York*, 198 U. S. 45, and cases cited.

While the Fourteenth Amendment may not limit the subjects upon which the police power of a State may be exercised, so long as there is no discrimination on account of race or color, yet in the exercise of that power the State cannot disregard the limitations which the Amendment imposes. *Ex parte Virginia*, 100 U. S. 339; *Bashier* v. *Connolly*, 113 U. S. 27–31.

The Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States were adopted for the protection of the colored race, and their primary purpose was

to establish absolute civil equality—that is, to place the colored race, in respect to civil rights, upon the same basis as the white race. *The Slaughter-House Cases*, 16 Wall. 36; *Strauder* v. *West Virginia*, 100 U. S. 303; *Virginia* v. *Rives*, 100 U. S. 313; *Bush* v. *Kentucky*, 107 U. S. 110.

But the effect of the Fourteenth Amendment is not only to secure equal civil rights to the colored race, but to protect the white race also in the unmolested enjoyment of all its rights of person and property.

In order to avail himself of the protection guaranteed by that Amendment, it is not necessary for a party to show that the legislation complained of makes a discrimination against the white race, as such, or against the colored race, as such. It is sufficient if it can be shown that an attempt has been made to abridge the privileges or immunities of citizens of the United States, or to deprive persons of life, liberty or property without due process of law, or to deny to any person within the jurisdiction of the State the equal protection of the law; and if the legislation attempts to do any of these things, and the complaining party is, or will be, injured by its enforcement, he has a right to contest its validity. It is well settled that the word "person" in the Amendment includes corporations as well as individuals.

Social equality between persons of the white and colored races, or between persons of the same race, cannot be enforced by legislation, nor can the voluntary association of persons of different races, or persons of the same race, be constitutionally prohibited by legislation unless it is shown to be immoral, disorderly, or for some other reason so palpably injurious to the public welfare as to justify a direct interference with the personal liberty of the citizen; and even in such a case the restriction should go no further than is absolutely necessary.

The validity of this act cannot be sustained on the ground that it was an amendment or repeal of the charter of the college. *Allgeyer* v. *Louisiana*, 165 U. S. 578, distinguished.

Mr. N. B. Hays, with whom *Mr. James Breathitt*, Attorney General of the State of Kentucky, *Mr. Thos. B. McGregor* and *Mr. Charles H. Morris* were on the brief, for defendant in error:

The statute is a reasonable exercise of the police power. Legislative power is the power and authority vested in the general assembly to make laws. This power, within constitutional limitations, is absolute and complete. The object and purpose of every government is to foster and promote the happiness and general welfare of its people. The welfare of the State and community is paramount to any right or privilege of the individual citizen. The rights of the citizen are guaranteed, subject to the welfare of the State. Hence, the State has not surrendered its sovereign power of legislation for the general welfare, by constitutional guaranties of individual liberty. Cooley's Const. Lim. (6th ed.), 704; *Lake View* v. *Rose Hill Cemetery Co.*, 70 Illinois, 192; Hare's American Constitutional Laws, 766; Tiedeman's Limitations of Police Power, 212; 111 U. S. 746, Justice Bradley; 165 U. S. 580, Justice Peckham; *State* v. *Holden*, 14 Utah, 718; *Commonwealth* v. *Alger*, 7 Cush. 85; *Power* v. *Pennsylvania*, 127 U. S. 678; 22 Am. and Eng. Ency. Law (2d ed.), 937.

This statute, the constitutional provision and the statutes of Kentucky providing for separate public schools for the two races; the statute prohibiting the intermarriage of the two races; the statute incapacitating the issue of such marriages from inheriting; and the statute requiring common carriers to provide separate coaches for the two races, are *in pari materia;* and the Commonwealth, in the enactment and passage of all these laws, had but one common purpose and end—to preserve race identity, the purity of blood, and prevent an amalgamation, and such is the settled public policy of the State. Kentucky Statutes, §§ 795, 2097, 2098, 2111, 2114, 4428.

Several other States, as well as Kentucky, prohibit the two races from attending the same public school, and provide separate public schools for the two races. These laws have been held to be a reasonable and valid exercise of the police

power of such States, and not to abridge any right or privilege granted by the Fourteenth Amendment to either of the races. *Lehew* v. *Brummell*, 103 Missouri, 551, 552; *Cary* v. *Carter*, 48 Indiana, 362; *Martin* v. *Board of Education*, 42 W. Va. 515; *State of Ohio* v. *McCann*, 21 Ohio St. 210; *Cisco* v. *School Board*, 161 N. Y. 598; *Bertonneau* v. *Board of Directors*, 3 Woods, 180.

The laws of several States, including Kentucky, require common carriers to provide separate cars or coaches for the white and colored persons who travel over their lines. These laws have been upheld by the Supreme Court of the United States as a reasonable and valid exercise of the police power; and not to abridge any immunity or privilege secured by the Fourteenth Amendment to either of the races. *West Chester & Philadelphia R. R. Co.* v. *Miles*, 93 Am. Dec. 747, 748.

The legislature of Kentucky is vested with a large discretion and is at liberty to act for the preservation of the public peace and general welfare. The political rights of the two races may be equal without being identical. The conditions of this statute apply equally to both races. *Mugler* v. *Kansas*, 123 U. S. 678; *L. & N. R. R. Co.* v. *Kentucky*, 161 U. S. 677.

This statute neither denies the equal protection of the law, nor does it deprive any person of life, liberty or property without due process of law. Social equality is not guaranteed by the Fourteenth Amendment, nor is voluntary association guaranteed to the races.

The State by this statute prohibits the voluntary co-education of the two races, nothing more. Unless white pupils are guaranteed the right to voluntarily associate with the pupils of the colored race, and *vice versa*, the act is not in conflict with, nor repugnant to, the Fourteenth Amendment. *Cary* v. *Carter*, 17 Am. Rep. 757.

All property in the Commonwealth and every property right is held subject to those general regulations which are necessary to promote the common good and general welfare.

The following authorities will illustrate the different phases

in which this question has been presented to the courts: Cooley's Constitutional Limitations (7th ed.), 830; *Powers* v. *Commonwealth*, 101 Kentucky, 287; *Dunn* v. *The Commonwealth*, 88 Am. Rep. 344; *N. Y., N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628; *Gladine* v. *Minnesota*, 166 U. S. 427; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Nor. Securities Co.* v. *United States*, 193 U. S. 196; *Otis* v. *Parker*, 187 U. S. 66; *Holden* v. *Hardy*, 169 U. S. 366.

The right to do business within a State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes. *Allgeyer* v. *Louisiana*, 165 U. S. 578.

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

There is no dispute as to the facts. That the act does not violate the constitution of Kentucky is settled by the decision of its highest court, and the single question for our consideration is whether it conflicts with the Federal Constitution. The Court of Appeals discussed at some length the general power of the State in respect to the separation of the two races. It also ruled that "the right to teach white and negro children in a private school at the same time and place is not a property right. Besides, appellant as a corporation created by this State has no natural right to teach at all. Its right to teach is such as the State sees fit to give to it. The State may withhold it altogether, or qualify it. *Allgeyer* v. *Louisiana*, 165 U. S. 578."

Upon this we remark that when a state court decides a case upon two grounds, one Federal and the other non-Federal, this court will not disturb the judgment if the non-Federal ground, fairly construed, sustains the decision. *Murdock* v. *City of Memphis*, 20 Wall. 590, 636; *Eustis* v. *Bolles*, 150 U. S. 361; *Giles* v. *Teasley*, 193 U. S. 146, 160; *Allen* v. *Arguimbau*, 198 U. S. 149.

Again, the decision by a state court of the extent and limitation of the powers conferred by the State upon one of its own corporations is of a purely local nature. In creating a corporation a State may withhold powers which may be exercised by and cannot be denied to an individual. It is under no obligation to treat both alike. In granting corporate powers the legislature may deem that the best interests of the State would be subserved by some restriction, and the corporation may not plead that in spite of the restriction it has more or greater powers because the citizen has. "The granting of such right or privilege [the right or privilege to be a corporation] rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy." *Home Ins. Co.* v. *New York*, 134 U. S. 594, 600; *Perrine* v. *Chesapeake & Delaware Canal Co.*, 9 How. 172, 184; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305-312. The act of 1904 forbids "any person, corporation or association of persons to maintain or operate any college," etc. Such a statute may conflict with the Federal Constitution in denying to individuals powers which they may rightfully exercise, and yet, at the same time, be valid as to a corporation created by the State.

It may be said that the Court of Appeals sustained the validity of this section of the statute, both against individuals and corporations. It ruled that the legislation was within the power of the State, and that the State might rightfully thus restrain all individuals, corporations and associations. But it is unnecessary for us to consider anything more than the question of its validity as applied to corporations.

The statute is clearly separable and may be valid as to one class while invalid as to another. Even if it were conceded that its assertion of power over individuals cannot be sustained, still it must be upheld so far as it restrains corporations.

There is no force in the suggestion that the statute, although

clearly separable, must stand or fall as an entirety on the ground the legislature would not have enacted one part unless it could reach all. That the legislature of Kentucky desired to separate the teaching of white and colored children may be conceded, but it by no means follows that it would not have enforced the separation so far as it could do so, even though it could not make it effective under all circumstances. In other words, it is not at all unreasonable to believe that the legislature, although advised beforehand of the constitutional question, might have prohibited all organizations and corporations under its control from teaching white and colored children together, and thus made at least uniform official action. The rule of construction in questions of this nature is stated by Chief Justice Shaw in *Warren* v. *Mayor of Charlestown*, 2 Gray, 84, quoted approvingly by this court in *Allen* v. *Louisiana*, 103 U. S. 80–84.

"But if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

See also *Loeb* v. *Township Trustees*, 179 U. S. 472, 490, in which this court said:

"As one section of a statute may be repugnant to the Constitution without rendering the whole act void, so, one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand, while another will fall, unless the two are so connected or dependent on each other in subject-matter, meaning or purpose, that the good cannot remain without the bad. The point is, not whether the parts are contained in the same section, for, the distribution into sections is purely artificial; but whether

they are essentially and inseparably connected in substance—whether the provisions are so interdependent that one cannot operate without the other."

Further, inasmuch as the Court of Appeals considered the act separable, and while sustaining it as an entirety gave an independent reason which applies only to corporations, it is obvious that it recognized the force of the suggestions we have made. And when a state statute is so interpreted this court should hesitate before it holds that the Supreme Court of the State did not know what was the thought of the legislature in its enactment. *Missouri, Kansas & Texas Railway* v. *McCann*, 174 U. S. 580, 586; *Tullis* v. *Lake Erie & Western Railroad*, 175 U. S. 348, 353.

While the terms of the present charter are not given in the record, yet it was admitted on the trial that the defendant was a corporation organized and incorporated under the general statutes of the State of Kentucky, and of course the state courts, as well as this court on appeal, take judicial notice of those statutes. Further, in the brief of counsel for the defendant is given a history of the incorporation proceedings, together with the charters. From that it appears that Berea College was organized under the authority of an act for the incorporation of voluntary associations, approved March 9, 1854 (2 Stanton Rev. Stat. Ky. 553), which act was amended by an act of March 10, 1856 (2 Stanton, 555), and which in terms reserved to the General Assembly "the right to alter or repeal the charter of any associations formed under the provisions of this act, and the act to which this act is an amendment, at any time hereafter." After the constitution of 1891 was adopted by the State of Kentucky, and on June 10, 1899, the college was reincorporated under the provisions of chap. 32, art. 8, Ky. Stat. (Carroll's Ky. Stat. 1903, p. 459), the charter defining its business in these words: "Its object is the education of all persons who may attend its institution of learning at Berea, and, in the language of the original articles, 'to promote the cause of Christ.'" The constitution of 1891

provided in § 3 of the bill of rights that "Every grant of a franchise, privilege or exemption shall remain, subject to revocation, alteration or amendment." Carroll's Ky. Stat. 1903, p. 86. So that the full power of amendment was reserved to the legislature.

It is undoubtedly true that the reserved power to alter or amend is subject to some limitations, and that under the guise of an amendment a new contract may not always be enforcible upon the corporation or the stockholders; but it is settled "that a power reserved to the legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right. *Commissioners on Inland Fisheries* v. *Holyoke Water Power Co.*, 104 Massachusetts, 446, 451; *Holyoke Co.* v. *Lyman*, 15 Wall. 500, 522;" *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 476.

Construing the statute, the Court of Appeals held that "if the same school taught the different races at different times, though at the same place or at different places at the same time it would not be unlawful." Now, an amendment to the original charter, which does not destroy the power of the college to furnish education to all persons, but which simply separates them by time or place of instruction, cannot be said to "defeat or substantially impair the object of the grant." The language of the statute is not in terms an amendment, yet its effect is an amendment, and it would be resting too much on mere form to hold that a statute which in effect works a change in the terms of the charter is not to be considered as an amendment, because not so designated. The act itself, being separable, is to be read as though it in one section prohibited any person, in another section any corporation, and in a third any association of persons to do the acts named. Reading the statute as containing a separate prohibition on all corporations, at least, all state corporations,

it substantially declares that any authority given by previous charters to instruct the two races at the same time and in the same place is forbidden, and that prohibition being a departure from the terms of the original charter in this case may properly be adjudged an amendment.

Again, it is insisted that the Court of Appeals did not regard the legislation as making an amendment, because another prosecution instituted against the same corporation under the fourth section of the act, which makes it a misdemeanor to teach pupils of the two races in the same institution, even although one race is taught in one branch and another in another branch, provided the two branches are within twenty-five miles of each other, was held could not be sustained, the court saying: "This last section, we think, violates the limitations upon the police power: it is unreasonable and oppressive." But while so ruling it also held that this section could be ignored and that the remainder of the act was complete notwithstanding. Whether the reasoning of the court concerning the fourth section be satisfactory or not is immaterial, for no question of its validity is presented, and the Court of Appeals, while striking it down, sustained the balance of the act. We need concern ourselves only with the inquiry whether the first section can be upheld as coming within the power of a State over its own corporate creatures.

We are of opinion, for reasons stated, that it does come within that power, and on this ground the judgment of the Court of Appeals of Kentucky is

Affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE MOODY concur in the judgment.

MR. JUSTICE HARLAN, dissenting.

This prosecution arises under the first section of an act of the General Assembly of Kentucky, approved March 22, 1904.

The purpose and scope of the act is clearly indicated by its title. It is "An act to prohibit white and colored persons from attending the same school." Ky. Acts 1904, p. 181.

It is well to give here the entire statute, as follows:

"SEC. 1. That it shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and negro races are both received as pupils for instruction; and any person or corporation who shall operate or maintain any such college, school or institution shall be fined $1,000, and any person or corporation who may be convicted of violating the provisions of this act shall be fined $100 for each day they may operate said school, college or institution after such conviction.

"SEC. 2. That any instructor who shall teach in any school, college or institution where members of said two races are received as pupils for instruction shall be guilty of operating and maintaining same and fined as provided in the first section hereof.

"SEC. 3. It shall be unlawful for any white person to attend any school or institution where negroes are received as pupils or receive instruction, and it shall be unlawful for any negro or colored person to attend any school or institution where white persons are received as pupils or receive instruction. Any person so offending shall be fined $50 for each day he attends such institution or school: *Provided*, That the provisions of this law shall not apply to any penal institution or house of reform.

"SEC. 4. Nothing in this act shall be construed to prevent any private school, college or institution of learning from maintaining a separate and distinct branch thereof, in a different locality, not less than twenty-five miles distant, for the education exclusively of one race or color.

"SEC. 5. This act shall not take effect, or be in operation before, the 15th day of July 1904." Acts 1904, ch, 85, p. 181.

The plaintiff in error, Berea College, is an incorporation, organized under the General Laws of Kentucky in 1859. Its original articles of incorporation set forth that the object of

the founders was to establish and maintain an institution of learning, "in order to promote the cause of Christ." In 1899 new articles were adopted, which provided that the affairs of the corporation should be conducted by twenty-five persons.

In 1904 the college was charged in a Kentucky state court with having unlawfully and willfully received both white and negro persons as pupils for instruction. A demurrer to the indictment was overruled, and a trial was had which resulted in a verdict of guilty and the imposition of a fine of $1,000 on the college. The trial court refused an instruction asked by the defendant to the effect that the statute was in violation of the Fourteenth Amendment of the Constitution of the United States. A motion in arrest of judgment and for a new trial having been overruled, the case was taken to the highest court of Kentucky, where the judgment of conviction was affirmed, one of the members of the court dissenting.

The state court had before it and determined at the same time (delivering one opinion for both cases) another case against Berea College—which was an indictment based on § 4 of the same statute—under which the college was convicted of the offense of "maintaining and operating a college, school and institution of learning where persons of the white and negro races are both received, and within *a distance of twenty-five miles of each other*, as pupils for instruction." After observing that there were fundamental limitations upon the police power of the several States which could not be disregarded, the state court held § 4 of the statute to be in violation of those limitations because "unreasonable and oppressive." Treating that particular section as null and void and regarding the other sections as complete in themselves and enforcible, the state court, in the first case (the present case) based on § 1, affirmed, and in the second case based on § 4 of the statute reversed the judgment. It held it to be entirely competent for the State to adopt the policy of the separation of the races, even in private schools, and concluded its opinion in these words: "The right to teach white and negro children in a private

school at the same time and place is not a property right." The state court (but without any discussion whatever) added, as if merely incidental to or a make-weight in the decision of the pivotal question, in this case, these words: "Besides, appellant as a *corporation* created by this State has no natural right to teach at all. Its right to teach is such as the State sees fit to give to it. The State may withhold it altogether or qualify it. *Allgeyer* v. *Louisiana*, 165 U. S. 578." It concluded: "We do not think the act is in conflict with the Federal Constitution."

Upon a review of the judgment below this court says that the statute is "clearly separable and may be valid as to one class, while invalid as to another;" that "even if it were conceded that its assertion of power over individuals cannot be sustained, still the statute must be upheld so far as it restrains corporations." "It is unnecessary," this court says, "for us to consider anything more than the question of its validity *as applied to corporations*. . . . We need concern ourselves only with the inquiry whether the first section can be upheld as coming within the power of a State over its own *corporate* creatures." The judgment of the state court is now affirmed, and thereby left in full force, so far as Kentucky and its courts are concerned, although such judgment rests in part upon the ground that the statute is not, in any particular, in violation of any rights secured by the Federal Constitution. In so ruling, it must necessarily have been assumed by this court that the legislature may have regarded the teaching of white and colored pupils at the same time and in the same school or institution, when maintained by private individuals and associations, as wholly different in its results from such teaching when conducted by the same individuals acting under the authority of or representing a corporation. But, looking at the nature or subject of the legislation it is inconceivable that the legislature consciously regarded the subject in that light. It is absolutely certain that the legislature had in mind to prohibit the teaching of the two races in the same private insti-

tution, at the same time by whomsoever that institution was conducted. It is a reflection upon the common sense of legislators to suppose that they might have prohibited a private *corporation* from teaching by its agents, and yet left individuals and unincorporated associations entirely at liberty, by the same instructors, to teach the two races in the same institution at the same time. It was the teaching of pupils of the two races *together*, or in the same school, no matter by whom or under whose authority, which the legislature sought to prevent. The manifest purpose was to prevent the association of white and colored persons in the same school. That such was its intention is evident from the title of the act, which, as we have seen, was "to prohibit white and colored persons from attending the same school." Even if the words in the body of the act were doubtful or obscure the title may be looked to in aid of construction. *Smythe* v. *Fiske*, 23 Wall. 374.

Undoubtedly, the general rule is that one part of a statute may be stricken down as unconstitutional and another part, distinctly separable and valid, left in force. But that general rule cannot control the decision of this case.

Referring to that rule, this court in *Huntington* v. *Worthen*, 120 U. S. 97, 102, said that if one provision of a statute be invalid the whole act will fall, where "*it is evident the legislature would not have enacted one of them without the other.*"

In *Spraigue* v. *Thompson*, 118 U. S. 90, 94, 95, the question arose as to the validity of a particular section of the Georgia Code. The Supreme Court of that State held that so much of a section of that code as made certain illegal exceptions could be disregarded, leaving the rest of the section to stand; this upon the principle that a distinct, separable and unconstitutional part of a statute may be rejected and the remainder preserved and enforced. "But," the court took care to say, "the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact *what confessedly the legislature never meant.*"

In *Field* v. *Clark*, 143 U. S. 649, 696, it was held that certain specified parts of the tariff act of 1890 could be adjudged invalid without affecting the validity of another and distinct part, covering a different subject. But that, as the court held, was because "they are entirely separate *in their nature*, and, in law, are wholly independent of each other."

A case very much in point here is that of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565. Those were actions upon promissory notes, and an open account. The defense was that the notes and the account arose out of business transactions with the Union Sewer Pipe Company, an Ohio corporation doing business in Illinois, and which corporation, it was alleged, was a trust and combination of a class or kind described in the Illinois anti-trust statute. That statute made certain combinations of capital, skill or acts by two or more persons for certain defined purposes illegal in Illinois. The defense was based in part on that statute, and the question was whether the statute was repugnant to the Constitution of the United States, in that, after prescribing penalties for its violation, it provided by a distinct section (§ 9) that its provisions "shall not apply to agricultural products or live stock while in the hands of the producer or raiser." The transactions out of which the notes and account in suit arose had no connection whatever with agriculture or with the business of raising live stock, and yet the question considered and determined—and which the court did not feel at liberty to pass by—was whether the entire statute was not unconstitutional by reason of the fact that the ninth section excepted from its operation agricultural products and live stock while in the hands of the producer or raiser. This court held that section to be repugnant to the Constitution of the United States, in that it made such a discrimination in favor of agriculturists or live-stock dealers as to be a denial to all others of the equal protection of the laws. The question then arose, whether the other provisions of the statute could not be upheld and enforced by eliminating the ninth section. This court held in the negative, saying: "The

principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results *not contemplated or desired by the legislature*, then the *entire statute must be held inoperative*. . . . Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturists and live-stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section."

The general principle was well stated by Chief Justice Shaw, who, after observing that if certain parts of a statute are wholly independent of each other, one part may be held void and the other enforced, said in *Warren* v. *Mayor and Aldermen of Charlestown*, 2 Gray, 84: "But if they are so mutually connected with and dependent on each other, as conditions, *considerations* or compensations for each other as to warrant a belief that the *legislature intended them as a whole*, and that if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or *connected*, must fall with them." This statement of the principle was affirmed in *Allen* v. *Louisiana*, 103 U. S. 80, 84, and again in *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 490, cited by the court. In the latter case the court said: "One part [of a statute] may stand, while another will fall, unless the two are so connected or dependent on each other in subject matter, meaning or purpose, that the good cannot remain without the bad. The point is, not whether the parts are contained in the same section, for, the distribution into sec-

tions is purely artificial; but whether they are essentially and inseparably *connected in substance*—whether the provisions are so interdependent that one cannot *operate without the other.*" All the cases are, without exception, in the same direction.

Now, can it for a moment be doubted that the legislature intended all the sections of the statute in question to be looked at, and that the purpose was to forbid the teaching of pupils of the two races together in the same institution, at the same time, *whether the teachers represented natural persons or corporations?* Can it be said that the legislature would have prohibited such teaching by corporations, and yet consciously permitted the teaching by private individuals or unincorporated associations? Are we to attribute such folly to legislators? Who can say that the legislature would have enacted one provision without the other? If not, then, in determining the intent of the legislature, the provisions of the statute relating to the teaching of the two races together by *corporations* cannot be separated in its operation from those in the same section that forbid such teaching by individuals and unincorporated associations. Therefore the court cannot, as I think, properly forbear to consider the validity of the provisions that refer to teachers who do not represent corporations. If those provisions constitute as, in my judgment, they do, an essential part of the legislative scheme or policy, and are invalid, then, under the authorities cited, the whole act must fall. The provision as to corporations may be valid, and yet the other clauses may be so inseparably connected with that provision and the policy underlying it, that the validity of all the clauses necessary to effectuate the legislative intent must be considered. There is no magic in the fact of incorporation which will so transform the act of teaching the two races in the same school at the same time that such teaching can be deemed lawful when conducted by private individuals, but unlawful when conducted by the representatives of corporations.

There is another line of thought. The state court evidently regarded it as necessary to consider the entire act; for it ad-

judged it to be competent for the State to forbid *all* teaching of the two races together, in the same institution, at the same time, no matter by whom the teaching was done. The reference at the close of its opinion, in the words above quoted, to the fact that the defendant was a corporation, which could be controlled, as the State saw fit, was, as already suggested, only incidental to the main question determined by the court as to the extent to which the State could control the teaching of the two races in the same institution. The state court upheld the authority of the State, under its general police power, to forbid the association of the two races in the same institution of learning, although it adjudged that there were limitations upon the exercise of that power, and that, under those limitations, § 4 was invalid, because unreasonable and oppressive. If it had regarded the authority of the State over its own corporations as being, in itself, and without reference to any other view, sufficient to sustain the statute, so far as the defendant corporation is concerned, it need only have said that much, and omitted all consideration of the general power of the State to forbid the teaching of the two races together, by anybody, in the same institution at the same time. It need not, in that view, have made any reference whatever to the twenty-five mile provision in the fourth section as being "unreasonable and oppressive," whether applied to teaching by individuals or by corporations, or held such provision to be void on that special ground.

Some stress is laid upon the fact that when Berea College was incorporated the State reserved the power to alter, amend or repeal its charter. If the State had, in terms, and in virtue of the power reserved, *repealed* outright the charter of the college, the case might present a different question. But the charter was not repealed. The corporation was left in existence. The statute here in question does not purport to *amend* the charter of any particular corporation, but assumes to establish a certain rule applicable alike to all individuals, associations or corporations that assume to teach the white and black races

together in the same institution. Besides, it should not be assumed that the State intended, under the guise of impliedly amending the charter of a private corporation, to destroy, or that it could destroy, the substantial, essential purposes for which the corporation was created, and yet leave the corporation in existence. The authorities cited by this court, in its opinion, establish the proposition that under the reserved power to amend or alter a charter no amendment or alteration can be made which will "defeat or substantially impair the object of the grant." *Holyoke* v. *Lyman*, 15 Wall. 500; *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 476.

In my judgment the court should directly meet and decide the broad question presented by the statute. It should adjudge whether the statute, as a whole, is or is not unconstitutional, in that it makes it a crime against the State to maintain or operate a private institution of learning where white and black pupils are received, at the same time, for instruction. In the view which I have as to my duty I feel obliged to express my opinion as to the validity of the act as a whole. I am of opinion that in its essential parts the statute is an arbitrary invasion of the rights of liberty and property guaranteed by the Fourteenth Amendment against hostile state action and is, therefore, void.

The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its use may not be forbidden or interfered with by Government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property—especially, where the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States. This court has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces "the right of the citizen to be free in the en-

joyment of all his faculties," and "to be free to use them in all lawful ways." *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Adair* v. *United States*, 208 U. S. 161, 173. If pupils, of whatever race—certainly, if they be citizens—choose with the consent of their parents or voluntarily to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether Federal or state, can legally forbid their coming together, or being together temporarily, for such an innocent purpose. If the Commonwealth of Kentucky can make it a crime to teach white and colored children together at the same time, in a private institution of learning, it is difficult to perceive why it may not forbid the assembling of white and colored children in the same Sabbath-school, for the purpose of being instructed in the Word of God, although such teaching may be done under the authority of the church to which the school is attached as well as with the consent of the parents of the children. So, if the state court be right, white and colored children may even be forbidden to sit together in a house of worship or at a communion table in the same Christian church. In the cases supposed there would be the same association of white and colored persons as would occur when pupils of the two races sit together in a private institution of learning for the purpose of receiving instruction in purely secular matters. Will it be said that the cases supposed and the case here in hand are different in that no government, in this country, can lay unholy hands on the religious faith of the people? The answer to this suggestion is that in the eye of the law the right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law. Again, if the views of the highest court of Kentucky be sound, that commonwealth may, without infringing the Constitution of the United States, forbid the

association in the same private school of pupils of the Anglo-Saxon and Latin races respectively, or pupils of the Christian and Jewish faiths, respectively. Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races? Further, if the lower court be right, then a State may make it a crime for white and colored persons to frequent the same market places at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature in which all citizens, without regard to race, are equally interested. Many other illustrations might be given to show the mischievous, not to say cruel, character of the statute in question and how inconsistent such legislation is with the great principle of the equality of citizens before the law.

Of course what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the State and maintained at the public expense. No such question is here presented and it need not be now discussed. My observations have reference to the case before the court and only to the provision of the statute making it a crime for any person to impart harmless instruction to white and colored pupils together, at the same time, in the same private institution of learning. That provision is in my opinion made an essential element in the policy of the statute, and if regard be had to the object and purpose of this legislation it cannot be treated as separable nor intended to be separated from the provisions relating to corporations. The whole statute should therefore be held void: otherwise, it will be taken as the law of Kentucky, to be enforced by its courts, that the teaching of white and black pupils, at the same time, even in a *private* institution, is a crime against that Commonwealth, punishable by fine and imprisonment.

In my opinion the judgment should be reversed upon the ground that the statute is in violation of the Constitution of the United States.

MR. JUSTICE DAY also dissents.

STATE OF LOUISIANA *v.* GARFIELD, SECRETARY OF THE INTERIOR.

ORIGINAL IN EQUITY.

No. 7. Argued October 27, 28, 1908.—Decided November 9, 1908.

This court has no jurisdiction of an action brought by a State against the Secretary of the Interior to establish title to, and prevent other disposition of, lands claimed under swamp land grants where questions of law and fact exist as to whether the United States still owns the lands. The United States is a necessary party, and the action cannot be tried without it.

THE facts are stated in the opinion of the court.

The Attorney General and *The Solicitor General*, with whom *Mr. Glenn E. Husted* was on the brief, for defendants, on demurrer:

The United States is the real party in interest as defendant, and as it has not consented to be sued, and cannot be sued without its consent, the bill must be dismissed. *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Naganab* v. *Hitchcock*, 202 U. S. 473; *Kansas* v. *United States*, 204 U. S. 331.

The point determined by the Secretary of the Interior in 1895 was not a matter of fact and merely quasi-jurisdictional as in *Noble* v. *Union River Logging Co.*, 147 U. S. 164, 173, but was a question of law and strictly jurisdictional expressly within the classification of that case, which included the instance where "the Land Department issues a patent for land

which has already been reserved or granted to another person." The act then is not voidable merely but void. This was the character of the Secretary's action, involving a manifest mistake of law.

Even if the court had jurisdiction the suit must fail because these military reservation lands were not intended to be and were not covered by the swamp land grant. Such grants are to be interpreted most strongly in favor of the Government, and nothing passes but what is clearly included within the terms of the grant. *Rice* v. *Railroad Co.*, 1 Black, 358; *Wilcox* v. *Jackson*, 13 Pet. 498; *Leavenworth &c. R. R.* v. *United States*, 92 U. S. 733; *Newhall* v. *Sanger*, 92 U. S. 761; *United States* v. *Michigan*, 190 U. S. 379. Congress could not have intended to grant to the State any interest as of the date of this swamp land act in lands then reserved and occupied for military purposes, and the act of February 24, 1871, 16 Stat. 430, transferring the Fort Sabine military reservation to the Interior Department shows that it was not the understanding of Congress that the grant applied to the reservation lands.

Furthermore, the approval by the Secretary of the Interior of the Surveyor General's certified list of swamp lands under the act of 1849, as amended by the act of 1850, connects and merges the special act of 1849 with the general act of 1850, and therefore this approval was merely an additional step and a patent as provided under the act of 1850 was necessary. No such patent has been issued and under the later act the legal title passes only upon delivery of the patent. *Brown* v. *Hitchcock*, 173 U. S. 473. This is not a case for the application of the rule that a posterior general act does not repeal a prior special provision unless the legislative intent to repeal be apparent. *People* v. *Jaehne*, 103 U. S. 182. The act of 1850 is to be regarded as the final expression of the legislature on swamp land grants; the requirements and method of conveyance of that act take the place of the special law and must be taken as substituted for the special law. *Morris* v. *Crocker*,

13 How. 429; *United States* v. *Tynen*, 11 Wall. 88; *Murdock* v. *City of Memphis*, 20 Wall. 590. This is also the conclusion to be drawn from the Revised Statutes, because the act of 1850 is the code there, and while some special swamp land provisions as to other States are preserved, this is not the case as to Louisiana.

The State by the action of its officers has apparently considered that a patent was necessary. After approval by the Secretary of the Interior in 1895, the register of the state land office, assuming to act under authority of an act of the state legislature, protested against the *patenting* of the lands embraced in the approved list as not described in accordance with the latest approved survey thereof, and sought to correct the description before the patent was to be issued. 33 Land Dec. 16. And again, the State of Louisiana instituted proceedings in the Court of Claims to recover money alleged to be due under the act of March 2, 1855, 10 Stat. 634, which provided for the patenting of lands to persons who prior to the issuance of patents to the States under the act of 1850 had located upon swamp lands, and for the payment to the States of the purchase money as indemnity.

Even if an actual patent was not necessary under the act of 1850, something more than bare approval was required. See act of August 3, 1854, now § 2449, Rev. Stat., providing for lists being *certified* by the Commissioner of the General Land Office. In this case there was no such list, and since the Secretary's mere approval was not given until long after the act of 1854 was passed, it was within the power of Congress to provide a different means of administering the grant as to land not already approved.

Mr. George H. Lamar and *Mr. Harvey M. Friend* for complainant, on demurrer:

According to the theory of the present bill, the title to the lands here in controversy has by conveyance not only passed out of the United States into the State of Louisiana, but by

reason of a certain congressional statute of limitation and repose the title so conveyed is no longer subject to attack or suit by or on behalf of the Federal Government, and, therefore, the United States is not, and cannot be made, the real party defendant, for the all-sufficient reason that the United States has no present, prospective or ultimate interest in the land whatsoever. If, therefore, the court shall find that the legal title to the lands in dispute has passed out of the United States into the State of Louisiana, then there cannot be any doubt of the jurisdiction of this court to entertain the suit.

The cases cited by the counsel for the defendants in support of the demurrer herein do not sustain the contention that this suit cannot be maintained because it is in effect a suit against the United States, which has not consented to be sued. *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Naganab* v. *Hitchcock*, 202 U. S. 473; and *Kansas* v. *United States*, 204 U. S. 331, discussed and distinguished.

The Secretary of the Interior and the Commissioner of the General Land Office are but creatures of the law, and mere agencies created by the law to carry it into practical operation, and neither of them should be permitted to exert his agency in violating the law and the Constitution and then claim exemption from the process of the court, whose duty it is to guard against abuses, on the ground that they are executive officers of the Government and cannot be restrained from violating the law. *Marbury* v. *Madison*, 1 Cranch, 137; *Noble* v. *Union River Logging Co.*, 147 U. S. 165, and cases cited.

This court has pointed out in numerous opinions that similar suits to enjoin an executive officer from executing an unconstitutional statute, or where such officer has been proceeded against on the ground that he is acting or assuming to act beyond the scope of his authority, were not against the State, but were against its officers who were assuming to act under an unconstitutional statute or were assuming to act *ultra vires* to the great and irreparable injury and damage of the com-

plainants in their property rights. *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 220; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Allen* v. *Baltimore & Ohio R. R. Co.*, 114 U. S. 311 (these last two being known as the *Virginia Coupon cases*); *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Stanley* v. *Schwalby*, 147 U. S. 508; *Tindal* v. *Wesley*, 167 U. S. 204; *Scott* v. *Donald*, 169 U. S. 58, 107; *Smyth* v. *Ames*, 169 U. S. 466; *Prout* v. *Starr*, 188 U. S. 537; *Ex parte Young*, 209 U. S. 123, and cases cited and referred to in the opinions in those cases.

Under many authorities, this court can entertain this suit under its original jurisdiction. *United States* v. *Texas*, 143 U. S. 621, 644; *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, 287; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 388; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518, 560; *Mississippi* v. *Johnson*, 4 Wall. 475, 501; *Texas* v. *White*, 7 Wall. 700, 719; *Pennsylvania* v. *Quicksilver Co.*, 10 Wall. 553, 556; *Florida* v. *Anderson*, 91 U. S. 667.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought in this court to establish the title of the State of Louisiana to certain swamp lands which it claims under the statutes of the United States, and to enjoin the defendants against carrying out an order making a different disposition of the lands. The defendants demur on the grounds that this really is a suit against the United States, which has not consented to be sued, that the title never has passed from the United States, and that the remedy, if any, would be at law.

The act of March 2, 1849, c. 87, 9 Stat. 352, purported to grant to the State of Louisiana the whole of the swamp and overflowed lands therein, and provided that on approval of a list of such lands by the Secretary of the Treasury (afterwards succeeded by the Secretary of the Interior) the fee simple to the same should vest in the State. Certain lands were ex-

cluded, but those in dispute were not by any express words. They belonged, however, to the Fort Sabine Military Reservation, established by the President on December 20, 1838, and although included in a list submitted under the statute, approval of the inclusion was suspended or denied. On March 25, 1871, the Fort Sabine Military Reservation was abandoned by executive order, in pursuance of the act of February 24, 1871, c. 68, 16 Stat. 430, which authorized the Secretary of War to transfer it to the control of the Secretary of the Interior, to be sold for cash. On October 31, 1895, the Secretary of the Interior decided that the land was included in the grant of the act of 1849, subject to the right of the United States to use it for military purposes until abandoned. On December 10, 1895, pursuant to his decision, the Secretary indorsed upon a list of these lands that it was "Approved to the State of Louisiana under the Act of Congress of March 2, 1849, as supplemented and enlarged by the Act of Congress of September 28, 1850, subject to any valid adverse rights that may exist." The plaintiff says that thereupon the title passed.

On June 6, 1904, the Secretary of the Interior ordered that his predecessor's approval of the list be vacated, and that the lands should be held for disposition as provided by law, on the ground that they were not within the grant of the act of 1849, because at that time embraced in a military reservation. This decision has been upheld and finally affirmed by the present Secretary, the defendant in this case, and the result is the bringing of this bill.

We will assume for purposes of decision that if the United States clearly had no title to the land in controversy we should have jurisdiction to entertain this suit; for we are of opinion that even on that assumption the bill must be dismissed. But before giving the reasons for our opinion the course taken by the argument for the United States makes it proper to state a portion of that argument that does not command our assent.

The next year after the act of 1849 another act was passed,

which granted swamp lands to the State of Arkansas. It provided for a list, required the Secretary of the Interior to issue a patent for the lands at the request of the Governor, and then enacted that "on that patent" the fee simple to the lands should vest in the State. The fourth section was more general: "That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as [*sic*] designated as aforesaid, may be situated." Act of September 28, 1850, c. 84, 9 Stat. 519. It is argued that this so far repealed the special act of 1849 that thereafter the title would not pass on simple approval as provided therein, but a patent was necessary. As we understand, the continuous construction of the Department has been to the contrary, and a great number of titles to a very large amount of land would be disturbed if we should accede to this argument. We see no reason for overthrowing the long continued understanding that the special provisions for Louisiana were not affected by a general clause, evidently intended to extend benefits to States that did not enjoy them at the time, not to change the mode of conveyance previously established in a case where the benefit already had been conferred. We may add that we assume that, if approval was sufficient to pass the title, the form of words used by the Secretary of the Interior on December 10, 1895, had that effect, notwithstanding the reference to the act of 1850, whatever may have been his understanding or intent.

A further argument was presented that if a patent was not necessary under the act of 1850, then a certificate by the Land Commissioner was made so by the act of August 3, 1854, c. 201, 10 Stat. 346, Rev. Stat. § 2449. But that law does not require so extended an application. We shall assume for purposes of decision that it is satisfied if confined according to its words to lands to which the act of 1849 did not purport "to convey the fee-simple title."

Leaving the foregoing arguments on one side we neverthe-

less are of opinion that the bill must fail. The land in controversy had been withdrawn from the public domain by reservation at the time when the act of 1849 was passed, and the general words of that act must be read as subject to an implied exception, under the rule laid down in *Scott* v. *Carew*, 196 U. S. 100, 109, and the earlier cases there cited. The case is not one where the approval proceeded upon a mistake of fact with regard to a matter on which it was necessary that the Secretary should pass. See *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, 173, 174. The approval proceeded upon a manifest mistake of law; that upon the abandonment of the military reservation the land fell within the terms of the grant of 1849. Therefore it was void upon its face. The only doubt is raised by the statute limiting suits by the United States to vacate patents to five years. Act of March 3, 1891, c. 561, § 8, 26 Stat. 1099. It may be that this act applies to approvals when they are given the effect of patents as well as to patents, which alone are named. In *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S. 447, it was decided that this act applied to patents even if void because of a previous reservation of the land, and it was said that the statute not merely took away the remedy but validated the patent. The doubt is whether Louisiana has not now a good title by the lapse of five years since the approval and by the operation of that act.

But that doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard. The United States fairly might argue that the statute of limitations was confined to patents, or was excluded by the act of 1871. If it yielded those points it still reasonably might maintain that a title could not be acquired under the statute by a mere void approval on paper, if the United States ever since had been in possession claiming title, as it claimed it earlier by the act of 1871. It might argue that, for equitable relief on the ground of title in the plaintiff, in the teeth of the last named act, it would be necessary at

least to allege that the State took and has held possession under the void grant. The United States might and undoubtedly would deny the fact of such possession, and that fact cannot be tried behind its back. It follows that the United States is a necessary party and that we have no jurisdiction of this suit.

Bill dismissed.

TWINING *v.* STATE OF NEW JERSEY.

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

No. 10. Argued March 19, 20, 1908.—Decided November 9, 1908.

The judicial act of the highest court of a State in authoritatively construing and enforcing its laws is the act of the State.

Exemption from compulsory self-incrimination in the state courts is not secured by any part of the Federal Constitution.

There is a citizenship of the United States and a citizenship of the State which are distinct from each other, *Slaughter House Cases*, 16 Wall. 36; and privileges and immunities, although fundamental, which do not arise out of the nature and character of the National Government, or are not specifically protected by the Federal Constitution, are attributes of state, and not of National, citizenship.

The first eight Amendments are restrictive only of National action, and while the Fourteenth Amendment restrained and limited state action it did not take up and protect citizens of the States from action by the States as to all matters enumerated in the first eight Amendments.

The words "due process of law" as used in the Fourteenth Amendment are intended to secure the individual from the arbitrary exercise of powers of government unrestrained by the established principles of private right and distributive justice, *Bank* v. *Okely*, 4 Wheat. 235, but that does not require that he be exempted from compulsory self-incrimination in the courts of a State that has not adopted the policy of such exemption.

Exemption from compulsory self-incrimination did not form part of the " law of the land " prior to the separation of the colonies from the mother-country, nor is it one of the fundamental rights, immunities

and privileges of citizens of the United States, or an element of due process of law, within the meaning of the Federal Constitution or the Fourteenth Amendment thereto.

The fact that exemption from compulsory self-incrimination is specifically enumerated in the guarantees of the Fifth Amendment tends to show that it was, and is to be, regarded as a separate right and not as an element of due process of law.

When a question is no longer open in this court, adverse arguments, although weighty, will not be considered; and, under the doctrine of *stare decisis*, *Slaughter-House Cases*, 16 Wall. 36, and *Maxwell* v. *Dow*, 176 U. S. 581, approved and followed.

Quære and not decided whether an instruction that the jury may draw an unfavorable inference from the failure of the accused to testify in denial of evidence tending to criminate him amounts to a violation of the privilege of immunity from self-incrimination.

74 N. J. L. 683, affirmed.

ALBERT C. TWINING and David C. Cornell, the plaintiffs in error, hereafter called the defendants, were indicted by the grand jury of Monmouth County, in the State of New Jersey. The indictment charged that the defendants, being directors of the Monmouth Trust and Safe Deposit Company, knowingly exhibited a false paper to Larue Vreedenberg, an examiner of the State Banking Department, with intent to deceive him as to the condition of the company. Such an act is made a misdemeanor by a statute of the State (P. L. 1899, p. 450, at 461), which is as follows:

"Every director, officer, agent or clerk of any trust company who willfully and knowingly subscribes or makes any false statement of facts or false entries in the books of such trust company, or knowingly subscribes or exhibits any false paper, with intent to deceive any person authorized to examine as to the condition of such trust company, or willfully or knowingly subscribes to or makes any false report, shall be guilty of a high misdemeanor and punished accordingly."

The defendants were found guilty on March 1, 1904, by the verdict of a jury, and judgment upon the verdict, that the defendants be imprisoned for six and four years respectively, was affirmed successively by the Supreme Court and the Court

of Errors and Appeals. There needs to be stated here only such part of what occurred at the trial as will describe the questions on which this court is authorized to pass. It appeared that in February, 1903, the company closed its doors. The bank examiner came at once to the place of business for the purpose of examining the affairs of the company, and found there Twining and Cornell, who were respectively president and treasurer as well as directors. Having soon discovered that according to a book entry there had been a recent payment of $44,875, for 381 shares of stock, the examiner inquired of the defendants by what authority this had been done, and was informed that it was done by authority of the board of directors, and the following paper was produced to him as a record of the transaction:

"Monmouth Trust & Safe Deposit Co., Asbury Park, N. J.

"A special meeting of the board of directors of this company was held at the office of the company on Monday, Feb. 9th, 1903. "There were present the following directors: George F. Kroehl, S. A. Patterson, G. B. M. Harvey, A. C. Twining, D. C. Cornell. "The minutes of the regular meeting held Jan. 15th, 1903, were read, and on motion duly approved.

"All loans taken since the last meeting were gone over carefully, and, upon motion duly seconded, were unanimously approved.

"A resolution that this company buy 381 shares of the stock of the First National Bank at $44,875 was adopted.

"On motion the meeting adjourned."

This was the paper referred to in the indictment, and it was incumbent on the prosecution to prove that it was false and that it was "knowingly" exhibited by the defendants to the examiner. There was evidence on the part of the prosecution tending to prove both these propositions. The defendants called no witnesses and did not testify themselves, although the law of New Jersey gave them the right to do so if they chose. In his charge to the jury the presiding judge said:

"Now, gentlemen, was this paper false? In the first place,

the paper charged in the indictment certifies in effect that a special meeting of the board of directors of this company was held at the office of the company on Monday, February 9, 1903. There were present the following directors: George F. Kroehl, S. A. Patterson, G. B. M. Harvey, A. C. Twining, D. C. Cornell.

"Among other things, appears a resolution of this company to buy 381 shares of the stock of the First National Bank at $44,875, which was adopted.

"Now, was that meeting held or not?

"That paper says that at this meeting were present, among others, Patterson, Twining and Cornell.

"Mr. Patterson has gone upon the stand and has testified that there was no such meeting to his knowledge; that he was not present at any such meeting; that he had no notice of any such meeting, and that he never acquiesced, as I understand, in any way in the passage of a resolution for the purchase of this stock.

"Now, Twining and Cornell, this paper says, were present. They are here in court and have seen this paper offered in evidence, and they know that this paper says that they were the two men, or two of the men, who were present. Neither of them has gone upon the stand to deny that they were present or to show that the meeting was held.

"Now, it is not necessary for these men to prove their innocence. It is not necessary for them to prove that this meeting was held. But the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance.

"Now, of course, in this action, I do not see how that can have much weight, because these men deny that they exhibited the paper, and if one of these men exhibited the paper and the other did not, I do not see how you could say that the person who claims he did not exhibit the paper would be under any obligation at all to go upon the stand. Neither is under any

obligation. It is simply a right they have to go upon the stand, and, consequently the fact that they do not go upon the stand to contradict this statement in the minutes, they both denying, through their counsel and through their plea, that they exhibited the paper, I do not see that that can be taken as at all prejudicial to either of them. They simply have the right to go upon the stand and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that entirely to you."

Further, in that part of the charge, relating to the exhibition of the paper to the examiner, the judge said:

"Now, gentlemen, if you believe that that is so; if you believe this testimony, that Cornell did direct this man's attention to it—Cornell has sat here and heard that testimony and not denied it—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt—if you believe that testimony beyond a reasonable doubt, Cornell is guilty. And yet he has sat here and not gone upon the stand to deny it. He was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it, and it is for you to take that into consideration.

"Now Twining has also sat here and heard this testimony, but you will observe there is this distinction as to the conduct of these two men in this respect: the accusation against Cornell was specific by Vreedenberg. It is rather inferential, if at all, against Twining, and he might say—it is for you to say whether he might say, 'Well, I don't think the accusation against me is made with such a degree of certainty as to require me to deny it, and I shall not; nobody will think it strange if I do not go upon the stand to deny it, because Vreedenberg is uncertain as to whether I was there; he won't swear that I was there.' So consequently the fact that Twining did not go upon the stand can have no significance at all.

"You may say that the fact that Cornell did not go upon the stand has no significance. You may say so, because the circumstances may be such that there should be no inference

drawn of guilt or anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him."

The question duly brought here by writ of error is, whether the parts of the charge set forth, affirmed as they were by the Court of last resort of the State, are in violation of the Fourteenth Amendment of the Constitution of the United States.

Mr. John G. Johnson and *Mr. Marshall Van Winkle,* with whom *Mr. William W. Gooch, Mr. Herbert C. Smyth* and *Mr. Frederic C. Scofield* were on the brief, for plaintiffs in error:

Comment by the court upon the failure of the accused to testify was a violation of the fundamental rights of the plaintiff in error and was a denial of due process of law as guaranteed by the Fourteenth Amendment.

In each case the primary inquiry must be as to what is the system of law of the particular State, and whether, according to that law, as adjudged by its courts, the procedure in question is "due process;" and the secondary inquiry must be whether in that process of law if followed, there is any violation of the fundamental rights secured by the Federal Constitution. Guthrie's Fourteenth Amendment, p. 72, citing *Kennard* v. *Louisiana,* 92 U. S. 480, 481; *Caldwell* v. *Texas,* 137 U. S. 692, 698; *Leeper* v. *Texas,* 139 U. S. 462, 469; *McNulty* v. *California,* 149 U. S. 645, 647.

When a statute, harmless on its face, is systematically enforced in violation of fundamental rights, the procedure is not due process of law, and may be declared void and set aside by the courts under the jurisdiction conferred by the Fourteenth Amendment. Guthrie, p. 73, and cases cited.

The State of New Jersey alone permits comment upon the failure of the accused to testify, and bases its action solely upon the absence of any restriction in the qualifying statute,

holding that the accused is thus placed in the same position as any party to a civil suit. *Parker* v. *State*, 61 N. J. L. 308; *State* v. *Wines*, 65 N. J. L. 31; *State* v. *Banusik*, 64 Atl. Rep. 994.

In this connection the decisions of courts of States in the same class with New Jersey (as to statutory provisions on this subject) should be considered. See, therefore, *People* v. *Tyler*, 36 California, 522; *Price* v. *Commonwealth*, 77 Virginia (Ct. of App.), 393; *State* v. *Howard*, 35 S. Car. 202; *Bird* v. *Georgia*, 50 Georgia, 585, 589.

See also, for statutes and decisions of the several States on this subject, Wigmore on Evidence, Vol. 3, § 2272, n. 2, and Vol. 1, § 488. Other cases are: *Wilson* v. *United States*, 149 U. S. 60; *McKnight* v. *United States*, 115 Fed. Rep. 982, 983; *Cooper* v. *State*, 86 Alabama, 610; *People* v. *Cuff*, 122 California, 589; *People* v. *Brown*, 53 California, 66; *People* v. *Streuber*, 121 California, 43; *Quinn* v. *People*, 123 Illinois, 345; *Baker* v. *People*, 105 Illinois, 452; *Austin* v. *People*, 102 Illinois, 261; *Angelo* v. *People*, 96 Illinois, 209; *Miller* v. *People*, 216 Illinois, 309; *Wynehamer* v. *People*, 13 N. Y. 444, 447; *Ruloff* v. *People*, 45 N. Y. 213, 225; *People* v. *Courtney*, 94 N. Y. 492.

Comment by the court upon the failure of the accused to testify was a denial to the plaintiff in error of his privilege and immunity as a citizen of the United States guaranteed by the Fourteenth Amendment, in that he was thus compelled to be a witness against himself in violation of the Fifth Amendment.

Whether or not the Fourteenth Amendment has extended the application of the principle of the Fifth Amendment to the several States is still an open question undecided by this court. *Davidson* v. *New Orleans*, 96 U. S. 104; *The Slaughter-House Cases*, 16 Wall. 36; *Barrington* v. *Missouri*, 205 U. S. 486.

The power of the States to abridge these great rights of citizens can never be conceded until the court shall expressly

so decide in a case involving the exact question, and adequately argued. Guthrie, p. 62.

That this privilege is a fundamental right is shown by the history of the provision contained in the Fifth Amendment. *Bram* v. *United States*, 168 U. S. 543 *et seq.;* 1 Stephen's History of the Criminal Law of England, 440; Story on the Constitution (5th ed.), 1782 and 1788; 2 Story's Commentaries on the Constitution (5th ed.), 697; Cooley's Const. Lim. (6th ed.), 375; *Counselman* v. *Hitchcock*, 142 U. S. 563. See *Boyd* v. *United States*, 116 U. S. 616, holding unconstitutional a statute making the failure of a witness to attend and produce evidence against himself, a confession of guilt.

Here a failure to take the stand is made an admission of guilt.

The compulsion prohibited by the Fifth Amendment is not alone physical or mental duress. *United States* v. *Bell*, 81 Fed. Rep. 837.

No statute, rule or regulation, or act of administration in the given case, can be constitutional, which does not in some way protect the right to be silent if the citizen chooses to be silent. *United States* v. *Bell, supra.*

And as to requiring production of documents which would have been self-incriminating, see *McKnight* v. *United States*, 115 Fed. Rep. 981.

When a State violates a fundamental right of a citizen of the United States, this court will interfere; and the laws of a State come under the prohibition of the Fourteenth Amendment when they infringe fundamental rights. *Ballard* v. *Hunter*, 204 U. S. 262.

The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. *Brown* v. *New Jersey*, 175 U. S. 175; *West* v. *Louisiana*, 194 U. S. 263; *Rogers* v. *Peck*, 199 U. S. 425; *Gibson* v. *Mississippi*, 162 U. S. 563.

Due process implies, at least, conformity to natural and inherent principles of justice. *Holden* v. *Hardy*, 169 U. S. 366.

In the Fourteenth Amendment, by parity of reasoning, it refers to that law of the land, in each State, which derives its authority from the inherent and reserved powers of the State, exercised within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure. *Hurtado* v. *California*, 110 U. S. 516. The purpose of that Amendment is to extend to the citizens and residents of the States the same protection against arbitrary state legislation affecting life, liberty and property as is afforded by the Fifth Amendment against similar legislation by Congress. *Tonawanda* v. *Lyon*, 181 U. S. 392; Guthrie, 2, 3; *Holden* v. *Hardy*, 169 U. S. 366, 389; *O'Neil* v. *Vermont*, 144 U. S. 323, 370.

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

If the court shall be of the opinion that the charge of the trial court had the effect of violating the privilege against compulsory self-crimination, we answer to the first assignment that it discloses no fundamental right or immunity guaranteed to the plaintiffs in error as citizens of the United States by the Fourteenth Amendment which has been abridged by the decision of the court of last resort of New Jersey.

While it is unquestionably true that there has always been in existence in this country a general government over and among the States, the sole rights secured by constitutional provision prior to the formation of the present Federal Government were those of the citizens of the several States. In these several constitutions, as in that of New Jersey, the inhabitants of each State declared the limitations which were

deemed essential to the protection and preservation of their cherished rights. The powers of the States differ in this respect from the powers of the general government, because, representing the people of the State, each state government exercises those powers against which it is not restrained by the limitations of the state constitution; while the general government, being a government of delegated powers, exercises only those powers which are contained in the provisions of the Federal Constitution. In the rights and restrictions under the state constitutions, therefore, rest the rights of the citizens of the States as such.

When a Federal Government was later formed, a Federal citizenship first came into being, not dependent upon the state constitutions, and not equipped with common-law rights, but dependent upon the essential requisites and provisions of the instrument, the Federal Constitution, which called it into being. The rights of a citizen of the United States may be those of a citizen of any of the States by virtue of the two citizenships existing conjointly in any one person, but they are not necessarily coincident; and the rights of a citizen of the United States are not necessarily those of a citizen of any of the individual States.

The duty of protection to a citizen of a State in his privileges and immunities is not by the Fourteenth Amendment devolved upon the general government, but remains with the State itself where it naturally and properly belongs. Story on the Constitution (5th ed.), par. 1936. See also *Kemmler* v. *United States*, 136 U. S. 448; *Duncan* v. *Missouri*, 152 U. S. 382; *Wadleigh* v. *Newhall*, 136 Fed. Rep. 946.

There is in the Federal Constitution, the source of the rights and immunities of the plaintiffs in error as citizens of the United States, no guarantee of a privilege against compulsory self-crimination which is binding upon the courts of New Jersey, or the abridgment of which by the state courts would give corrective jurisdiction in the Federal Supreme Court.

The only basis for a contrary claim is found in the Fifth

Amendment which, however, is binding only on the Federal Government and its agencies, and is not a limitation upon any of the States. The rights or immunities which it creates, therefore, are rights and immunities against Federal, but not against state interference or abridgment. See *Barron* v. *Baltimore*, 7 Pet. 243, which was reviewed and followed in *Twitchell* v. *The Commonwealth*, 7 Wall. 321; *Walker* v. *Sauvinet*, 92 U. S. 90; *Hallinger* v. *Davis*, 146 U. S. 314; *Holden* v. *Hardy*, 169 U. S. 366; *Munn* v. *Illinois*, 94 U. S. 113; *Kelly* v. *Pittsburg*, 104 U. S. 78; *Nashville* v. *Alabama*, 128 U. S. 96; *Davis* v. *Texas*, 139 U. S. 651.

As plaintiffs in error make no claim to this court as citizens of New Jersey, whatever rights and immunities have been abridged are not a matter of concern to this court unless they can be shown to have had their origin in the Constitution of the United States, or its Amendments, or the necessary requisites thereof. The only right against compulsory self-crimination guaranteed to citizens of the United States is a right and immunity operative in Federal courts, or in any sphere of Federal influence, but there is no such right guaranteed as such to citizens of the United States by the Constitution of the United States or its Amendments, which the State of New Jersey is obliged to consider.

If it be true that the Fourteenth Amendment added to the civil rights of citizens of the United States, the civil rights peculiar to the other citizens of any State in which they might choose to reside, and so far abolished the distinction between citizenship of a State and of the United States, then it is only necessary to inquire into the status of the rights and immunities with reference to the privilege against self-crimination enjoyed by the citizens of the State of New Jersey at the time of the promulgation of the Fourteenth Amendment.

This Amendment created no new civil rights. It merely extended the operation of existing rights, and furnished additional protection to such rights. *Barbier* v. *Connolly*, 113 U. S. 27; *United States* v. *Sanges*, 48 Fed. Rep. 78; *Minor* v. *Hap-*

persett, 21 Wall. 171; *United States* v. *Cruikshank*, 92 U. S. 542.

If, therefore, there was added to the civil rights and immunities guaranteed to the plaintiffs in error as citizens of the United States, any additional immunities or rights by virtue of the Fourteenth Amendment, the addition comprises only those rights and immunities which were common to all other citizens of New Jersey in July, 1868, when the Amendment went into effect. And citizens of the United States, resident in New Jersey, could have had at that time no greater rights or immunities than the other citizens of New Jersey enjoyed.

To a citizen of the United States there was at the time of the adoption of the Fourteenth Amendment, no guaranteed privilege or immunity with reference to an alleged error complained of which the courts of New Jersey were bound to recognize, and in the courts of New Jersey as to all persons under their jurisdiction, there was no right or immunity against the submission by a trial court to a jury of the question and matter submitted in this case.

The courts of New Jersey had established at that time the principle of privilege against self-crimination, and had also established as a parallel and not as a contradictory principle, that the question of inference to be raised by the failure to deny a direct criminal accusation when opportunity offered, might properly be submitted to a jury. Plaintiffs in error cannot show the existence of any fundamental right or immunity against compulsory self-crimination, guaranteed by the Fourteenth Amendment, which has been abridged by the courts of New Jersey, as alleged by the pleader in his first assignment of error. On the contrary, the charge in this case was in accordance with the legal recognition of the right of self-crimination as that right existed in New Jersey from the very beginning, and which has not been altered or attempted to be altered since the passage and adoption of the Fourteenth Amendment.

Plaintiffs in error have no just complaint on the basis of any want of due process of law. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. Each State prescribes its own modes of judicial proceedings. *Hallinger* v. *Davis*, 146 U. S. 321, citing *Missouri* v. *Lewis*, 101 U. S. 51, and see also *Holden* v. *Hardy*, 169 U. S. 366, 389; *Hurtado* v. *California*, 110 U. S. 535; *Walker* v. *Sauvinet*, 92 U. S. 92.

The Fourteenth Amendment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress. But the Federal courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a State applicable to all persons in like circumstances and conditions, and the Federal courts should not interfere unless there is some abuse of law amounting to confiscation of property or deprivation of personal rights. 9 Fed. Stat. Ann., 427.

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

In the view we take of the case we do not deem it necessary to consider whether, with respect to the Federal question, there is any difference in the situation of the two defendants. It is assumed, in respect of each, that the jury were instructed that they might draw an unfavorable inference against him from his failure to testify, where it was within his power, in denial of the evidence which tended to incriminate him. The law of the State, as declared in the case at bar, which accords with other decisions (*Parker* v. *State*, 61 N. J. L. 308; *State* v. *Wines*, 65 N. J. L. 31; *State* v. *Zdanowicz*, 69 N. J. L. 619; *State* v. *Banuski*, 64 Atl. Rep. 994), permitted such an inference to be drawn. The judicial act of the highest court of the

State, in authoritatively construing and enforcing its laws, is the act of the State. *Ex parte Virginia*, 100 U. S. 339; *Scott* v. *McNeal*, 154 U. S. 34; *Chicago, Burlington & Quincy Railroad Company* v. *Chicago*, 166 U. S. 226. The general question, therefore, is, whether such a law violates the Fourteenth Amendment, either by abridging the privileges or immunities of citizens of the United States, or by depriving persons of their life, liberty or property without due process of law. In order to bring themselves within the protection of the Constitution it is incumbent on the defendants to prove two propositions: first, that the exemption from compulsory self-incrimination is guaranteed by the Federal Constitution against impairment by the States; and, second, if it be so guaranteed, that the exemption was in fact impaired in the case at bar. The first proposition naturally presents itself for earlier consideration. If the right here asserted is not a Federal right, that is the end of the case. We have no authority to go further and determine whether the state court has erred in the interpretation and enforcement of its own laws.

The exemption from testimonial compulsion, that is, from disclosure as a witness of evidence against oneself, forced by any form of legal process, is universal in American law, though there may be differences as to its exact scope and limits. At the time of the formation of the Union the principle that no person could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other systems of jurisprudence. It was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions. Five of the original thirteen States (North Carolina, 1776; Pennsylvania, 1776; Virginia, 1776; Massachusetts, 1780; New Hampshire, 1784) had then guarded the principle from legislative or judicial change by including it in constitutions or bills of rights; Maryland had provided in her constitution (1776) that "no man ought to be compelled to give evidence against

himself, in a common court of law, or in any other court, but in such cases as have been usually practiced in this State or may hereafter be directed by the legislature;" and in the remainder of those States there seems to be no doubt that it was recognized by the courts. The privilege was not included in the Federal Constitution as originally adopted, but was placed in one of the ten Amendments which were recommended to the States by the first Congress, and by them adopted. Since then all the States of the Union have, from time to time, with varying form but uniform meaning, included the privilege in their constitutions, except the States of New Jersey and Iowa, and in those States it is held to be part of the existing law. *State* v. *Zdanowicz, supra; State* v. *Height*, 117 Iowa, 650. It is obvious from this short statement that it has been supposed by the States that, so far as the state courts are concerned, the privilege had its origin in the constitutions and laws of the States, and that persons appealing to it must look to the State for their protection. Indeed, since by the unvarying decisions of this court the first ten Amendments of the Federal Constitution are restrictive only of National action, there was nowhere else to look up to the time of the adoption of the Fourteenth Amendment, and the State, at least until then, might give, modify or withhold the privilege at its will. The Fourteenth Amendment withdrew from the States powers theretofore enjoyed by them to an extent not yet fully ascertained, or rather, to speak more accurately, limited those powers and restrained their exercise. There is no doubt of the duty of this court to enforce the limitations and restraints whenever they exist, and there has been no hesitation in the performance of the duty. But whenever a new limitation or restriction is declared it is a matter of grave import, since, to that extent, it diminishes the authority of the State, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and to the Union. The question in the case at bar has been twice before us, and been left undecided, as the cases were disposed of on other grounds. *Adams* v. *New*

York, 192 U. S. 585; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541. The defendants contend, in the first place, that the exemption from self-incrimination is one of the privileges and immunities of citizens of the United States which the Fourteenth Amendment forbids the States to abridge. It is not argued that the defendants are protected by that part of the Fifth Amendment which provides that "no person . . . shall be compelled in any criminal case to be a witness against himself," for it is recognized by counsel that by a long line of decisions the first ten Amendments are not operative on the States. *Barron* v. *Baltimore*, 7 Pet. 243; *Spies* v. *Illinois*, 123 U. S. 131; *Brown* v. *New Jersey*, 175 U. S. 172; *Barrington* v. *Missouri*, 205 U. S. 483. But it is argued that this privilege is one of the fundamental rights of National citizenship, placed under National protection by the Fourteenth Amendment, and it is specifically argued that the "privileges and immunities of citizens of the United States," protected against state action by that Amendment, include those fundamental personal rights which were protected against National action by the first eight Amendments; that this was the intention of the framers of the Fourteenth Amendment, and that this part of it would otherwise have little or no meaning and effect. These arguments are not new to this court and the answer to them is found in its decisions. The meaning of the phrase "privileges and immunities of citizens of the United States," as used in the Fourteenth Amendment, came under early consideration in the *Slaughter-House Cases*, 16 Wall. 36. A statute of Louisiana created a corporation and conferred upon it the exclusive privilege, for a term of years, of establishing and maintaining within a fixed division of the city of New Orleans stock-yards and slaughter-houses. The act provided that others might use these facilities for a prescribed price, forbade the landing for slaughter or the slaughtering of animals elsewhere or otherwise, and established a system of inspection. Those persons who were driven out of independent business by this law denied its validity in suits which came to this

court by writs of error to the Supreme Court of the State which had sustained the act. It was argued, *inter alia*, that the statute abridged the privileges and immunities of the plaintiffs in error as citizens of the United States, and the particular privilege which was alleged to be violated was that of pursuing freely their chosen trade, business or calling. The majority of the court were not content with expressing the opinion that the act did not in fact deprive the plaintiffs in error of their right to exercise their trade (a proposition vigorously disputed by four dissenting justices), which would have disposed of the case, but preferred to rest the decision upon the broad ground that the right asserted in the case was not a privilege or immunity belonging to persons by virtue of their National citizenship, but, if existing at all, belonging to them only by virtue of their state citizenship. The Fourteenth Amendment, it is observed by Mr. Justice Miller, delivering the opinion of the court, removed the doubt whether there could be a citizenship of the United States independent of citizenship of the State, by recognizing or creating and defining the former. "It is quite clear, then," he proceeds to say (p. 74), "that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual." The description of the privileges and immunities of state citizenship, given by Mr. Justice Washington in *Corfield* v. *Coryell*, 4 Wash. C. C. 371, is then quoted, approved and (p. 76) said to include "those rights which are fundamental," to embrace "nearly every civil right for the establishment and protection of which organized government is instituted," and "to be the class of rights which the state governments were created to establish and secure." This part of the opinion then concludes with the holding that the rights relied upon in the case are those which belong to the citizens of States as such and are under the sole care and protection of the state governments. The conclusion is preceded by the important declaration that the civil rights theretofore appertaining to citizenship of the States

and under the protection of the States, were not given the security of National protection by this clause of the Fourteenth Amendment. The exact scope and the momentous consequence of this decision are brought into clear light by the dissenting opinions. The view of Mr. Justice Field, concurred in by Chief Justice Chase and Justices Swayne and Bradley, was that the fundamental rights of citizenship, which by the opinion of the court were held to be rights of state citizenship, protected only by the state government, became, as the result of the Fourteenth Amendment, rights of National citizenship protected by the National Constitution. Said Mr. Justice Field (p. 95):

"The fundamental rights, privileges and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. . . . The Amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by state legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and laws of the United States always controlled any state legislation of that character. But if the Amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence."

In accordance with these principles it is said by the learned justice that the privileges and immunities of state citizenship described by Mr. Justice Washington, and held by the majority of the court still to pertain exclusively to state citizenship and to be protected solely by the state government, have been guaranteed by the Fourteenth Amendment as privileges and immunities of citizens of the United States. And see the concurring opinions of Mr. Justice Field and Mr. Justice Bradley in *Bartemeyer* v. *Iowa*, 18 Wall. 129, and in *Butchers' Union Company* v. *Crescent City Company*, 111 U. S. 746. There can be no doubt, so far as the decision in the *Slaughter-House Cases* has determined the question, that the civil rights sometimes described as fundamental and inalienable, which before the war Amendments were enjoyed by state citizenship and protected by state government, were left untouched by this clause of the Fourteenth Amendment. Criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this court. Undoubtedly, it gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended, and disappointed many others. On the other hand, if the views of the minority had prevailed it is easy to see how far the authority and independence of the States would have been diminished, by subjecting all their legislative and judicial acts to correction by the legislative and review by the judicial branch of the National Government. But we need not now inquire into the merits of the original dispute. This part at least of the *Slaughter-House Cases* has been steadily adhered to by this court, so that it was said of it, in a case where the same clause of the Amendment was under consideration (*Maxwell* v. *Dow*, 176 U. S. 581, 591), "The opinion upon the matters actually involved and maintained by the judgment in the case has never been doubted or overruled by any judgment of this court." The distinction between National and state citizenship and their respective privileges there drawn has come to be firmly established. And so it was held that the right of peaceable assem-

bly for a lawful purpose (it not appearing that the purpose had any reference to the National Government) was not a right secured by the Constitution of the United States, although it was said that the right existed before the adoption of the Constitution of the United States, and that "it is and always has been one of the attributes of citizenship under a free government." *United States* v. *Cruikshank*, 92 U. S. 542, 551. And see *Hodges* v. *United States*, 203 U. S. 1. In each case the *Slaughter-House Cases* were cited by the court, and in the latter case the rights described by Mr. Justice Washington were again treated as rights of state citizenship under state protection. If then it be assumed, without deciding the point, that an exemption from compulsory self-incrimination is what is described as a fundamental right belonging to all who live under a free government, and incapable of impairment by legislation or judicial decision, it is, so far as the States are concerned, a fundamental right inherent in state citizenship, and is a privilege or immunity of that citizenship only. Privileges and immunities of citizens of the United States, on the other hand, are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. *Slaughter-House Cases*, *supra*, p. 79; *In re Kemmler*, 136 U. S. 436, 448; *Duncan* v. *Missouri*, 152 U. S. 377, 382.

Thus among the rights and privileges of National citizenship recognized by this court are the right to pass freely from State to State, *Crandall* v. *Nevada*, 6 Wall. 35; the right to petition Congress for a redress of grievances, *United States* v. *Cruikshank*, *supra;* the right to vote for National officers, *Ex parte Yarbrough*, 110 U. S. 651; *Wiley* v. *Sinkler*, 179 U. S. 58; the right to enter the public lands, *United States* v. *Waddell*, 112 U. S. 76; the right to be protected against violence while in the lawful custody of a United States marshal, *Logan* v. *United States*, 144 U. S. 263; and the right to inform the United States authorities of violation of its laws, *In re Quarles*, 158 U. S. 532.

Most of these cases were indictments against individuals for conspiracies to deprive persons of rights secured by the Constitution of the United States, and met with a different fate in this court from the indictments in *United States* v. *Cruikshank* and *Hodges* v. *United States*, because the rights in the latter cases were rights of state and not of National citizenship. But assuming it to be true that the exemption from self-incrimination is not, as a fundamental right of National citizenship, included in the privileges and immunities of citizens of the United States, counsel insist that, as a right specifically granted or secured by the Federal Constitution, it is included in them. This view is based upon the contention which must now be examined, that the safeguards of personal rights which are enumerated in the first eight Articles of amendment to the Federal Constitution, sometimes called the Federal Bill of Rights, though they were by those Amendments originally secured only against National action, are among the privileges and immunities of citizens of the United States, which this clause of the Fourteenth Amendment protects against state action. This view has been, at different times, expressed by justices of this court (Mr. Justice Field in *O'Niel* v. *Vermont*, 144 U. S. 323, 361; Mr. Justice Harlan in the same case, 370, and in *Maxwell* v. *Dow*, 176 U. S. 606, 617), and was undoubtedly that entertained by some of those who framed the Amendment. It is, however, not profitable to examine the weighty arguments in its favor, for the question is no longer open in this court. The right of trial by jury in civil cases, guaranteed by the Seventh Amendment (*Walker* v. *Sauvinet*, 92 U. S. 90), and the right to bear arms guaranteed by the Second Amendment (*Presser* v. *Illinois*, 116 U. S. 252), have been distinctly held not to be privileges and immunities of citizens of the United States guaranteed by the Fourteenth Amendment against abridgment by the States, and in effect the same decision was made in respect of the guarantee against prosecution, except by indictment of a grand jury, contained in the Fifth Amendment (*Hurtado* v. *California*, 110 U. S. 516),

and in respect of the right to be confronted with witnesses, contained in the Sixth Amendment. *West* v. *Louisiana*, 194 U. S. 258. In *Maxwell* v. *Dow*, *supra*, where the plaintiff in error had been convicted in a state court of a felony upon an information, and by a jury of eight persons, it was held that the indictment, made indispensable by the Fifth Amendment, and the trial by jury guaranteed by the Sixth Amendment, were not privileges and immunities of citizens of the United States, as those words were used in the Fourteenth Amendment. The discussion in that case ought not to be repeated. All the arguments for the other view were considered and answered, the authorities were examined and analyzed, and the decision rested upon the ground that this clause of the Fourteenth Amendment did not forbid the States to abridge the personal rights enumerated in the first eight Amendments, because those rights were not within the meaning of the clause "privileges and immunities of citizens of the United States." If it be possible to render the principle which governed the decision more clear, it is done so by the dissent of Mr. Justice Harlan. We conclude, therefore, that the exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship guaranteed by this clause of the Fourteenth Amendment against abridgment by the States.

The defendants, however, do not stop here. They appeal to another clause of the Fourteenth Amendment, and insist that the self-incrimination, which they allege the instruction to the jury compelled, was a denial of due process of law. This contention requires separate consideration, for it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law. Few

phrases of the law are so elusive of exact apprehension as this. Doubtless the difficulties of ascertaining its connotation have been increased in American jurisprudence, where it has been embodied in constitutions and put to new uses as a limit on legislative power. This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise. There are certain general principles well settled, however, which narrow the field of discussion and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words "due process of law" are equivalent in meaning to the words "law of the land," contained in that chapter of Magna Carta, which provides that "no freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land." *Murray* v. *Hoboken Land Co.*, 18 How. 272; *Davidson* v. *New Orleans*, 96 U. S. 97; *Jones* v. *Robbins*, 8 Gray, 329; Cooley, Const. Lim. (7th ed.), 500; McGehee, Due Process of Law, 16. From the consideration of the meaning of the words in the light of their historical origin this court has drawn the following conclusions:

First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. This test was adopted by the court, speaking through Mr. Justice Curtis, in *Murray* v. *Hoboken Land Co.*, 18 How. 272, 280 (approved in *Hallinger* v. *Davis*, 146 U. S. 314, 320; *Holden* v. *Hardy*, 169 U. S. 366, 390, but see *Lowe* v. *Kansas*, 163 U. S. 81, 85). Of course, the part of the Constitution then

before the court was the Fifth Amendment. If any different meaning of the same words, as they are used in the Fourteenth Amendment, can be conceived, none has yet appeared in judicial decision. "A process of law," said Mr. Justice Matthews, commenting on this statement of Mr. Justice Curtis, "which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country." *Hurtado* v. *California*, 110 U. S. 516, 528.

Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment. That, said Mr. Justice Matthews, in the same case, p. 529, "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement." *Holden* v. *Hardy*, 169 U. S. 366, 388; *Brown* v. *New Jersey*, 175 U. S. 172, 175.

Third. But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government. This idea has been many times expressed in differing words by this court, and it seems well to cite some expressions of it. The words due process of law "were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia* v. *Okely*, 4 Wh. 235, 244 (approved in *Hurtado* v. *California*, 110 U. S. 516, 527; *Leeper* v. *Texas*, 139 U. S. 462, 468; *Scott* v. *McNeal*, 154 U. S. 34, 45). "This court has never attempted to define

with precision the words 'due process of law.' . . . It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." *Holden* v. *Hardy*, 169 U. S. 366, 389. "The same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *In re Kemmler*, 136 U. S. 436, 448. "The limit of the full control which the State has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." *West* v. *Louisiana*, 194 U. S. 258, 263.

The question under consideration may first be tested by the application of these settled doctrines of this court. If the statement of Mr. Justice Curtis, as elucidated in *Hurtado* v. *California*, is to be taken literally, that alone might almost be decisive. For nothing is more certain, in point of historical fact, than that the practice of compulsory self-incrimination in the courts and elsewhere existed for four hundred years after the granting of Magna Carta, continued throughout the reign of Charles I (though then beginning to be seriously questioned), gained at least some foothold among the early colonists of this country, and was not entirely omitted at trials in England until the eighteenth century. Wigmore on Evidence, § 2250 (see for the Colonies, note 108); Hallam's Constitutional History of England, ch. VIII, 2 Widdleton's American ed., 37 (describing the criminal jurisdiction of the Court of Star Chamber); Bentham's Rationale of Judicial Evidence, book IX, ch. III, § IV.

Sir James Fitzjames Stephen, in his studies of the reports of English trials for crime, has thrown much light on the existence of the practice of questioning persons accused of

crime and its gradual decay. He considers, first, a group of trials which occurred between 1554 and 1637. Speaking of the trial before the jury, he says:

"The prisoner, in nearly every instance, asked, as a favor, that he might not be overpowered by the eloquence of counsel denouncing him in a set speech, but, in consideration of the weakness of his memory, might be allowed to answer separately to the different matters which might be alleged against him. This was usually granted, and the result was that the trial became a series of excited altercations between the prisoner and the different counsel opposed to him. Every statement of counsel operated as a question to the prisoner, and indeed they were constantly thrown into the form of questions, the prisoner either admitting or denying or explaining what was alleged against him. The result was that, during the period in question, the examination of the prisoner, which is at present scrupulously and I think even pedantically avoided, was the very essence of the trial, and his answers regulated the production of the evidence; the whole trial, in fact, was a long argument between the prisoner and counsel for the Crown, in which they questioned each other and grappled with each other's arguments with the utmost eagerness and closeness of reasoning." Stephen, 1 Hist. of the Crim. Law, 325.

This description of the questioning of the accused and the meeting of contending arguments finds curious confirmation in the report of the trial, in 1637, of Ann Hutchinson (which resulted in banishment), for holding and encouraging certain theological views which were not approved by the majority of the early Massachusetts rulers. 1 Hart's American History Told by Contemporaries, 382. The trial was presided over and the examination very largely conducted by Governor Winthrop, who had been for some years before his emigration an active lawyer and admitted to the Inner Temple. An examination of the report of this trial will show that he was not aware of any privilege against self-incrimination or conscious of

any duty to respect it. Stephen says of the trials between 1640 and 1660 (*Ib.*, 358): "In some cases the prisoner was questioned, but never to any greater extent than that which it is practically impossible to avoid when a man has to defend himself without counsel. When so questioned the prisoners usually refused to answer." He further says (*Ib.*, 440): "Soon after the Revolution of 1688 the practice of questioning the prisoner died out." But committing magistrates were authorized to take the examination of persons suspected, which if not under oath, was admissible against him on his trial, until by the 11 & 12 Vict., ch. 2, the prisoner was given the option whether he would speak, and warned that what he said might be used against him. But even now there seems to be a very well-recognized and important exception in English law to the rule that no person can be compelled to furnish evidence against himself. A practice in bankruptcy has existed from ancient times, and still exists, which would not be constitutionally possible under our national bankruptcy law or under the insolvency law of any State whose constitution contains the customary prohibition of compulsory self-incrimination. The Bankruptcy Act of 1 James I, ch. 15, § 7 (1603), authorized the commissioners of bankruptcy to compel, by commitment if necessary, the bankrupt to submit to an examination touching his estate and dealings. The provision was continued in the subsequent acts, and in 1820, in *Ex parte Cossens*, Buck, Bkcy. Cases, 531, 540, Lord Eldon, in the course of a discussion of the right to examine a bankrupt, held that he could be compelled to disclose his violations of law in respect of his trade and estate, and, while recognizing the general principle of English law, that no one could be compelled to incriminate himself, said: "I have always understood the proposition to admit of a qualification with respect to the jurisdiction in bankruptcy." The act of 6 Geo. IV, ch. 16, § 36 (1825), authorized the compulsory examination of the bankrupt "touching all matters relating either to his trade, dealings, or estate, or which may tend to disclose any

secret grant, conveyance or concealment of his lands." The act of 12 & 13 Vict., ch. 106, § 117 (1849), contained the same provision. Construing these acts, it was held that the bankrupt must answer, though his answer might furnish evidence of his crime, and even if an indictment were pending against him, and that the evidence thus compelled was admissible on his trial for crime. *Re Heath*, 2 D. & Ch. 214; *Re Smith*, 2 D. & Ch. 230, 235; *Reg.* v. *Scott*, Dearsley & Bell, 47; *Reg.* v. *Cross*, 7 Cox C. C. 226; *Reg.* v. *Widdop*, L. R. 2 C. C. R. 3. The act of 46 & 47 Vict., ch. 52, § 17 (1883), which we understand to be (with some amendment not material here) the present law, passed after the decisions cited, expressly provided that the examination shall be taken in writing and signed by the debtor, "and may thereafter be used in evidence against him." It has since been held that other evidence of his testimony than that written and signed by him may be used. *Reg.* v. *Erdheim* (1896), 2 Q. B. D. 260, and see *Rex* v. *Pike* (1902), 1 K. B. 552.[1] It is to be observed that not until 1883 did Parliament, which has an unlimited legislative power, expressly provide that the evidence compelled from the bankrupt could be used in proof of an indictment against him. The rule had been previously firmly established by judicial decisions upon statutes simply authorizing a compulsory examination. If the rule had been thought to be in conflict with "the law of the land" of Magna Carta, "a sacred text, the nearest approach to an irrepealable, 'fundamental statute' that England has ever had," 1 Pollock & Maitland, 152, it is inconceivable that such a consideration would not have received some attention from counsel and judges. We think it is manifest, from this review of the origin, growth, extent and limits of the exemption from compulsory self-incrimination in the English law, that it is not regarded as a part of the law of the land of Magna Carta or the due process of law, which

[1] In certain offenses, which may be generally described as embezzlements, the evidence compelled from a bankrupt cannot be used against him. 24 & 25 Vict., ch. 96, § 85; 53 & 54 Vict., ch. 71, § 27.

has been deemed an equivalent expression, but, on the contrary, is regarded as separate from and independent of due process. It came into existence not as an essential part of due process, but as a wise and beneficent rule of evidence developed in the course of judicial decision. This is a potent argument when it is remembered that the phrase was borrowed from English law and that to that law we must look at least for its primary meaning.

But without repudiating or questioning the test proposed by Mr. Justice Curtis for the court, or rejecting the inference drawn from English law, we prefer to rest our decision on broader grounds, and inquire whether the exemption from self-incrimination is of such a nature that it must be included in the conception of due process. Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law. In approaching such a question it must not be forgotten that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that in our peculiar dual form of government nothing is more fundamental than the full power of the State to order its own affairs and govern its own people, except so far as the Federal Constitution expressly or by fair implication has withdrawn that power. The power of the people of the States to make and alter their laws at pleasure is the greatest security for liberty and justice, this court has said in *Hurtado* v. *California, supra.* We are not invested with the jurisdiction to pass upon the expediency, wisdom or justice of the laws of the States as declared by their courts, but only to determine their conformity with the Federal Constitution and the paramount laws enacted pursuant to it. Under the guise of interpreting the Constitution we must

take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations. The question before us is the meaning of a constitutional provision which forbids the States to deny to any person due process of law. In the decision of this question we have the authority to take into account only those fundamental rights which are expressed in that provision, not the rights fundamental in citizenship, state or National, for they are secured otherwise, but the rights fundamental in due process, and therefore an essential part of it. We have to consider whether the right is so fundamental in due process that a refusal of the right is a denial of due process. One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law. Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there could be no due process without it? It has already appeared that, prior to the formation of the American Constitutions, in which the exemption from compulsory self-incrimination was specifically secured, separately, independently, and side by side with the requirement of due process, the doctrine was formed, as other doctrines of the law of evidence have been formed, by the course of decision in the courts covering a long period of time. Searching further, we find nothing to show that it was then thought to be other than a just and useful principle of law. None of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it. The privilege was not dreamed of for hundreds of years after Magna Carta (1215), and could not have been implied in the "law of the land" there secured. The Petition of Right (1629), though it insists upon the right secured by Magna Carta to be condemned only by the law of the land, and sets forth by way of grievance divers violations of

it, is silent upon the practice of compulsory self-incrimination, though it was then a matter of common occurrence in all the courts of the realm. The Bill of Rights of the first year of the reign of William and Mary (1689) is likewise silent, though the practice of questioning the prisoner at his trial had not then ceased. The negative argument which arises out of the omission of all reference to any exemption from compulsory self-incrimination in these three great declarations of English liberty (though it is not supposed to amount to a demonstration) is supported by the positive argument that the English Courts and Parliaments, as we have seen, have dealt with the exemption as they would have dealt with any other rule of evidence, apparently without a thought that the question was affected by the law of the land of Magna Carta, or the due process of law which is its equivalent.

We pass by the meager records of the early colonial time, so far as they have come to our attention, as affording light too uncertain for guidance. See Wigmore, § 2250, note 108; 2 Hennings St. at Large, 422 (Va., 1677); 1 Winthrop's History of New England, 47, Provincial Act, 4 W. & M. Ancient Charters, Massachusetts, 214. Though it is worthy of note that neither the declaration of rights of the Stamp Act Congress (1765) nor the declaration of rights of the Continental Congress (1774) nor the ordinance for the government of the Northwestern Territory included the privilege in their enumeration of fundamental rights.

But the history of the incorporation of the privilege in an amendment to the National Constitution is full of significance in this connection. Five States, Delaware, Pennsylvania, New Jersey, Georgia and Connecticut, ratified the Constitution without proposing amendments. Massachusetts then followed with a ratification, accompanied by a recommendation of nine amendments, none of which referred to the privilege; Maryland with a ratification without proposing amendments; South Carolina with a ratification accompanied by a recommendation of four amendments, none of which referred to the privilege,

and New Hampshire with a ratification accompanied by a recommendation of twelve amendments, none of which referred to the privilege. The nine States requisite to put the Constitution in operation ratified it without a suggestion of incorporating this privilege. Virginia was the tenth State to ratify, proposing, by separate resolution, an elaborate Bill of Rights under twenty heads, and in addition twenty amendments to the body of the Constitution. Among the rights enumerated as "essential and inalienable" is that no man "can be compelled to give evidence against himself," and "no freeman ought to be deprived of his life, liberty or property but by the law of the land." New York ratified with a proposal of numerous amendments and a declaration of rights which the convention declared could not be violated and were consistent with the Constitution. One of these rights was that "No person ought to be taken, imprisoned or deprived of his freehold, or be exiled or deprived of his privileges, franchises, life, liberty or property but by due process of law;" and another was that "in all criminal prosecutions the accused . . . should not be compelled to give evidence against himself." North Carolina and Rhode Island were the last to ratify, each proposing a large number of amendments, including the provision that no man "can be compelled to give evidence against himself;" and North Carolina, that "no freeman ought to be . . . deprived of his life, liberty or property but by the law of the land;" and Rhode Island, that "no freeman ought to be . . . deprived of his life, liberty or property but by the trial by jury, or by the law of the land."

Thus it appears that four only of the thirteen original States insisted upon incorporating the privilege in the Constitution, and they separately and simultaneously with the requirement of due process of law, and that three States proposing amendments were silent upon this subject. It is worthy of note that two of these four States did not incorporate the privilege in their own constitutions, where it would have had a much wider field of usefulness, until many years after. New York

in 1821 and Rhode Island in 1842 (its first constitution). This survey does not tend to show that it was then in this country the universal or even general belief that the privilege ranked among the fundamental and inalienable rights of mankind; and what is more important here, it affirmatively shows that the privilege was not conceived to be inherent in due process of law, but on the other hand a right separate, independent and outside of due process. Congress, in submitting the amendments to the several States, treated the two rights as exclusive of each other. Such also has been the view of the States in framing their own constitutions, for in every case, except in New Jersey and Iowa, where the due process clause or its equivalent is included, it has been thought necessary to include separately the privilege clause. Nor have we been referred to any decision of a state court save one (*State* v. *Height*, 117 Iowa, 650), where the exemption has been held to be required by due process of law. The inference is irresistible that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in due process of law, nor an essential part of it. We believe that this opinion is proved to have been correct by every historical test by which the meaning of the phrase can be tried.

The decisions of this court, though they are silent on the precise question before us, ought to be searched to discover if they present any analogies which are helpful in its decision. The essential elements of due process of law, already established by them, are singularly few, though of wide application and deep significance. We are not here concerned with the effect of due process in restraining substantive laws, as, for example, that which forbids the taking of private property for public use without compensation. We need notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, *Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Scott* v. *McNeal*, 154 U. S. 34; *Old Wayne Life Association*

v. *McDonough*, 204 U. S. 8, and that there shall be notice and opportunity for hearing given the parties, *Hovey* v. *Elliott*, 167 U. S. 409; *Roller* v. *Holly*, 176 U. S. 398; and see *Londoner* v. *Denver*, 210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. *Walker* v. *Sauvinet*, 92 U. S. 90; *Re Converse*, 137 U. S. 624; *Caldwell* v. *Texas*, 137 U. S. 692; *Leeper* v. *Texas*, 139 U. S. 462; *Hallinger* v. *Davis*, 146 U. S. 314; *McNulty* v. *California*, 149 U. S. 645; *McKane* v. *Durston*, 153 U. S. 684; *Iowa Central* v. *Iowa*, 160 U. S. 389; *Lowe* v. *Kansas*, 163 U. S. 81; *Allen* v. *Georgia*, 166 U. S. 138; *Hodgson* v. *Vermont*, 168 U. S. 262; *Brown* v. *New Jersey*, 175 U. S. 172; *Bolln* v. *Nebraska*, 176 U. S. 83; *Maxwell* v. *Dow*, 176 U. S. 581; *Simon* v. *Craft*, 182 U. S. 427; *West* v. *Louisiana*, 194 U. S. 258; *Marvin* v. *Trout*, 199 U. S. 212; *Rogers* v. *Peck*, 199 U. S. 425; *Howard* v. *Kentucky*, 200 U. S. 164; *Rawlins* v. *Georgia*, 201 U. S. 638; *Felts* v. *Murphy*, 201 U. S. 123.

Among the most notable of these decisions are those sustaining the denial of jury trial both in civil and criminal cases, the substitution of informations for indictments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. The cases proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. Thus it was said in *Iowa Central* v. *Iowa*, 160 U. S. 393: "But it is clear that the Fourteenth Amendment in no way undertakes to control the

power of the State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted gives reasonable notice and affords fair opportunity to be heard before the issues are decided;" and in *Louisville & Nashville Railroad Company* v. *Schmidt*, 177 U. S. 230, 236: "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend;" and in *Hooker* v. *Los Angeles*, 188 U. S. 314, 318: "The Fourteenth Amendment does not control the power of a State to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard;" and in *Rogers* v. *Peck*, 199 U. S. 435: "Due process of law, guaranteed by the Fourteenth Amendment, does not require the State to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution." It is impossible to reconcile the reasoning of these cases and the rule which governed their decision with the theory that an exemption from compulsory self-incrimination is included in the conception of due process of law. Indeed the reasoning for including indictment by a grand jury and trial by a petit jury in that conception, which has been rejected by this court in *Hurtado* v. *California* and *Maxwell* v. *Dow*, was historically and in principle much stronger. Clearly appreciating this, Mr. Justice Harlan, in his dissent in each of these cases, pointed out that the inexorable logic of the reasoning of the court was to allow the States, so far as the Federal Constitution was concerned, to compel any person to be a witness against himself. In *Missouri* v. *Lewis*, 101 U. S. 22, Mr. Justice Bradley, speaking

for the whole court, said, in effect, that the Fourteenth Amendment would not prevent a State from adopting or continuing the civil law instead of the common law. This *dictum* has been approved and made an essential part of the reasoning of the decision in *Holden* v. *Hardy*, 169 U. S. 387, 389, and *Maxwell* v. *Dow*, 176 U. S. 598. The statement excludes the possibility that the privilege is essential to due process, for it hardly need be said that the interrogation of the accused at his trial is the practice in the civil law.

Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it to-day, and it is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient. See Wigmore, § 2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law. It should, must and will be rigidly observed where it is secured by specific constitutional safeguards, but there is nothing in it which gives it a sanctity above and before constitutions themselves. Much might be said in favor of the view that the privilege was guaranteed against state impairment as a privilege and immunity of National citizenship, but, as has been shown, the decisions of this court have foreclosed that view. There seems to be no reason whatever, however, for straining the meaning of due process of law to include this privilege within it, because, perhaps, we may think it of great value. The States had guarded the privilege

to the satisfaction of their own people up to the adoption of the Fourteenth Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands. They may, if they choose, alter it by legislation, as the people of Maine did when the courts of that State made the same ruling. *State* v. *Bartlett*, 55 Maine, 200; *State* v. *Lawrence*, 57 Maine, 574; *State* v. *Cleaves*, 59 Maine, 298; *State* v. *Banks*, 78 Maine, 490, 492; Rev. Stat. ch. 135, § 19.

We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not intend, however, to lend any countenance to the truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself and not a denial of it. The reasoning by which this view is supported will be found in the cases cited from New Jersey and Maine, and see *Reg.* v. *Rhodes* (1899), 1 Q. B. 77; *Ex parte Kops* (1894), A. C. 650. The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, we think that the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution.

Judgment affirmed.

MR. JUSTICE HARLAN, dissenting.

I feel constrained by a sense of duty to express my non-concurrence in the action of the court in this present case.

Twining and Cornell were indicted for a criminal offense in a New Jersey court and having been found guilty by a jury were sentenced, respectively, to imprisonment for six and

four years. The judgment of conviction was affirmed, first in the Supreme Court of the State, afterwards in the Court of Errors and Appeals. The case was brought here for review and the accused assigned for error that the mode of proceeding during the trial was such as to deny them a right secured by the Constitution of the United States, namely, the right of an accused not to be compelled to testify against himself.

Upon this point the court, in the opinion just delivered, says: "We have assumed, only for the purpose of discussion, that what was done in the case at bar was an infringement of the privilege against self-incrimination." But the court takes care to add immediately: "We do not intend, however, to lend any countenance to the truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself."

It seems to me that the first inquiry on this writ of error should have been whether, upon the record before us, that which was actually done in the trial court amounted, in law, to a violation of that privilege. If the court was not prepared to hold, upon the record before it, that the privilege of immunity from self-incrimination had been actually violated, then, I submit, it ought not to have gone further and held it to be competent for a State, despite the granting of immunity from self-incrimination by the Federal Constitution, to compel one accused of crime to be a witness against himself. Whether a State is forbidden by the Constitution of the United States to violate the principle of immunity from self-incrimination is a question which it is clearly unnecessary to decide now, unless what was, in fact, done at the trial was inconsistent with that immunity. But, although expressly declaring that it will not lend any *countenance* to the *truth* of the *assumption* that the proceedings below were in disregard of the maxim, *Nemo tenetur seipsum accusare*, and without saying whether there was, in fact, any substantial violation of the privilege

of immunity from self-incrimination, the court, for the purpose only of discussion, has entered upon the academic inquiry whether a State may, without violating the Constitution of the United States, compel one accused of crime to be a witness against himself—a question of vast moment, one of such transcendent importance that a court ought not to decide it unless the record before it requires that course to be adopted. It is entirely consistent with the opinion just delivered that the court thinks that what is complained of as having been done at the trial of the accused was not, in law, an infringement of the privilege of immunity from self-incrimination. Yet, as stated, the court, in its wisdom, has forborne to say whether, in its judgment, that privilege was, in fact, violated in the state court, but simply, for the purpose of *discussion*, has proceeded on the *assumption* that the privilege was disregarded at the trial.

As a reason why it takes up first the question of the power of a State, so far as the Federal Constitution is concerned, to compel self-incrimination, the court says that if the right here asserted is not a Federal right that is an end of the case, and it must not go further. It would, I submit, have been more appropriate to say that if no ground whatever existed, under the facts disclosed by the record, to contend that a Federal right had been violated, this court would be without authority to go further and express its opinion on an abstract question relating to the powers of the State under the Constitution.

What I have suggested as to the proper course of procedure in this court is supported by our action in *Shoener* v. *Pennsylvania*, 207 U. S. 188, 195. That was a criminal case, brought here from the Supreme Court of Pennsylvania—the accused, who was convicted, insisting that the proceeding against him in the state court was in violation of the clause of the Federal Constitution declaring that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Upon looking into the record of that case we found that the accused had not been, previously, put in legal jeopardy for

the same offense. We went no further, but dismissed the writ of error, declining to consider the grave constitutional question pressed upon our attention, namely, whether the jeopardy clause of the Federal Constitution operated as a restraint upon the *States* in the execution of their criminal laws. But as a different course has been pursued in this case, I must of necessity consider the sufficiency of the grounds upon which the court bases its present judgment of affirmance.

The court, in its consideration of the relative rights of the United States and of the several States, holds, in this case, that, *without violating the Constitution of the United States*, a State can *compel* a person accused of crime to testify against himself. In my judgment, immunity from self-incrimination is protected against hostile state action, not only by that clause in the Fourteenth Amendment declaring that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," but by the clause, in the same Amendment, "nor shall any State deprive any person of life, liberty or property, without due process of law." No argument is needed to support the proposition that, whether manifested by statute or by the final judgment of a court, state action if liable to the objection that it abridges the privileges or immunities of National citizenship must also be regarded as wanting in the due process of law enjoined by the Fourteenth Amendment, when such state action substantially affects life, liberty or property.

At the time of the adoption of the Fourteenth Amendment immunity from self-incrimination was one of the privileges or immunities belonging to citizens, for the reason that the Fifth Amendment, speaking in the name of the People of the United States, had declared, in terms, that no person "shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law." That Amendment, it was long ago decided, operated as a restriction on the exercise of powers by the United States or by Federal tribunals and agencies, but

did not impose any restraint upon a State or upon a state tribunal or agency. The original Amendments of the Constitution had their origin, as all know, in the belief of many patriotic statesmen in the States then composing the Union, that under the Constitution, as originally submitted to the People for adoption or rejection, the National Government might disregard the fundamental principles of Anglo-American liberty for the maintenance of which our fathers took up arms against the mother country.

What, let me inquire, must then have been regarded as principles that were fundamental in the liberty of the citizen? Every student of English history will agree that long before the adoption of the Constitution of the United States certain principles affecting the life and liberty of the subject had become firmly established in the jurisprudence of England and were deemed vital to the safety of freemen, and that among those principles was the one that no person accused of crime could be compelled to be a witness against himself. It is true that at one time in England the practice of "questioning the prisoner" was enforced in Star Chamber proceedings. But we have the authority of Sir James Fitzjames Stephen, in his History of the Criminal Law of England, for saying that soon after the Revolution of 1688 the practice of questioning the prisoner died out. Vol. 1, p. 440. The liberties of the English people had then been placed on a firmer foundation. Personal liberty was thenceforward jealously guarded. Certain it is, that when the present Government of the United States was established it was the belief of all liberty-loving men in America that real, genuine freedom could not exist in any country that recognized the power of government to *compel* persons accused of crime to be witnesses against themselves. And it is not too much to say that the wise men who laid the foundations of our constitutional government would have stood aghast at the suggestion that immunity from self-incrimination was not among the essential, fundamental principles of English law. An able writer on English and American constitutional

law has recently well said: "When the first Continental Congress of 1774 claimed to be entitled to the benefit, not only of the common law of England, but of such of the English statutes as existed at the time of the colonization, and which they had by experience found to be applicable to their several local and other circumstances, they simply declared the basic principle of English law that English subjects going to a new and uninhabited country carry with them, as their birthright, the laws of England existing when the colonization takes place. . . . English law, public and private, continued in force in all the States that became sovereign in 1776, each State declaring for itself the date from which it would recognize it." Taylor, The Science of Jurisprudence, 436, 437. It is indisputably established that, despite differences in forms of government, the people in the colonies were a unit as to certain leading principles, among which was the principle that the people were entitled to "enjoy the rights and privileges of British-born subjects and the benefit of the common laws of England," 1 Story, § 163, and that (to use the words of the Continental Congress of 1774) "by emigration to the colonies, the people by no means forfeited, surrendered or lost any of those rights, but that they were then, and their descendants are now, entitled to the exercise and enjoyment of them as their local and other circumstances enable them to exercise and enjoy."

Can there be any doubt that at the opening of the War of Independence the people of the colonies claimed as one of their birthrights the privilege of immunity from self-incrimination? This question can be answered in but one way. If at the beginning of the Revolutionary War any lawyer had claimed that one accused of crime could lawfully be compelled to testify against himself, he would have been laughed at by his brethren of the bar, both in England and America. In accordance with this universal view as to the rights of freemen, Virginia, in its Convention of May, 1776—in advance, be it observed, of the Declaration of Independence—made a

Declaration (drawn entirely by the celebrated George Mason) which set forth certain rights as pertaining to the people of that State and to their posterity "as the basis and foundation of government." Among those rights (that famous Declaration distinctly announced) was the right of a person not to be compelled to give evidence against himself. Precisely the same declaration was made in Pennsylvania by its Convention assembled at Philadelphia on the fifteenth of July, 1776. Vermont, by its Convention of 1777, said: "Nor can he [a man accused of crime] be compelled to give evidence against himself." Maryland in 1776 declared that "no man ought to be compelled to give evidence against himself, in a court of criminal law." Massachusetts, in its constitution of 1780, provided that "no subject shall be . . . compelled to accuse, or to furnish evidence against himself." The same provision was made by New Hampshire in its constitution of 1784. And North Carolina as early as 1776 recognized the privilege of immunity from self-incrimination by declaring, in its constitution, that a man "shall not be compelled to give evidence against himself." These explicit declarations in the constitutions of leading colonies, before the submission of the National Constitution to the People for adoption or rejection, caused patriotic men, whose fidelity to American liberty no one doubted, to protest that that instrument was defective in that it furnished no express guaranty against the violation by the National Government of the personal rights that inhered in liberty. Nothing is made clearer by the history of our country than that the Constitution would not have been accepted by the requisite number of States, but for the understanding, on all sides, that it should be promptly amended so as to meet this objection. So, when the first Congress met, there was entire unanimity among statesmen of that day as to the necessity and wisdom of having a National Bill of Rights which would, beyond all question, secure against Federal encroachment all the rights, privileges and immunities which, everywhere and by everybody in America, were then recognized as

fundamental in Anglo-American liberty. Hence the prompt incorporation into the Supreme Law of the Land of the original amendments. By the Fifth Amendment, as already stated, it was expressly declared that no one should be compelled in a criminal case to be a witness against himself. Those Amendments being adopted by the Nation, the People no longer feared that the United States or any Federal agency could exert power that was inconsistent with the fundamental rights recognized in those Amendments. It is to be observed that the Amendments introduced no principle not already familiar to liberty-loving people. They only put in the form of constitutional sanction, as barriers against oppression, the principles which the people of the colonies, with entire unanimity, deemed vital to their safety and freedom.

Still more. At the close of the late Civil War, which had seriously disturbed the foundations of our governmental system, the question arose whether provision should not be made by constitutional amendments to secure against attack by the *States* the rights, privileges and immunities which, by the original Amendments, had been placed beyond the power of the United States or any Federal agency to impair or destroy. Those rights, privileges and immunities had not then, in terms, been guarded by the National Constitution against impairment or destruction by the States, although, before the adoption of the Fourteenth Amendment, every State, without, perhaps, an exception, had, in some form, recognized, as part of its fundamental law, most, if not all, the rights and immunities mentioned in the original Amendments, among them immunity from self-incrimination. This is made clear by the opinion of the court in the present case. The court says: "The exemption from testimonial compulsion, that is, from disclosure as *a witness of evidence against one's self, forced by any form of legal process, is universal in American law*, though there may be a difference as to its exact scope and limits. At the time of the formation of the Union, the principle that no person could be compelled to be a witness against himself

had become embodied in the common law and distinguished it from all other systems of jurisprudence. *It was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions.*" Such was the situation, the court concedes, at the time the Fourteenth Amendment was prepared and adopted. That Amendment declared that all persons born or naturalized in the United States and subject to its jurisdiction are citizens of the United States, "and of the State wherein they reside." Momentous as this declaration was, in its political consequences, it was not deemed sufficient for the complete protection of the essential rights of National citizenship and personal liberty. Although the Nation was restrained by existing constitutional provisions from encroaching upon those rights, yet so far as the Federal Constitution was concerned, the States could at that time have dealt with those rights upon the basis entirely of their own constitution and laws. It was therefore deemed necessary that the Fourteenth Amendment should, in the name of the United States forbid, as it expressly does, any *State* from making or enforcing a law that will abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty or property without due process of law. The privileges and immunities mentioned in the original Amendments, and universally regarded as our heritage of liberty from the common law, were thus secured to every citizen of the United States and placed beyond assault by any government, Federal or state, and due process of law, in all public proceedings affecting life, liberty or property, were enjoined equally upon the Nation and the States.

What, then, were the privileges and immunities of citizens of the United States which the Fourteenth Amendment guarded against encroachment by the States? Whatever they were, that Amendment placed them beyond the power of any State to abridge. And what were the rights of life and liberty which the Amendment protected? Whatever they were, that Amend-

ment guarded them against any hostile state action that was wanting in due process of law.

I will not attempt to enumerate all the privileges and immunities which *at that time* belonged to citizens of the United States. But I confidently assert that among such privileges was the privilege of immunity from self-incrimination which the People of the United States, by adopting the Fifth Amendment, had placed beyond Federal encroachment. Can such a view be deemed unreasonable in the face of the fact, frankly conceded in the opinion of the court, that at common law, as well at the time of the formation of the Union and when the Fourteenth Amendment was adopted, immunity from self-incrimination was a privilege "universal in American law," was everywhere deemed "of great value, a protection to the innocent though a shelter to the guilty and a safeguard against heedless, unfounded or tyrannical prosecutions"? Is it conceivable that a privilege or immunity of such a priceless character, one expressly recognized in the Supreme Law of the Land, one thoroughly interwoven with the history of Anglo-American liberty, was not in the mind of the country when it declared, in the Fourteenth Amendment, that no State shall abridge the privileges or immunities of citizens of the United States? The Fourteenth Amendment would have been disapproved by every State in the Union if it had saved or recognized the right of a State to compel one accused of crime, in its courts, to be a witness against himself. We state the matter in this way because it is common knowledge that the compelling of a person to criminate himself shocks or ought to shock the sense of right and justice of every one who loves liberty. Indeed, this court has not hesitated thus to characterize the Star Chamber method of compelling an accused to be a witness against himself. In *Boyd* v. *United States*, 116 U. S. 616, 631, 633, will be found some weighty observations by Mr. Justice Bradley, delivering the judgment of the court, as to the scope and meaning of the Fourth and Fifth Amendments. The court, speaking by that eminent jurist, said:

"Now it is elementary knowledge, that one cardinal rule of the court of chancery is never to decree a discovery which might *tend to convict the party of a crime*, or to forfeit his property. And any *compulsory* discovery *by extorting the party's oath*, or compelling the production of his private books and papers, *to convict him of crime*, or to forfeit his property, *is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.*" Again: "We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For, the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." These observations were referred to approvingly in *Counselman* v. *Hitchcock*, 142 U. S. 547, 580, 581.

I am of opinion that as immunity from self-incrimination was recognized in the Fifth Amendment of the Constitution and placed beyond violation by any Federal agency, it should be deemed one of the immunities of citizens of the United States which the Fourteenth Amendment in express terms forbids any State from abridging—as much so, for instance, as the right of free speech (Amdt. II), or the exemption from cruel or unusual punishments (Amdt. VIII), or the exemption from being put twice in jeopardy of life or limb for the same offense (Amdt. V), or the exemption from unreasonable searches

and seizures of one's person, house, papers or effects (Amdt. IV). Even if I were anxious or willing to cripple the operation of the Fourteenth Amendment by strained or narrow interpretations, I should feel obliged to hold that when that Amendment was adopted all these last-mentioned exemptions were among the immunities belonging to citizens of the United States, which, after the adoption of the Fourteenth Amendment, no State could impair or destroy. But, as I read the opinion of the court, it will follow from the general principles underlying it, or from the reasoning pursued therein, that the Fourteenth Amendment would be no obstacle whatever in the way of a state law or practice under which, for instance, cruel or unusual punishments (such as the thumb screw, or the rack or burning at the stake) might be inflicted. So of a state law which infringed the right of free speech, or authorized unreasonable searches or seizures of persons, their houses, papers or effects, or a state law under which one accused of crime could be put in jeopardy twice or oftener, at the pleasure of the prosecution, for the same offense.

It is my opinion also that the right to immunity from self-incrimination cannot be taken away by any State consistently with the clause of the Fourteenth Amendment that relates to the deprivation by the State of life or liberty without due process of law. This view is supported by what Mr. Justice Miller said for the court in *Davidson* v. *New Orleans*, 96 U. S. 97, 101, 102. That great judge, delivering the opinion in that case, said: "The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment, in the year 1866." After observing that the equivalent of the phrase "due process of law," according to Lord Coke, is found in the words "law of the land," in the Great Charter, in connection with the guarantees of the rights of the subject

against the oppression of the crown, the court said: "In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the States as further limitations upon the power of the Federal Government, it is found in the Fifth, in connection *with other guarantees of personal rights of the same character.*" *Among these guarantees* this court distinctly said was protection against being twice tried for the same offense, and protection "*against the accused being compelled, in a criminal case, to testify against himself.*" Again, said the court: "It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no State shall deprive any person of life, liberty, or property without due process of law,' can a State make any thing due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is affected under the forms of state legislation."

I cannot support any judgment declaring that immunity from self-incrimination is not one of the privileges or immunities of National citizenship, nor a part of the liberty guaranteed by the Fourteenth Amendment against hostile state action. The declaration of the court, in the opinion just delivered, that immunity from self-incrimination is of great value, a protection to the innocent and a safeguard against unfounded and tyrannical prosecutions, meets my cordial

approval. And the court having heretofore, upon the fullest consideration, declared that the compelling of a citizen of the United States, charged with crime, to be a witness against himself, was a rule abhorrent to the instincts of Americans, was in violation of universal American law, was contrary to the principles of free government and a weapon of despotic power which could not abide the pure atmosphere of political liberty and personal freedom, I cannot agree that a State may make that rule a part of its law and binding on citizens, despite the Constitution of the United States. No former decision of this court requires that we should now so interpret the Constitution.

STATE OF WASHINGTON *v.* STATE OF OREGON.

ORIGINAL, IN EQUITY.

No. 3. Argued January 8, 9, 1908.—Decided November 16, 1908.

Congress cannot change the boundary of a State without its consent.

In the absence of specific statement to that effect, the middle of a river, or the middle of the main channel of a river, is not necessarily the exact line when such river separates two States, and where the boundary is properly established in the center of a particular channel, it so remains, subject to changes by accretion, notwithstanding another channel may become more important and be regarded as the main channel of the river.

The fact that the south channel of the Columbia River has become more important than the north channel has not changed the boundary between the States of Oregon and Washington as fixed by the act of February 14, 1859, c. 33, 11 Stat. 383, admitting Oregon to the Union; and that boundary at Sand Island is the center of the north channel of the Columbia River, subject only to changes by accretion.

The boundary line between Oregon and Washington established as indicated on maps annexed to the opinion.

In boundary cases where both parties are alike interested the costs are equally divided between them.

THIS is an original suit, commenced in this court on Feb-

ruary 26, 1906, by the State of Washington against the State of Oregon, to determine their boundary line. Pleadings were filed, testimony taken before a commissioner by consent of the parties, and on these pleadings and proofs the case has been argued and submitted. The maps or charts accompanying this opinion have been prepared from exhibits filed by the parties, and will aid to an understanding of the case.

A brief chronological statement is that on August 14, 1848, the Territory of Oregon was established, c. 177, 9 Stat. 323, and on March 2, 1853, the Territory of Washington, including all that portion of Oregon Territory lying north of the middle of the main channel of the Columbia River. C. 90, 10 Stat. 172. On February 14, 1859, Oregon was admitted into the Union. The boundary, so far as is important in this controversy is as follows. C. 33, 11 Stat. 383:

"Beginning one marine league at sea due west from the point where the forty-second parallel of north latitude intersects the same; thence northerly, at the same distance from the line of the coast, lying west and opposite the State, including all islands within the jurisdiction of the United States, to a point due west and opposite the middle of the north ship channel of the Columbia River; thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel thereof, to a point near Fort Walla Walla."

On February 22, 1889, an act was passed providing for the admission of Washington. C. 180, 25 Stat. 676. On November 11, 1889, the President, as authorized by § 8, of the statute last referred to, issued his proclamation, declaring Washington duly admitted into the Union. 26 Stat. 1552. The material part of the boundary described in the constitution of that State is—

"Beginning at a point in the Pacific Ocean one marine league due west of and opposite the middle of the mouth of the north ship channel of the Columbia River, thence running easterly to and up the middle channel of said river and where

it is divided by islands up the middle of the widest channel thereof to where the forty-sixth parallel of north latitude crosses said river, near the mouth of the Walla Walla River." Art. XXIV, § 1; Hill's Stats. & Codes of Washington, vol. 2, p. 851.

Mr. E. C. Macdonald, with whom *Mr. John D. Atkinson,* Attorney General of the State of Washington, *Mr. Samuel H. Piles, Mr. A. J. Falknor* and *Mr. J. B. Alexander* were on the brief, for complainant:

The true boundary line is the varying center or middle of that channel of the river which is best suited and ordinarily used for the purposes of navigation. This proposition is conclusively sustained by decisions of this court. *Nebraska* v. *Iowa,* 143 U. S. 359, where the following cases and works are cited: *New Orleans* v. *United States,* 10 Pet. 662, 717; *Jones* v. *Soulard,* 24 How. 41; *Banks* v. *Ogden,* 2 Wall. 57; *Saulet* v. *Shepherd,* 4 Wall. 502; *St. Clair* v. *Lovingston,* 23 Wall. 46; *Jeffries* v. *East Omaha Land Co.,* 134 U. S. 178; Angell on Water Courses; Gould on Waters, § 159; *Trustees* v. *Dickinson,* 9 Cush. 544; *Buttenuth* v. *St. Louis Bridge Co.,* 123 Illinois, 535; *Hagan* v. *Campbell,* 8 Porter (Alabama), 9; *Murray* v. *Sermon,* 1 Hawks (Nor. Car.), 56. When a navigable river constitutes the boundary between two independent States, the line, defining the point at which the jurisdiction of the two separates, is well established to be the middle of the main channel of the stream. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is therefore laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State will on its side exercise jurisdiction. *Iowa* v. *Illinois,* 147 U. S. 1.

The same doctrine was announced and followed in *Missouri* v. *Nebraska,* 196 U. S. 23. See also *Louisiana* v. *Mississippi,* 202 U. S. 1 (p. 49).

Mr. A. M. Crawford, Attorney General of the State of Oregon, with whom *Mr. I. H. Van Winkle, Mr. Harrison Allen, Mr. C. W. Fulton* and *Mr. A. M. Smith* were on the brief, for defendant:

Assuming our position, on the facts, as to the position of the line as established by the act admitting Oregon into the Union, to be correct, it follows that the line must remain the same unless it has been changed by consent of the State of Oregon, or under the doctrine of accretion as defined by this court.

It was held in the case of *Indiana* v. *Kentucky,* 136 U. S. 479, in substance, that after the boundaries of a State are established by act of Congress and the State admitted as a member of the Union of States, such boundary cannot be changed without the consent of such State, except by accretion as before stated. The decision of the court is stated in the syllabus as follows:

"The dominion and jurisdiction of a State, bounded by a river, continue as they existed at the time when it was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river."

The above doctrine is sustained by the following cases: *Missouri* v. *Kentucky,* 11 Wall. 401; *Nebraska* v. *Iowa,* 143 U. S. 359, and cases cited.

The doctrine of the *Nebraska-Iowa case* is approved in *Shively* v. *Bowlby,* 152 U. S. 36.

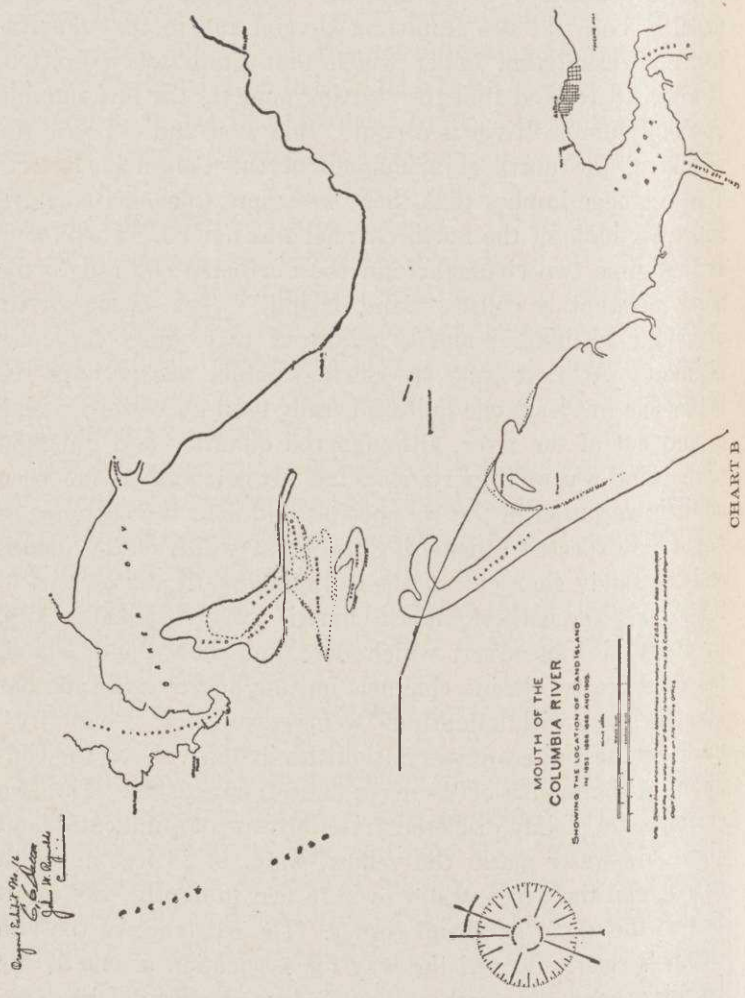
The same doctrine is supported by the following authorities: Bishop's New Criminal Law, § 150; *Coulthard* v. *Stevens,* 35 American State Reports, 304, and note 307; Opinions of Attorney General (U. S.), vol. 8, p. 175; *Hagan* v. *Campbell,* 33 Am. Dec. 267, and note 276; *Mulry* v. *Norton,* 100 N. Y. 424, 429; *S. C.,* 53 Am. Rep. 206, and note 215.

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

The northern boundary of the State of Oregon was estab-

lished prior to that of the State of Washington, and it is not within the power of the National Government to change that boundary without the consent of Oregon. Nor, indeed, was there any attempt to change it. The same description is found in both the act admitting Oregon and in the constitution of Washington, under which that State was admitted. It will be perceived that the starting point in the line running up the Columbia River is a point "due west and opposite the middle of the north ship channel of the Columbia River." This language implies that there was more than one channel, and the middle of the north channel was named. There were at that time two channels, and the northerly one ran to the north of what is called "Sand Island." This is shown by abundant testimony, and is admitted by counsel for complainant. At that time the north channel was perhaps the better one—at least one quite generally used by vessels passing in and out of the river, although the quantity and direction of the wind was an important factor. It is true there has been no little variation in the channels at and near the entrance as might be expected considering the great width of the mouth and the sandy character of the soil underneath a large part of the river. The earliest known chart is a sketch made in 1792 by Admiral Vancouver, which does not show Sand Island, but discloses two inside channels uniting and crossing the bar into the ocean with a depth of twenty-seven feet. Chart "A," made by the United States authorities in 1851, shows the condition of the mouth of the river as it then existed. The two channels are plainly disclosed. The brown color indicates land above low-water mark; the yellow, water of 18 feet in depth or less, and the white, water over 18 feet in depth. See notation at the upper left hand corner. The existence of the two channels clearly opened the way for a selection of one as the boundary, and the north one was adopted. Sand Island appears as a small body of land surrounded by shoal water. Another chart was prepared in 1854, which of all the charts and maps is the nearest in point of time to the admission of

Oregon. On this, as in Chart "A," Sand Island is shown, and the two channels, one north and the other south of the island. It is called an island, but it was little more than a sand bar.



By the action of the waters it had been gradually moving northward, but the general configuration of the mouth of the river was unchanged. Since then the movement of Sand

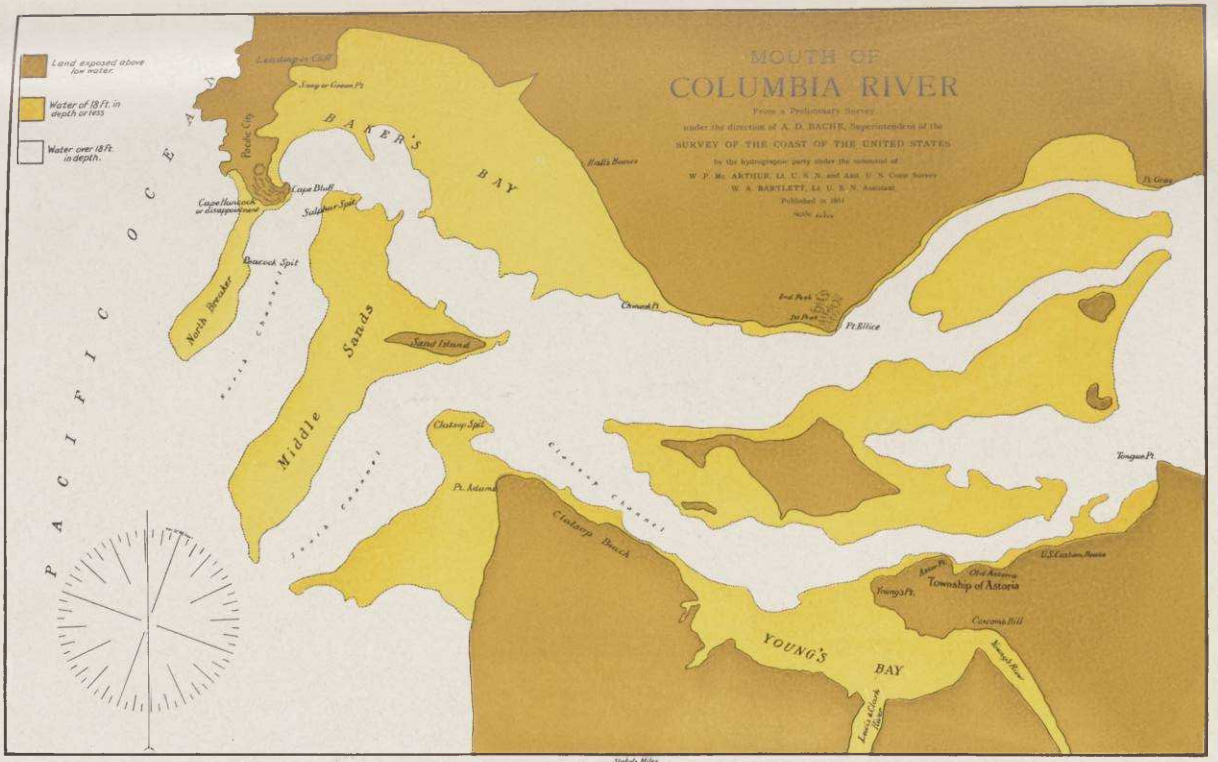


CHART A

OREGON

1851

Island has continued, the north channel has been growing more shallow, and the southern channel has become the one most used. The movements of Sand Island and the changes in the entrance are shown in Chart "B."

Looking only at the description of the boundary in the act one might think that there were three channels, north, south and middle, but it is quite apparent, from the testimony that there were but the two. The meaning would be more clear if the language was "easterly to and up the middle of said channel," and that that was the intent of Congress is, we think, obvious; first, because there were only two channels; second, to locate a starting point on the west line in the ocean opposite the middle of one channel and thence run the boundary up the middle of another channel would hardly be expected. If the middle of the northern channel was intended to be the dividing line between Oregon and the territory north, it would be natural to fix the point of starting in the ocean west of the center of that channel. Further, that the channel north of Sand Island was the one intended as the boundary between Oregon and the territory north of it is made more clear by this fact:

On October 21, 1864, Oregon passed an act granting to the United States—

"all right and interest of the State of Oregon, in and to the land in front of Fort Stevens and Point Adams, situate in this State, and subject to overflow between high and low tide, and also to Sand Island, situate at the mouth of the Columbia River in this State; the said island being subject to overflow between high and low tide.

"SEC. 2. The Governor of this State shall cause two copies of this act to be prepared and certified under the seal of this State, and forward one of such copies to the Secretary of War of the United States, and the other of such copies to the commanding officer of this district of the military department of the Pacific Coast." Special Laws of Oregon, 1864, p. 72.

Now this act was passed shortly after the admission of Oregon and indicates the understanding both of the State of Oregon

and the United States that the boundary was through the channel north of Sand Island. It is a recognition of Oregon's title to that island and an acceptance by the United States of a grant from that State.

While all this is not in terms admitted by counsel for complainant, yet the burden of their principal contention impliedly does so, for they say:

"The proof will disclose the fact that there have been various channels in the Columbia River which have gradually, imperceptibly and continuously changed and shifted. There has been at no time such a change as to come within the definition of avulsion. The contention of the complainant is that the true boundary line is the varying center or middle of that channel of the river which is best constituted and ordinarily used for the purposes of navigation. . . . The line claimed by the defendant commences at a point which is alleged to have been the middle of the North Ship channel of the river as it existed in 1859 (the year in which Oregon was admitted into the Union), and follows certain channels supposed to exist in that year throughout the portion of the river in controversy."

In support of their contention counsel refer to: *Nebraska* v. *Iowa*, 143 U. S. 359; *Iowa* v. *Illinois*, 147 U. S. 1; *Louisiana* v. *Mississippi*, 202 U. S. 1. To these may be added *Missouri* v. *Nebraska*, 196 U. S. 23, 35.

But in these cases the boundary named was "the middle of the main channel of the river," or "the middle of the river," and it was upon such a description that it was held that in the absence of avulsion the boundary was the varying center of the channel. But there is no fixed rule making that the boundary between States bordering on a river. Thus, the grant of Virginia, of all right, title and claim which the said commonwealth had to the territory northwest of the River Ohio, was held to place the boundary on the north bank of the river. *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, in which the subject is discussed by Mr. Chief Justice Marshall. See also *Howard* v. *Ingersoll*, 13 How. 381. Now, if Congress in establishing the bound-

ary between Washington and Oregon had simply named the middle of the river, or the center of the channel, doubtless it would be ruled that the center of the main channel, varying as it might from year to year through the processes of accretion, was the boundary between the two States. That Congress had the propriety of such a boundary in mind is suggested by the terms of the act establishing the territorial government of Washington, passed March 2, 1853, c. 90, 10 Stat. 172, in which "the middle of the main channel of the Columbia River" was named as the boundary. However, as we have seen, when Congress came to provide for the admission of Oregon (doubtless from being more accurately advised as to the condition of the channels of the Columbia River) it provided that the boundary should be the middle of the north channel. The courts have no power to change the boundary thus prescribed and establish it at the middle of some other channel. That remains the boundary, although some other channel may in the course of time become so far superior as to be practically the only channel for vessels going in and out of the river. It is true the middle of the north ship channel may vary through the processes of accretion. It may narrow in width, may become more shallow, and yet the middle of that channel will remain the boundary. This is but enforcing the idea which controlled the decisions in the prior cases referred to, the difference springing out of the fact that here there were two instead of but one substantial channel. Aside from the fact that any other rule would be ignoring the action of the Government in prescribing the boundary—the intention in respect to which was in effect confirmed by the conveyance from Oregon to the United States of Sand Island and adjoining lands—there would be this practical difficulty. At the time of the admission of Oregon both the north and south channels were freely used. The depth of water in each was nearly the same, and the use of either channel depended largely upon the prevailing wind, so that it would be hard to say which was the most important, so surpassing in importance the other as to be properly called the main channel.

Concede that to-day, owing to the gradual changes through accretion, the north channel has become much less important, and seldom, if ever, used by vessels of the largest size, yet when did the condition of the two channels change so far as to justify transferring the boundary to the south channel, on the ground that it had become the main channel? When and upon what conditions could it be said that grants of land or of fishery rights made by the one State ceased to be valid because they had passed within the jurisdiction of the other? Has the United States lost title to Sand Island by reason of the change in the main channel? And if by accretion the north should again become the main channel, would the boundary revert to the center of that channel? In other words, does the boundary move from one channel to the other, according to which is, for the time being, the most important, the one most generally used?

These considerations lead to the conclusion that when, in a great river like the Columbia, there are two substantial channels, and the proper authorities have named the center of one channel as the boundary between the States bordering on that river, the boundary, as thus prescribed, remains the boundary, subject to the changes in it which come by accretion, and is not moved to the other channel, although the latter in the course of years becomes the most important and properly called the main channel of the river.

The testimony fails to show anything calling for consideration in respect to the last clause in the quotation from the boundary of Oregon. The channel is not divided by islands.

Our conclusion, therefore, is in favor of the State of Oregon, and that the boundary between the two States is the center of the north channel, changed only as it may be from time to time through the processes of accretion.

This is one of those cases in which the parties to the suit are alike interested, and, according to the usual rule, the costs will be divided equally between them.

HONOLULU RAPID TRANSIT AND LAND COMPANY *v.* WILDER,[1] ASSESSOR.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 23. Argued October 28, 29, 1908.—Decided November 16, 1908.

In determining rights and liabilities, local legislation under authority of Congress previously granted is treated as emanating from the local legislature and not from Congress.

A general ratification by Congress of charters does not amount to making the charters so ratified acts of Congress.

A ratification of legislation between certain specified dates does not exclude legislation enacted on those dates. *Taylor* v. *Brown*, 147 U. S. 640.

A provision in a charter that certain payments shall be made out of income and that, after dividends up to a specified percentage have been paid, the balance shall be divided between the government and the stockholders, does not, in the absence of any exemption in express terms, exempt the corporation from taxation on its franchise.

18 Hawaii, 668, affirmed.

THE facts are stated in the opinion.

Mr. David L. Withington and *Mr. Aldis B. Browne*, with whom *Mr. Alexander Britton* and *Mr. William R. Castle* were on the brief, for appellant:

The franchise, ratified by Congress and approved by the President, is an irrevocable contract, providing in definite terms for the division of the revenue of the company between the Territory and the company, and fixing the charges deductible from the income, which charges include taxes on the physical property, but not on the franchise.

The term railway as used in the act is defined to be the physical structure and not an intangible right, and hence the

[1] Substituted for Holt, assessor.

"completed and equipped portions liable to taxation" are portions of the physical structure; so that the taxation to which the corporation becomes liable is a tax on the physical structure of the road, thus creating a charge on the income.

Taxing the completed and equipped portions as fast as they are completed and equipped is consistent with the taxation of the real and personal property "separately as to each item for its full cash value;" it is inconsistent with the contention that the aggregate value in operation as an enterprise for profit, which would include the franchise, can be so assessed. Nor can the franchise itself be assessed separately; it is not a part of the completed and equipped portion of the road, and although the word "franchise" is to be found in § 1215, which describes the character of personal property to be taxed, it had long been held to be the policy of Hawaii to tax only tangible property. *McBryde* v. *Kala*, 6 Hawaii, 529; *Brewer* v. *Luce*, 6 Hawaii, 554.

Moreover, it would be double taxation and unconstitutional. *Kekaha Sugar Co.* v. *Hawaiian Government*, 8 Hawaii, 293.

The franchise was one in which the right to share with the Territory was the only beneficial right which the corporation enjoyed.

Where the property itself was taxed which comprised the enterprise, to tax the right to share is double taxation. *Kekaha Sugar Co.* v. *Hawaiian Government*, *ubi supra*; *Alexander* v. *Fornander*, 6 Hawaii, 322; *Haiku Sugar Co.* v. *Fornander*, 6 Hawaii, 532; *Castle* v. *Luce*, 4 Hawaii, 63.

While an exemption from taxation must be plainly and unmistakably granted, since in grants from the public nothing passes by implication, the exemption need not be in any particular words, is not implied but is expressed if, from all the language of the grant, there is no doubt of the contract. *Gordon* v. *The Appeal Tax Court*, 3 How. 132, 145; *New York* v. *State Board of Tax Commissioners*, 199 U. S. 1; *Piqua Branch of the State Bank* v. *Knoop*, 16 How. 369; *People of New York* v. *Commissioner of Taxes*, 4 Wall. 244; *Jefferson Branch Bank*

v. *Skelly*, 1 Black, 436; *Farrington* v. *Tennessee*, 95 U. S. 679; *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307; *Memphis Gas Light Co.* v. *Taxing District*, 109 U. S. 398; *New York, L. E. & W. R. Co.* v. *Pennsylvania*, 153 U. S. 628.

The power of amendment of charters may be exercised where it will not defeat or substantially impair the object of the grant or any rights which have vested under it. But the alterations must be reasonable, must be made in good faith and be consistent with the scope and object of the act of incorporation. *Holyoke Water Power Co.* v. *Lyman*, 15 Wall. 500; *Fairhaven & W. R. Co.* v. *New Haven*, 203 U. S. 379; *Los Angeles* v. *City Water Co.*, 177 U. S. 558; *S. C.*, 124 California, 368; 61 California, 65.

The franchise of the company, granted by the Republic of Hawaii, July 7, 1898, ratified by Congress and approved by the President, is not assessable.

Whether or not, without Congressional action, the franchise granted by the Republic of Hawaii on the very day of the passage of the resolution of annexation would have been perfect if accepted by the grantees; until accepted, Congress had the power to take away that right, and the approval by Congress and its ratification in the organic act is a part of the contract between the parties. *California* v. *Central Pacific R. R. Co.*, 127 U. S. 1.

The State has power to levy property tax on a corporation holding a Federal franchise, but has no power to subject its operations to taxation. *Thomson* v. *Pacific Railroad*, 9 Wall. 579; *Union Pacific R. R. Co.* v. *Peniston*, 18 Wall. 5.

And it has been held that where there are two franchises, a State may tax its own franchise but not that of the United States. *Central Pacific R. Co.* v. *California*, 162 U. S. 91; *Southern Pacific Railway Co.* v. *California*, 162 U. S. 167.

A similar line of decisions has been followed in reference to telegraph companies which have accepted the provisions of the act of Congress of July 24, 1866. *Western Union Tel. Co.* v. *Attorney General*, 125 U. S. 530; *Attorney General* v. *Western*

Union Tel. Co., 141 U. S. 40; *Western Union Tel. Co.* v. *Missouri*, 190 U. S. 412; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Leloup* v. *Port of Mobile*, 127 U. S. 640.

Mr. Charles R. Hemenway, Attorney General of the Territory of Hawaii, with whom *Mr. Mason F. Prosser* was on the brief, for appellee:

The franchise of appellant is not a Federal franchise, and even if it were it would be subject to local taxation. The approval by Congress of the act of the legislature of the Republic of Hawaii, amounts to no more than a prior authorization. It was a ratification only of an act of the Republic of Hawaii and was not intended to, nor did it, confer a special grant from Congress itself. *Miners' Bank* v. *State of Iowa*, 12 How. 1; *Lyons* v. *Wood*, 153 U. S. 661; *United States* v. *Church*, 5 Utah, 373 (15 Pac. Rep. 479); *Atl. & Pac. Ry.* v. *Lesueur*, 1 L. R. A. 244.

The terms of the franchise itself grant no immunity from taxation, nor is it exempt under the general laws of Hawaii. Revised Laws of Hawaii, §§ 851, 1212, 1215, 1216.

Within the meaning of the sections above quoted the franchise of appellant was properly considered a part of its property and taxable in connection with the other property of appellant as combined property forming the basis of an enterprise for profit, since the franchise, of necessity, was subject to all general laws in force at the time it was granted, unless a contrary intent is clearly expressed. *Theological Seminary* v. *Illinois*, 188 U. S. 662, 672; *New Orleans City & Lake Ry.* v. *New Orleans*, 143 U. S. 192; *Memphis Gaslight Co.* v. *Shelby Co.*, 109 U. S. 398; *Chicago, B. & K. C. R. R.* v. *Guffey*, 120 U. S. 569; *Atl. & Pac. Ry. Co.* v. *Lesueur*, 1 L. R. A. 244; *Vicksburg Ry. Co.* v. *Dennis*, 116 U. S. 665, 668; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146; *Ford* v. *Delta & Pine Land Co.*, 164 U. S. 662, 666; *Hoge* v. *R. R. Co.*, 99 U. S. 348, 355.

As a general rule the franchise, capital stock, business and profits of all corporations are liable to taxation in the place where they do business and by the State which creates them,

and any exemption from such taxation must be given in clear terms. *Central Pac. Ry.* v. *California*, 162 U. S. 91, 126; *State Ry. Tax Cases*, 92 U. S. 575, 603; *State Freight Tax Cases*, 15 Wall. 232; *Society for Savings* v. *Coite*, 6 Wall. 607; *Thomson* v. *Pac. Railroad Co.*, 9 Wall. 579, 590; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150; *Atl. & Pac. R. R. Co.* v. *Lesueur*, *supra*.

Under the provisions of the act to provide a government for the Territory of Hawaii, 31 Stat. 141, as is also the case under the organic acts of the other Territories, the power of taxation is general and restricted only by the Constitution and laws of the United States. *Peacock* v. *Pratt*, 121 Fed. Rep. 772, 776; *Talbott* v. *Bd. of Commissioners*, 139 U. S. 438; *Atl. & Pac. Ry.* v. *Lesueur*, 1 L. R. A. 244; *Silver Bow Mining Co.* v. *Davis*, 6 Montana, 306.

The tax assessed and in controversy here is not upon the franchise of appellant, as such, but upon the combined property of appellant as an enterprise for profit.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a judgment affirming a decision of the Tax Appeal Court and sustaining a tax upon the appellant. The appellant objected to the tax on the grounds that its franchise was derived from an act of Congress and therefore was exempt from taxation, and that its charter also exempted it in terms. These objections, taken below, were argued at length before us.

The charter was granted by the Republic of Hawaii on July 7, 1898, the day on which Congress passed the resolution of annexation, and doubts having been felt as to the right of the Hawaiian legislature to grant a charter at that time (see 22 Op. Att. Gen. 574; *Ibid.*, 627), the organic act declared that "Subject to the approval of the President . . . all franchises granted by the Hawaiian government in conformity with the laws of Hawaii, between the seventh day of July,

eighteen hundred and ninety-eight, and the twenty-eighth day of September, eighteen hundred and ninety-nine, are hereby ratified and confirmed." Act of April 30, 1900, c. 339, § 73, 31 Stat. 141, 154. It is contended that the effect of this section was to make the charter an act of Congress by adoption. In our opinion this is a mistake. There is no doubt that local legislation under the authority of Congress previously granted is treated as emanating from its immediate, not from its remote source, in determining rights and liabilities. *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353, 354. See *Matter of Moran*, 203 U. S. 96, 104. A general ratification like that of existing laws in § 6 would have no greater effect. We discover nothing in the words just quoted from § 73 to indicate that Congress had this particular franchise in view, or meant to adopt it and give it a superior source, or to do anything more than to supply the power that by accident might have been wanting. See *Miners' Bank* v. *Iowa*, 12 How. 1, 8; *Murphy* v. *Utter*, 186 U. S. 95, 106. We need not pursue further this part of the objection to the tax, except to remark that, in view of the obvious purpose, it properly was admitted that July 7 was not excluded from the ratification by the word "between." See *Taylor* v. *Brown*, 147 U. S. 640. For it also was admitted at the argument before us that if there was no exemption in the charter the appellant had no case, and we are of opinion that there was none.

The tax in question is a property tax, and the effect of the decision is to uphold a valuation of the whole property as a going concern, and as more than a mere congeries of items; or in other words, an addition of half a million dollars to the appellant's valuation, for the franchise of the company. The appellant says that this was contrary to § 17 of its charter, construed in the light of the scheme disclosed. That section provides that "the following charges shall be lawful upon the income of said railway: 1st. The expense of operating, repairs, renewals, extensions, interest, and every other cost and charge properly or necessarily connected with the maintenance and

operation of said railway. 2nd. Dividends may be paid to the stockholders not to exceed eight per cent. on the par value of the stock issued. 3d. A sinking fund may be created for the redemption of any bond which may be issued or other record debt and the capital upon the expiration of the franchise. Provided [that the amount is limited as set forth]. 4th. The excess of income shall be divided equally between the Government of the Republic of Hawaii and the stockholders of said corporation." It is said that here is a complete plan for the division of the income, declaring what charges shall be lawful, and that only such taxes are allowed as fall under the words, "other charge properly connected with the maintenance and operation of the road."

The taxes authorized as such charges are thought to be limited to a license tax not to exceed ten dollars on each passenger car used, imposed by § 31, and to the provisions of § 30. The latter section exempts from duty material produced in and imported from the United States, and goes on to say that "the property of said association and others shall not be liable to internal taxation while said railway is under construction, provided that as fast as completed and equipped the completed and equipped portion shall become liable to such taxation." It is said that when the charter was granted real and personal property were assessed for taxation "separately as to each item thereof for its full cash value," with provisos deemed not to be material, Rev. L. Hawaii, 1905, § 1216, that § 30 contemplates a taxation of this kind, and that a taxation of the franchise would be double taxation and was excluded. It is true that one of the provisos in § 1216 taxes going concerns as wholes, but § 30 is thought to show a choice of the other method. It is contended that the charter by fair implication contracts against any other charges, especially in view of the ultimate division of the excess of income, after the payment of eight per cent dividend. If the dividends do not exceed eight per cent the tax will fall wholly on the stockholders, contrary to the fair understanding of what the charter holds out.

The argument of which we have given a summary outline is far from establishing such a clear renunciation of the right to tax as the cases require. *Metropolitan Street Ry. Co.* v. *New York State Board of Tax Commissioners*, 199 U. S. 1. It appears to us very questionable whether the phrase, "charges properly or necessarily connected with the maintenance and operation of the road," has any reference to taxes. It points in another direction. Taxes are left unmentioned in § 17, and the liability to them is assumed. The language of § 30 does not import the imposition of a tax that otherwise would be excluded. It takes the liability for granted, and relieves the company from the burden for a certain time. The drift of the section cannot be made clearer by lengthy restatement. It starts with exoneration and merely saves the right to tax the portions completed by a proviso which, in this case, fulfills the proper function of that much abused term. If any doubt were raised by § 17, which does not seem to us to be the case, it would be relieved by this further section of the same act. Nothing else seems to us to need mention in the present posture of the case.

Judgment affirmed.

HONOLULU RAPID TRANSIT AND LAND COMPANY *v.* WILDER,[1] ASSESSOR.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 22. Argued October 28, 29, 1908.—Decided November 16, 1908.

Where the record does not show that any Federal question was raised or suggested before the assignment of error in this court, a judgment of the Supreme Court of Hawaii cannot be reviewed by this court under § 86 of the act of April 30, 1900, c. 339, 31 Stat. 141.

The claim that a charter granted by the Republic of Hawaii has become a statute of the United States because ratified by act of Con-

[1] Substituted for Holt, assessor.

gress, must be asserted before assignment of error in this court in order to give this court jurisdiction to review on the ground that the construction of, or a right claimed under, a law of the United States is involved.

Writ of error to review 18 Hawaii, 15, dismissed.

THE facts are stated in the opinion.

Mr. David L. Withington and *Mr. Aldis B. Browne,* with whom *Mr. William R. Castle,* was on the brief, for plaintiff in error.

Mr. Charles R. Hemenway, Attorney General of the Territory of Hawaii, with whom *Mr. Mason F. Prosser,* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case is intended to bring up a question of deductions from gross income in assessing the income tax of the appellant, as well as that of the liability of the plaintiff in error to the tax. The liability to taxes not mentioned in the charter has been disposed of by the preceding case. As to the former question, the plaintiff in error says that it has no net income liable to taxation. But the whole tax assessed was $588.20, and therefore the case cannot be brought here under the act of March 3, 1905, c. 1465, § 3, 33 Stat. 1035. On the other hand, the record does not show that any Federal question was raised or suggested before the assignment of error in this court, and therefore the plaintiff in error has no standing under the act of April 30, 1900, c. 339, § 86, 31 Stat. 141. It is true that in the decision of the Tax Appeal Court it is said that the appellant claims under § 17 of its charter a right to charge certain amounts against income. But it does not appear there or elsewhere that the appellant set up that the charter was a statute of the United States, or that it relied upon Article I, § 10, or any other clause of the Constitution of the United States.

Writ dismissed.

KAIZO *v.* HENRY, HIGH SHERIFF OF HAWAII.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 27. Argued October 29, 1908.—Decided November 16, 1908.

While a court of competent jurisdiction may discharge a prisoner held by another court which has exceeded its jurisdiction, even in such a case the prisoner may be remitted to his remedy by writ of error.

No court may properly release a prisoner under conviction and sentence of another court unless for want of jurisdiction of cause or person or some matter rendering the proceeding void.

Where a court has jurisdiction mere errors cannot be corrected upon *habeas corpus*.

Disqualifications of grand jurors do not destroy jurisdiction if it otherwise exists, and the indictment though voidable is not void; and objections seasonably taken in the trial court if erroneously overruled must be corrected by writ of error and not by proceedings in *habeas corpus*.

18 Hawaii, 28, 658, affirmed.

THE facts are stated in the opinion.

Mr. Duane E. Fox and *Mr. Arthur S. Browne*, with whom *Mr. A. S. Humphreys* was on the brief, for plaintiff in error.

Mr. Charles R. Hemenway, with whom *Mr. Mason F. Prosser* was on the brief, for defendant in error.

MR. JUSTICE MOODY delivered the opinion of the court.

This is a writ of error directed to a judgment of the Supreme Court of the Territory of Hawaii, discharging a writ of *habeas corpus* and remanding the petitioner to the custody of the sheriff. The plaintiff in error was indicted for murder by a grand jury at a term of a Circuit Court of the Territory, held in August, 1905. The grand jury was composed of sixteen members. A plea in abatement was seasonably filed, alleging that

eight of the grand jurors were not citizens of the United States or of the Territory, a qualification prescribed by the laws of the Territory. The Territory joined issue on this plea. The parties then agreed upon the facts upon which it was based, namely, that the eight grand jurors questioned were citizens only by virtue of judgments of naturalization in a Circuit Court of the Territory. The plea, with the agreed facts, raised the question of the jurisdiction of the Circuit Courts of the Territory to naturalize aliens. Under a statute of the Territory that question was certified to the Supreme Court, and that court held that the Circuit Courts of the Territory had jurisdiction to naturalize and that the grand jury possessed the necessary qualifications. Thereupon the trial judge overruled the plea in abatement, and an exception was taken. After due proceedings, plaintiff in error was found guilty as charged, and, on March 22, 1906, sentenced to death. Thereupon he prosecuted a writ of error to the Supreme Court of the Territory, assigning, among other errors, the overruling of the plea in abatement. The judgment of the lower court was affirmed by the Supreme Court on October 23, 1906, and a death warrant thereupon was issued by the Governor of the Territory, commanding the high sheriff to execute the sentence of death on January 22, 1907. No writ of error was sued out on the foregoing judgments of the Supreme Court. The plaintiff in error, however, six days before the date fixed for his execution, filed a petition for *habeas corpus* in the Supreme Court of the Territory, basing his claim for discharge from custody upon the same facts set forth in the plea in abatement and in the agreed statement of facts. The petition alleged that for the reason of the disqualification of eight members of the grand jury, the indictment was void, and that the trial court was without jurisdiction to proceed against him under it. The writ of *habeas corpus* was discharged and the petitioner remanded to the custody of the sheriff, and to this judgment the present writ of error is directed.

The principal question argued before us by counsel is, whether the eight members of the grand jury, whose qualifications were

questioned, were naturalized by courts having the authority to naturalize aliens. But we find no occasion to decide or consider this question. If the plaintiff in error desired the judgment of this court upon it he should have brought a writ of error to the judgment of the Supreme Court of the Territory which passed upon it in affirming the judgment of conviction in the trial court. He may not lie by, as he did in this case, until the time for the execution of the judgment comes near, and then seek to raise collaterally, by *habeas corpus*, questions not affecting the jurisdiction of the court which convicted him, which were open to him in the original case, and, if properly presented then, could ultimately have come to this court upon writ of error. Unquestionably, if the trial court had exceeded its jurisdiction a prisoner held under its judgment might be discharged from custody upon a writ of *habeas corpus* by another court having the authority to entertain the writ, *Ex parte Lange*, 18 Wall. 163; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Wilson*, 114 U. S. 417; though even in a case of this kind a court will sometimes refrain from releasing a prisoner upon writ of *habeas corpus*, and will remit him to his remedy by writ of error. *Riggins* v. *United States*, 199 U. S. 547; *Urquhart* v. *Brown*, 205 U. S. 179. But no court may properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of the cause or person, or for some other matter rendering its proceedings void. Where a court has jurisdiction, mere errors which have been committed in the course of the proceedings cannot be corrected upon a writ of *habeas corpus*, which may not in this manner usurp the functions of a writ of error. *Ex parte Parks*, 93 U. S. 18; *Ex parte Siebold, supra*, 375; *Ex parte Yarbrough*, 110 U. S. 651, 653; *Ex parte Wilson, supra*, 421; *In re Delgado*, 140 U. S. 586; *United States* v. *Pridgeon*, 153 U. S. 48, 59, 63; *Andrews* v. *Swartz*, 156 U. S. 272, 276; *Riggins* v. *United States, supra*; *Felts* v. *Murphy*, 201 U. S. 123; *Valentina* v. *Mercer*, 201 U. S. 131.

These well-settled principles are decisive of the case before us. Disqualifications of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case. *Ex parte Harding*, 120 U. S. 782; *In re Wood*, 140 U. S. 278; *In re Wilson*, 140 U. S. 575. See *Matter of Moran*, 203 U. S. 96, 104. The indictment, though voidable, if the objection is seasonably taken, as it was in this case, is not void. *United States* v. *Gale*, 109 U. S. 65. The objection may be waived, if it is not made at all or delayed too long. This is but another form of saying that the indictment is a sufficient foundation for the jurisdiction of the court in which it is returned, if jurisdiction otherwise exists. That court has the authority to decide all questions concerning the constitution, organization and qualification of the grand jury, and if there are errors in dealing with these questions, like all other errors of law committed in the course of the proceedings, they can only be corrected by writ of error.

Judgment affirmed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* MOTTLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 37. Argued October 13, 1908.—Decided November 16, 1908.

The jurisdiction of the Circuit Court is defined and limited by statute; and, even if not questioned by either party, this court will, of its own motion, see to it that such jurisdiction is not exceeded.

A suit arises under the Constitution and laws of the United States, so as to give the Circuit Court jurisdiction on that ground, only when plaintiff's statement of his own cause is based thereon; that jurisdiction cannot be based on an alleged anticipated defense which may

be set up and which is invalid under some law, or provision, of the Constitution of the United States.

The Circuit Court has no jurisdiction, in the absence of diverse citizenship, of a suit brought against a railroad corporation to enforce an alleged contract for an annual pass because, as stated in the bill, the refusal is based solely on the anti-pass provisions of the Hepburn Interstate Commerce Act of June 29, 1906, c. 3591, 34 Stat. 584.

The practice in such cases is to reverse the judgment and remit the case to the Circuit Court with instructions to dismiss the suit for want of jurisdiction.

THE appellees (husband and wife), being residents and citizens of Kentucky, brought this suit in equity in the Circuit Court of the United States for the Western District of Kentucky against the appellant, a railroad company and a citizen of the same State. The object of the suit was to compel the specific performance of the following contract:

"Louisville, Ky., Oct. 2nd, 1871.

"The Louisville & Nashville Railroad Company in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released Company from all damages or claims for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the railroad of said Company at Randolph's Station, Jefferson County, Ky., hereby agrees to issue free passes on said Railroad and branches now existing or to exist, to said E. L. & Annie E. Mottley for the remainder of the present year, and thereafter, to renew said passes annually during the lives of said Mottley and wife or either of them."

The bill alleged that in September, 1871, plaintiffs, while passengers upon the defendant railroad, were injured by the defendant's negligence, and released their respective claims for damages in consideration of the agreement for transportation during their lives, expressed in the contract. It is alleged that the contract was performed by the defendant up to January 1, 1907, when the defendant declined to renew the passes. The bill then alleges that the refusal to comply with the con-

tract was based solely upon that part of the act of Congress of June 29, 1906, 34 Stat. 584, which forbids the giving of free passes or free transportation. The bill further alleges: First, that the act of Congress referred to does not prohibit the giving of passes under the circumstances of this case; and, second, that if the law is to be construed as prohibiting such passes, it is in conflict with the Fifth Amendment of the Constitution, because it deprives the plaintiffs of their property without due process of law. The defendant demurred to the bill. The judge of the Circuit Court overruled the demurrer, entered a decree for the relief prayed for, and the defendant appealed directly to this court.

Mr. Henry Lane Stone for appellant.

Mr. Lewis McQuown and *Mr. Clarence U. McElroy* for appellees.

By leave of court, *Mr. L. A. Shaver*, in behalf of The Interstate Commerce Commission, submitted a brief as *amicus curiæ*.

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

Two questions of law were raised by the demurrer to the bill, were brought here by appeal, and have been argued before us. They are, first, whether that part of the act of Congress of June 29, 1906 (34 Stat. 584), which forbids the giving of free passes or the collection of any different compensation for transportation of passengers than that specified in the tariff filed, makes it unlawful to perform a contract for transportation of persons, who in good faith, before the passage of the act, had accepted such contract in satisfaction of a valid cause of action against the railroad; and, second, whether the statute, if it should be construed to render such a contract unlawful, is in

violation of the Fifth Amendment of the Constitution of the United States. We do not deem it necessary, however, to consider either of these questions, because, in our opinion, the court below was without jurisdiction of the cause. Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the Circuit Court, which is defined and limited by statute, is not exceeded. This duty we have frequently performed of our own motion. *Mansfield, &c. Railway Company* v. *Swan*, 111 U. S. 379, 382; *King Bridge Company* v. *Otoe County*, 120 U. S. 225; *Blacklock* v. *Small*, 127 U. S. 96, 105; *Cameron* v. *Hodges*, 127 U. S. 322, 326; *Metcalf* v. *Watertown*, 128 U. S. 586, 587; *Continental National Bank* v. *Buford*, 191 U. S. 119.

There was no diversity of citizenship and it is not and cannot be suggested that there was any ground of jurisdiction, except that the case was a "suit . . . arising under the Constitution and laws of the United States." Act of August 13, 1888, c. 866, 25 Stat. 433, 434. It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution. In *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, the plaintiff, the State of Tennessee, brought suit in the Circuit Court of the United States to recover from the defendant certain taxes alleged to be due under the laws of the State. The plaintiff alleged that the defendant claimed an immunity from the taxation by virtue of its charter, and that therefore the tax was void, because in violation of the provision of the Constitution of the United

States, which forbids any State from passing a law impairing the obligation of contracts. The cause was held to be beyond the jurisdiction of the Circuit Court, the court saying, by Mr. Justice Gray (p. 464), "a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws." Again, in *Boston & Montana Consolidated Copper & Silver Mining Company* v. *Montana Ore Purchasing Company*, 188 U. S. 632, the plaintiff brought suit in the Circuit Court of the United States for the conversion of copper ore and for an injunction against its continuance. The plaintiff then alleged, for the purpose of showing jurisdiction, in substance, that the defendant would set up in defense certain laws of the United States. The cause was held to be beyond the jurisdiction of the Circuit Court, the court saying, by Mr. Justice Peckham (pp. 638, 639).

"It would be wholly unnecessary and improper in order to prove complainant's cause of action to go into any matters of defence which the defendants might possibly set up and then attempt to reply to such defence, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defence and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defence is inconsistent with any known rule of pleading so far as we are aware, and is improper.

"The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving to the defendant to set up in his answer what his defence is and, if anything more than a denial of complainant's cause of action, imposing upon the defendant the burden of proving such defence.

"Conforming itself to that rule the complainant would not, in the assertion or proof of its cause of action, bring up a single Federal question. The presentation of its cause of action would not show that it was one arising under the Constitution or laws of the United States.

"The only way in which it might be claimed that a Federal question was presented would be in the complainant's statement of what the defence of defendants would be and complainant's answer to such defence. Under these circumstances the case is brought within the rule laid down in *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454. That case has been cited and approved many times since, . . ."

The interpretation of the act which we have stated was first announced in *Metcalf* v. *Watertown*, 128 U. S. 586, and has since been repeated and applied in *Colorado Central Consolidated Mining Company* v. *Turck*, 150 U. S. 138, 142; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 459; *Chappell* v. *Waterworth*, 155 U. S. 102, 107; *Postal Telegraph Cable Company* v. *Alabama*, 155 U. S. 482, 487; *Oregon Short Line & Utah Northern Railway Company* v. *Skottowe*, 162 U. S. 490, 494; *Walker* v. *Collins*, 167 U. S. 57, 59; *Muse* v. *Arlington Hotel Company*, 168 U. S. 430, 436; *Galveston &c. Railway* v. *Texas*, 170 U. S. 226, 236; *Third Street & Suburban Railway Company* v. *Lewis*, 173 U. S. 457, 460; *Florida Central & Peninsular Railroad Company* v. *Bell*, 176 U. S. 321, 327; *Houston & Texas Central Railroad Company* v. *Texas*, 177 U. S. 66, 78; *Arkansas* v. *Kansas & Texas Coal Company & San Francisco Railroad*, 183 U. S. 185, 188; *Vicksburg Waterworks Company* v. *Vicksburg*, 185 U. S. 65, 68; *Boston & Montana Consolidated Copper & Silver Mining Company* v. *Montana Ore Purchasing Company*, 188 U. S. 632, 639; *Minnesota* v. *Northern Securities Company*, 194 U. S. 48, 63; *Joy* v. *City of St. Louis*, 201 U. S. 332, 340; *Devine* v. *Los Angeles*, 202 U. S. 313, 334. The application of this rule to the case at bar is decisive against the jurisdiction of the Circuit Court.

It is ordered that the

Judgment be reversed and the case remitted to the Circuit Court with instructions to dismiss the suit for want of jurisdiction.

AMERICAN SUGAR REFINING COMPANY *v.* UNITED STATES.

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

No. 3. Argued November 11, 1908.—Decided November 30, 1908.

A direct appeal from the Circuit Court will not lie where the only real substantial point is whether or not an officer of the United States has misconstrued a statute.

The claim that the Secretary of the Treasury has exercised legislative power in promulgating, pursuant to § 251, Revised Statutes, regulations concerning the collection of duties under the tariff law does not constitute a real and substantial dispute or controversy concerning the construction or application of the Constitution upon which the result depends, and a direct appeal will not lie to this court under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 826, 828.

The regulations of 1897, promulgated by the Secretary of the Treasury, in regard to polariscopic tests of sugar to determine the duty payable thereon, as provided in § 1, Schedule E, par. 209, of the Tariff Act of July 24, 1897, c. 11, 30 Stat. 168, could have been enacted in terms by Congress without violating any provision of the Constitution of the United States, and prior decisions have determined that the Secretary properly construed the statute.

THE facts are stated in the opinion.

Mr. John G. Johnson, with whom *Mr. Henry B. Closson* and *Mr. John E. Parsons* were on the brief, for appellant:

The appeal in this case although arising under the revenue laws is properly brought direct from the Circuit Court and brings with it not only the constitutional question involved, but all the questions arising upon the record.

If the Treasury regulations are invalid, it is because in assuming to add something to the dutiable standard prescribed by the tariff act they constitute an exercise by the executive branch of the Government of legislative power which, by the

Constitution, has been confided solely to Congress. In a case presenting this question, a direct appeal lies to this court. *Boske* v. *Comingore*, 177 U. S. 459.

Such an appeal brings up every question in the case. *Davis Co.* v. *Los Angeles*, 189 U. S. 207; *Horner* v. *United States, No.* 2, 143 U. S. 570; *Chappell* v. *United States*, 160 U. S. 499.

Where this constitutional question is presented, it is immaterial that the case arises under the revenue laws.

When the case made by the plaintiff involves a question other than those relating to the constitutionality of the act and to the application and construction of the Constitution, the Circuit Court of Appeals has jurisdiction to review the judgment of the Circuit Court, although, if the plaintiff had elected to bring it here directly, this court would have had jurisdiction to determine all the questions arising upon the record. . . . The meaning of the words "arising under the revenue laws," in the sixth section, is satisfied if they are held as embracing a case strictly arising under laws providing for internal revenues and which does not, by reason of any question in it, belong also to the class mentioned in the fifth section of the act of 1891. *Spreckles Sugar Refining Co.* v. *McClain*, 192 U. S. 397.

Mr. James C. McReynolds for appellee:

The direct appeal from the Circuit Court cannot be entertained unless the construction or application of the Constitution of the United States is involved. Upon that ground alone counsel for appellant attempt to support the jurisdiction. They say that if the Treasury regulations are invalid, it is because, in assuming to add something to the dutiable standard prescribed by the tariff act, they constitute an exercise by the executive branch of the Government of legislative power which by the Constitution has been confided solely to Congress.

A mere allegation that some constitutional question is involved does not suffice to give jurisdiction; the record must

show a real, substantial dispute or controversy concerning the construction or application of the Constitution upon which the result depends. *Western Union Telegraph Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239, 243; *Lampasas* v. *Bell*, 180 U. S. 276; *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277, 281. No such dispute or controversy exists.

The only real substantial point involved is whether or not the Secretary of the Treasury acting under § 251, Rev. Stat., properly construed the statute, and that gives this court no jurisdiction upon direct appeal. *Sloan* v. *United States*, 193 U. S. 614, 620; *Beavers* v. *Haubert*, 198 U. S. 77, 85.

It may not be doubted that Congress, without violating any constitutional provision, could have in terms directed exactly what was prescribed by the Treasury regulations. If, attempting to act under the statute, executive officers have imposed an unauthorized burden upon appellant, no constitutional rights have been violated; there has been at most a misconstruction of the law, which does not give a direct appeal. *South Carolina* v. *Seymour*, 153 U. S. 353, 358; *Linford* v. *Ellison*, 155 U. S. 503, 508; *Rawlins* v. *Georgia*, 201 U. S. 638; *Matter of Moran*, 203 U. S. 96, 104.

Manifestly, if the construction or application of the Constitution of the United States within the meaning of § 5, act of 1891, is involved in every case where one claims according to his interpretation of a statute excessive duty or tax has been demanded by executive officers, the provisions of that act making decisions of the Circuit Court of Appeals in revenue cases final are of very limited value, and this court must entertain direct appeals from the Circuit Courts in most tariff and tax controversies.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

The tariff act of July 24, 1897, c. 11, 30 Stat. 151, provides (p. 168):

"Par. 209. Sugars not above number sixteen Dutch standard in color, tank bottoms, sirups of cane juice, melada, concentrated melada, concrete and concentrated molasses, testing by the polariscope not above seventy-five degrees, ninety-five one-hundreths of one per cent per pound, and for every additional degree shown by the polariscopic test, thirty-five one-thousandths of one cent per pound additional, and fractions of a degree in proportion; and on sugar above number sixteen Dutch standard in color, and on all sugar which has gone through a process of refining, one cent and ninety-five one-hundreths of one cent per pound; molasses testing above forty degrees and not above fifty-six degrees, three cents per gallon; testing fifty-six degrees and above, six cents per gallon; sugar drainings and sugar sweepings shall be subject to duty as molasses or sugar, as the case may be, according to polariscopic test: . . ."

In October, 1897, the Treasury Department issued general regulations [1] (subsequently modified in particulars not material here) governing sampling and classification of sugars under the above-quoted paragraph, which, among other things, declared:

"The expression 'testing . . . degrees by the polariscope,' occurring in the act, is construed to mean the percentage of pure sucrose contained in the sugar as ascertained by polarimetric estimation."

It was further stated that changes of temperature affect the indications of a polariscope, and to determine by means of it true sucrose contents apparent readings must be corrected as shown by a table accompanying each instrument and embodying the results of careful experiments therewith; when the thermometer is above 17.5° Centigrade, the point of standardization, additions must be made; when below, corresponding subtractions.

[1] These regulations, as originally promulgated, will be found at length annexed to Treasury Department Synopsis of Decisions No. 18,508, and see pars. 77 *et seq.*

The interpretation of the statute and validity of the regulations were at once challenged by importers, who claimed that the reading of a polariscope is not affected by change in temperature; and, further, that the term "polariscopic test" in the tariff act of 1897, according to its well-settled commercial use, as well as by the language itself, requires testing only in the way theretofore observed by merchants, and forbids any correction of the result observed by the eye. These contentions were denied by the collector.

The importers appealed to the Board of General Appraisers, and in March, 1899, their protest was overruled in a considered opinion. G. A. 4386.

Under the titles *Bartram Bros.* v. *United States, Howell* v. *United States* and *The American Sugar Refining Company* v. *United States,* appeal was taken to the Circuit Court, Southern District of New York, which was decided May 4, 1903. 123 Fed. Rep. 327. That court reversed the judgment of the General Appraisers, holding that the term, "testing by the polariscope," had a well-settled commercial meaning prior to 1897, and must be interpreted according thereto. It declared, however, the preponderance of proof sustained the contention "that there is a variation in the reading of the polariscope, according to variations in temperature at the place where the sugar is tested, and that the corrections and additions provided for by the regulations merely consist in an addition of 3 per cent for each 10 degrees Centigrade of temperature above that at which the polariscope is standardized, and that in this way the actual amount of pure sucrose in each sample is more accurately determined than was the case under the old eye test."

The Circuit Court of Appeals (131 Fed. Rep. 833) reversed the Circuit Court and sustained the General Appraisers. It held Congress intended there should be a scientific determination, by means of the polariscope, of sucrose contents, and that the method prescribed by the Treasury regulations was proper in order to secure the desired result.

The rulings are correctly stated in the headnotes thus:

"In construing the provision in paragraph 209, tariff act July 24, 1897, c. 11, sec. 1, schedule E, 30 Stat. 168 (U. S. Compiled St. 1901, p. 1647), regulating duty on sugars according to the polariscopic test, *held* that the expressions therein, 'testing by the polariscope' and 'shown by the polariscopic test,' are not used with any special trade meaning that would confine them to a particular method of conducting such test, but import an intention on the part of Congress that the method adopted should be the one best calculated to make a scientific determination.

"Under the general power of the Secretary of the Treasury to make customs regulations not inconsistent with law, granted by section 251, Rev. Stat. (U. S. Comp. St. 1901, p. 138), it is competent for that officer to prescribe the method of 'testing by the polariscope' the sugars dutiable according to such test under paragraph 209, tariff act July 24, 1897, c. 11, sec. 1, schedule E, 30 Stat. 168 (U. S. Comp. 1901, p. 1647); and so long as he acts in good faith, and it does not appear that his regulations operate to make the polariscopic test less accurate than when Congress adopted it, the courts should not interfere with the administrative details confided to him.

"Where, for a period of years covering the operation of several tariff acts, the Secretary of the Treasury has made regulations for carrying out certain provisions in those acts, it is to be presumed that subsequent legislation by Congress was enacted with reference to such regulations."

At October term, 1904, a petition for a writ of certiorari to bring up these cases for review was presented to this court, and denied. 195 U. S. 635.

In the present cause counsel stipulated:

"It is agreed that the sugars in question were tested and classified in accordance with the Treasury regulations of October 27, 1897, and of February 17, 1899, and that the questions raised are the same as those in the cases of *Joseph E. Bartram and others* v. *The United States, Benjamin H.*

Howell and others v. *The United States*, and *The American Sugar Refining Company* v. *The United States*, reported in 123 Fed. Rep. 327, and in 131 Fed. Rep. 833, and it is agreed that the evidence and exhibits in those cases contained on pages 33 to 364, inclusive, and pages 373 to 734, inclusive, of the transcript of record in those cases prepared for the Supreme Court of the United States and contained in the volume filed herewith . . . are to be treated as duly taken and introduced as evidence in this cause."

By § 6 of the act of March 3, 1891, c. 517, 26 Stat. 826, 828, the judgments or decrees of the Circuit Courts of Appeals are made final in all cases arising under the revenue law, and can only be carried to the Supreme Court by certificate, or on a certiorari. In the aforementioned cases there was no certificate for instruction on any question or proposition of law, and the application for certiorari was denied. The present direct appeal to this court is a mere attempt to obtain a reconsideration of questions arising under the revenue laws and already determined by the Circuit Court of Appeals in due course. Such direct appeals, under § 5 of the act of 1891, cannot be entertained unless the construction or application of the Constitution of the United States is involved.

This is conceded, and counsel for appellant attempt to sustain the jurisdiction on the ground that the regulations assumed to add something to the dutiable standard prescribed by the tariff act, and that in doing so the Secretary exercised legislative power confided by the Constitution solely to Congress. But this does not constitute a real and substantial dispute or controversy concerning the construction or application of the Constitution upon which the result depends.

The admitted duty of the Secretary of the Treasury was to construe as best he could the paragraph relating to collection of duty upon sugars, and to promulgate regulations for carrying it into effect. Rev. Stat. § 251. This and this alone he did. The only real substantial point involved is whether or not he misconstrued the statute, and that gives this court no juris-

diction upon direct appeal. *Sloan* v. *United States*, 193 U. S. 614, 620, and cases cited; *United States ex rel. Taylor* v. *Taft, Secretary*, 203 U. S. 461.

Undoubtedly Congress, without violating any constitutional provision, could have in terms directed exactly what was prescribed by the Treasury regulations; and prior decisions have held that the statute was properly construed by the Secretary.

We concur with counsel for the Government that if the construction or application of the Constitution of the United States, within the meaning of § 5, act of 1891, is involved in every case where one claims that according to his interpretation of a statute excessive duty or tax has been demanded by executive officers, the provisions of that act making decisions of the Circuit Court of Appeals in revenue cases final are of very limited value, and this court must entertain direct appeals from the Circuit Courts in most tariff and tax controversies, which we regard as out of the question.

Appeal dismissed.

COTTON *v.* TERRITORY OF HAWAII, BY HOLLOWAY, SUPERINTENDENT OF PUBLIC WORKS.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 7. Argued October 27, 1908.—Decided November 30, 1908.

The elementary rule, that the power of this court to review judgments under § 709, Rev. Stat., and under statutes relating to review of judgments from territorial courts extends only to final judgments, also governs appeals from the Supreme Court of Hawaii under § 86 of the act of April 30, 1900, c. 339, 31 Stat. 141, 158, and the amendatory act of March 3, 1905, c. 1465, 33 Stat. 1035.

The power of this court to review the judgments of courts of the Territories depends upon acts of Congress and cannot be extended by territorial legislation.

The decisions of the Supreme Court of Hawaii in this case, overruling

exceptions and reversing order for new trial, were based on bill of exception which did not bring up the whole record, were not under the practice of Hawaii final judgments, and are not reviewable by this court.

Writ of error to review 17 Hawaii, 618, dismissed.

THE facts are stated in the opinion.

Mr. Charles A. Keigwin, with whom *Mr. William B. Matthews* was on the brief, for plaintiffs in error:

The order on exceptions was a final judgment.

The opinion of the Supreme Court of Hawaii upon defendants' bill of exceptions, the last sentence of which is "the exceptions are overruled," was rendered and filed in the clerk's office on September 27, 1906.

The question, what amounts to a judgment, is, of course, one of local practice. If by accepted usage in Hawaii, or in the Supreme Court of the Territory, such a minute entry as appears in this record is regarded as a judgment, then that entry, however meager or technically irregular, may, and should be accepted as a judgment of that court, and the writ will lie.

A judgment which the supreme court of a State holds to be a final judgment can hardly be considered in any other light by this court. *Belmont Bridge* v. *Wheeling Bridge*, 138 U. S. 287; *Tippecanoe Co.* v. *Lucas*, 93 U. S. 108.

Independently of any peculiar local practice, and as a principle of the general law, the entry of September 27, 1906, is the entry of a judgment, though never drawn out into the formal words of a judgment.

The judgment, being the act of the court, and the substantial thing, of which the expanded entry is mere form and dress, becomes a judgment when it is pronounced and directed to be recorded, or, at all events, so soon as the first notation is made. The date of the judgment is that of the minute entry. It is then immediately executionable, unless otherwise provided by statute. All rights of the parties depend upon and

relate to the original minute and not to the later formal entry. Freeman on Judgments, 4th ed., §§ 38, 40.

The action of the clerk, being non-judicial, may be at any time afterward. The usual custom, perhaps, is for him to wait for leisure moments to perform that duty. In many cases the record is not completed until after the adjournment of the term. This practice seems to have prevailed at common law. *Casement* v. *Ringgold*, 28 California, 335; *McMillan* v. *Richards*, 12 California, 467.

It is, therefore, immaterial whether or not the judgment is ever spread out upon the formal minutes. The neglect of the clerk is the neglect of a purely ministerial duty which does not at all impair the validity of the judgment. In some States no record is ever made up. Such is, or at one time was, the usage in Maryland and Pennsylvania, and it was so formerly in the District of Columbia. In such jurisdictions the files and journal entries stand in place of the record, and memoranda indicating the rendition of judgments are treated as judgments. *Packet Co.* v. *Sickles*, 24 How. 340; *Cromwell* v. *Bank*, 2 Wall. Jr. 569; *Boteler* v. *State*, 8 Gill. & J. 381; *Ruggles* v. *Alexander*, 2 Rawle, 232; Freeman on Judgments, § 86.

The judgment on new trial is reviewable in this court. The action of the Territorial Supreme Court whereby it undertook to reverse Judge Gear's order of new trial was taken by the entry of a formal judgment.

Orders granting or denying new trials, while generally not the subjects of error, may be reviewed and reversed in error when they are void as being beyond the jurisdiction of the court assuming to make them. *Hume* v. *Bowie*, 148 U. S. 245; *Coughlin* v. *District of Columbia*, 106 U. S. 7.

And such an order may be revised in error when it appears that the lower court in acting upon the motion for a new trial proceeded upon an erroneous theory of its powers and duties in the matter or upon incorrect principles of evidence and practice. *Metropolitan R. R. Co.* v. *Moore*, 121 U. S. 358; *Mattox* v. *United States*, 146 U. S. 140.

In this case the court held, as a matter of general law and local practice, that the order of a trial court upon a motion for new trial is discretionary and cannot be revised in error.

The action of the Territorial Supreme Court in reversing the order for new trial was beyond its authority because its appellate jurisdiction was invoked too late and was attempted to be exercised after the time to which it was limited by statute; and, because the order of new trial was, by reason of its nature and because it was an order of new trial, not within the appellate jurisdiction, but altogether within the discretion of the trial court; and also because the Territorial Supreme Court erred in holding that the order was void and therefore excepted from the general rule of the subject.

Whether the Supreme Court of the Territory was right or wrong in its view of the order of new trial, its judgment reversing that order is reviewable in this court.

Mr. Charles R. Hemenway, Attorney General of the Territory of Hawaii, for defendant in error:

Upon a bill of exceptions only certain specific rulings are made the direct subject of review and only so much of the record comes before the appellate court as is necessary to pass upon such rulings. The decision is usually that the exceptions be sustained or overruled, and that such further proceedings be had as this ruling may require. The decision of the Supreme Court of Hawaii upon a bill of exceptions cannot be a final judgment in the sense that such judgment is the final act determining the rights and liabilities of the parties. The overruling of the exceptions in this case necessarily left the record in the condition in which it was prior to the allowance of the bill. Therefore, the judgment formally entered in the Circuit Court stood and stands as the final adjudication of the questions at issue between the parties.

The Territory now submits that only this judgment, to wit, the judgment entered in the Circuit Court, can properly be made the subject of a writ of error from this court, and that

by the writ now before the court the questions adjudicated below are not presented for review.

The practice in Hawaii as to exceptions is similar to that in Massachusetts and the other States where bills of exceptions bring up to the appellate court for review certain specific rulings only, and do not bring up the entire case including the final judgment rendered. In such States writs of error from this court have run to the court where the final judgment was entered. *Atherton* v. *Fowler*, 91 U. S. 143; *Worts* v. *Hoagland*, 105 U. S. 702; *Polleys* v. *Black River Improvement Co.*, 113 U. S. 83; *Stanley* v. *Schwalby*, 162 U. S. 269; *McDonald* v. *Massachusetts*, 180 U. S. 311; *Rothschild* v. *Knight*, 184 U. S. 334.

A judgment to be final within the meaning of the acts of Congress, giving this court jurisdiction on writs of error over such judgments, must terminate the litigation between the parties on the merits of the case so that if this court affirms such judgment, the court below would have nothing to do but to carry it into effect. *Bostwick* v. *Brinkerhof*, 106 U. S. 3; *Macfarland* v. *Brown*, 187 U. S. 237.

Therefore the decisions of the Supreme Court of Hawaii based upon bills of exceptions brought before such court cannot properly be made the subject of writs of error from this court.

Mr. Justice White delivered the opinion of the court.

The errors assigned are directed to the action of the court below on two subjects. Jurisdiction to consider them is challenged by the defendant in error. To understand the question as to jurisdiction and the issues which it will be necessary to consider, if it be that we have power to decide the merits, requires us to state briefly proceedings which are referred to by both parties and which are embraced in the printed transcript, without determining at this moment how far all the proceedings thus to be referred to may be considered as properly embraced in the record in the legal sense.

On May 27, 1904, as the result of a trial before a jury of an action brought by the Territory of Hawaii to recover damages for the loss of a dredge boat belonging to the Territory, through the negligence of the defendants (who are now plaintiffs in error), there was a verdict in favor of the Territory for the sum of twenty-five thousand dollars. On May 31, 1904, the defendants filed a motion for new trial, and gave notice that it would be called for a hearing on June 3. On that date the motion was continued to June 7. On June 7 the Territory objected to the court entertaining the motion because the defendants had not complied with § 1805, Revised Laws of Hawaii, requiring that the party against whom a verdict or judgment had been rendered should, as a prerequisite to moving for a new trial, "file within ten days after rendition of verdict or judgment" a bond securing the payment of costs, and conditioned against the removal or disposition of any property within the jurisdiction subject to execution. The defendants thereupon asked further time to file the bond. On the same day the court entered a formal judgment on the verdict, and also granted, over the exception of the plaintiff, the request of the defendants for further time to make and file the bond. The court was of the opinion that the statutory period commenced to run only from the date of the entry of judgment on the verdict. The bond was filed on June 7, the motion for a new trial was renewed on the same day, and was ultimately taken under advisement. The plaintiff, reserving the benefit of its exception as to the power of the court to consider the motion, agreed that the motion might be passed upon in vacation. Meanwhile the defendants presented and filed a summary bill of exceptions relating to certain errors which it was alleged had been committed by the court during the trial. In February following the judge who presided at the trial, and who was detained in San Francisco by sickness, telegraphed the clerk of the court that he granted the motion for a new trial, and had forwarded his grounds for doing so by mail. This telegram was filed by the clerk. The term

of office of the judge expired on March 2, 1905. A few days thereafter, viz., on March 4, 1905, the clerk received by mail the opinion of the judge stating his reasons for granting a new trial, which opinion was also filed. In the following April the defendants moved the court then presided over by the successor in office of the judge who had tried the cause to make a formal entry of the granting of the new trial, and this was done over the objection and exception of the plaintiff, who thereupon prosecuted a writ of error to the Supreme Court of Hawaii. The Supreme Court, after overruling a motion to quash the writ, based on the ground that the action of the court in granting a new trial was not reviewable (17 Hawaii, 374), on March 8, 1906, reversed the order granting a new trial. Putting out of view all other questions, in substance, it was held that the filing of the bond within ten days as required by the statute was essential to give the court jurisdiction to entertain a motion for a new trial, and that the court had mistakenly decided that the ten days began to run only from the date of formal entry of the judgment. 17 Hawaii, 445.

The formal judgment entered in the Supreme Court was simply one reversing the order for a new trial. Thereupon in the trial court the defendants moved to be allowed to make the summary bill of exceptions which they had previously taken more specific. Over the objection of the plaintiff this was allowed to be done, and the defendants thereupon filed an amended bill of exceptions, which was allowed, and upon this bill, conformably to the Hawaiian practice, the exceptions were taken by the defendants to the Supreme Court of Hawaii. In that court a motion was made to quash the bill of exceptions, on the ground that as amended it embraced matters not legally included within the bill as originally filed, and which were in consequence not cognizable. This motion was overruled, on the ground that although nothing was open for review on the amended bill but such questions as were legally incorporated in the original bill, the bill as amended could

not be quashed, as it undoubtedly presented matters which were embraced in the first or summary bill. 17 Hawaii, 608, 645. Thereafter on the hearing of the exceptions the court—excluding from consideration such matters as it held were not contained in the original bill, although incorporated in the amended bill—decided that the exceptions were without merit. 17 Hawaii, 618. Conformably to the opinion an order was entered in the minutes on September 27, 1906, overruling the exceptions. Thereupon the present writ of error was allowed by the Chief Justice of the Supreme Court of the Territory.

The two subjects to which, as at the outset we stated, all the assignments of error relate involve the correctness of the action of the Supreme Court on September 27, 1906, in refusing to consider certain of the exceptions because deemed not to have been embodied in the summary bill previously filed and its decision on the exceptions which were passed upon, and the correctness of the action of the same court, taken nearly six months previously, reversing the order of the trial court granting a new trial. Have we jurisdiction to pass upon these issues, is the first question for decision.

Our authority to review the judgments of the Supreme Court of the Territory of Hawaii is derived from the act of April 30, 1900, c. 339, § 86, 31 Stat. 141, 158, and the amendatory act of March 3, 1905, c. 1465, § 3, 33 Stat. 1035. In the first act jurisdiction is conferred over judgments or decrees of the Supreme Court of the Territory only in cases like unto those where we would be empowered to review the judgments or decrees of the courts of the several States, conferred by § 709, Rev. Stat. By the amendatory act our jurisdiction was extended so as to embrace, in addition, all cases, irrespective of the nature of the questions presented, where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars. In other words, whilst the first act conferred the power only in cases where it would exist if the decree or judgment had been rendered in a state court, the

second, adopting the principle and necessarily therefore carrying with it the rules generally prevailing as to the review of judgments or decrees of the supreme courts of the incorporated Territories of the United States, gives an additional right to review, depending solely upon the amount involved. *Bierce* v. *Hutchins*, 205 U. S. 340, 344. As jurisdiction, if it exists in this cause, depends not upon the existence of questions under Rev. Stat., § 709, but entirely upon the amount involved, the authority conferred by the act of 1900 may be at once put out of view.

It is elementary, however, that the power to review both under § 709, Rev. Stats., and under the laws governing the right to review the judgments or decrees of the supreme courts of the incorporated Territories generally, extends only to final judgments or decrees. It is apparent, therefore, that we have no jurisdiction to review the several rulings of the Supreme Court of the Territory, the last one in September, 1906, overruling the exceptions, and the prior one in April, 1906, reversing the order granting a new trial, unless those rulings, independently considered, are final in the full sense of the term. Let us test their finality separately.

On its face the proceeding by which the exceptions of the defendants were taken to the court of last resort in Hawaii for review did not purport to present to that court a consideration of the whole record in the cause, but only submitted the particular rulings embraced in the exceptions. The order which the court entered when it disposed of the exceptions was neither in substance nor did it purport in form to be a final judgment conclusively disposing of the cause. As our power to review depends upon the acts of Congress, which it is beyond the authority of a Territory by forms of legal procedure to modify or change, it results that whatever may be the forms of procedure prevailing in the Territory for the review of judgments or decrees, nothing in the territorial laws or procedure can have the effect of conferring upon this court the power to consider causes coming from the Territory by

piecemeal; that is, to review judgments or decrees which in their essential nature are not final within the intendment of the legislation of Congress—in other words, extend our jurisdiction to judgments which do not completely dispose of the controversy. But the application of this latter principle is not now required, since it will appear from a review of the territorial legislation that the decision of the Supreme Court overruling the exceptions was not under the territorial laws in any sense a final judgment. The relevant Hawaiian statutes are copied in the margin.[1]

It is clear that under these statutes the Supreme Court may

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[1] Revised Laws of Hawaii for 1905, c. 123, p. 732, *et seq.*:

"EXCEPTIONS.

"SEC. 1862. QUESTIONS RESERVED BY COURT.—Whenever any question of law shall arise in any trial or other proceeding before a circuit court, the presiding judge may reserve the same for the consideration of the supreme court; and in such case shall report the cause, or so much thereof as may be necessary to a full understanding of the questions, to the supreme court. (L. 1892, c. 57, s. 72; C. L. s. 1436.)

"SEC. 1863. RESERVED ON MOTION.—Any question may be reserved in like manner upon the motion of either party, on account of any opinion, direction, instruction, ruling or order of the judge in any matter of law. (L. 1892, c. 57, s. 73; C. L. s. 1437.)"

Following a paragraph prescribing the method of settling exceptions, it is provided in § 1864 as follows:

"Bills of exceptions upon like terms as to filing bond and payment of costs, may be certified to the supreme court from decisions overruling demurrers or from other interlocutory orders, decisions or judgments, whenever the judge in his discretion, may think the same advisable for a more speedy termination of the case. The refusal of the judge to certify an interlocutory bill of exceptions to the supreme court shall not be reviewable by any other court. (L. 1892, c. 57, s. 74; C. L. s. 1438; am. L. 1898, c. 40, s. 2; am. L. 1903, c. 32, s. 18.)"

"SEC. 1865. BOND.—Upon the allowance of such bill of exceptions and the deposit of twenty-five dollars, or a bond of the same amount, by the party excepting with the clerk of such court, for costs to accrue in the supreme court, the questions arising thereon shall be considered by the supreme court; but judgment may be entered and may be enforced or arrested pending such exceptions as provided in section 1861

review the action of the trial courts by two separate forms of procedure, either by writ of error or appeal, which brings up the judgment or decree with the entire record, and the other by exceptions, which does not bring up the whole record and calls upon the reviewing court merely to pass upon specific questions raised by the bill. The statutes, it will be observed, confer no express power upon the Supreme Court of the Territory to enter a final judgment in a cause upon the overruling of exceptions, and, indeed, that the Supreme Court of the Territory does not construe the territorial statutes as giving it such authority, and, therefore, that the court could not have intended to exert such power in this case so conclusively appears from recent decisions of the Supreme Court of Hawaii as to leave the question not open to controversy.

Meheula v. *Pioneer Mill Co.*, 17 Hawaii, 91, was brought

in the case of an appeal, mutatis mutandis. (L. 1892, c. 57, s. 75; C. L. s. 1439; am. L. 1903, c. 32, s. 19.)

"Sec. 1866. Exceptions, Frivolous, Immaterial.—When, upon the hearing of a cause brought before the supreme court upon exceptions, it shall appear that the exceptions are frivolous or immaterial, or were intended for delay, the court may award against the party taking the exceptions, double costs from the time when the same were alleged; and also interest, from the same time, at the rate of nine per cent per annum on the sum, if any, found due for debt or damages; or may award any part of such additional costs and interest as it may deem proper. (L. 1892, c. 57, s. 76; C. L. s. 1440.)

"Sec. 1867. Vacating Judgment by Supreme Court.—When judgment has been entered in any cause in which exceptions have been allowed, the judgment may be vacated by the supreme court without any writ of error in like manner as if it had been entered by mistake, and thereupon such further proceedings shall be had in the cause as to law and justice shall appertain. (L. 1892, c. 57, s. 77; C. L. s. 1441.)

"Sec. 1868. Jury Trial Not Delayed.—No trial by jury shall be prevented or delayed by the alleging, filing or allowance of such exceptions; but the verdict shall be received and such further proceedings shall be had in the cause as the court may order, in pursuance of the foregoing provisions. (L. 1892, c. 57, s. 78; C. L. s. 1442.)

"Writs of Error.

"Sec. 1869. Had When.—A writ of error may be had by any party

to the appellate court on exceptions. The exceptions were overruled. Thereupon counsel for the unsuccessful party, in order that the record might be in such form as to permit an appeal to this court, moved in the appellate court that a final judgment be entered affirming the judgment of the trial court and remanding the cause with directions to carry the judgment into execution. The motion was denied. The court rendered a lengthy opinion, in the course of which it was said (17 Hawaii, 93):

"If the exceptions are overruled nothing further is required but to notify the Circuit Court, in the form of a remittitur. . . . A bill of exceptions, unlike a writ of error or an appeal, does not bring the entire case or its record to this court. We have merely to decide whether the exceptions are good or bad. If they are overruled, that is the end of the functions of this court relating thereto, nothing remaining but the order, notice, or remittitur, on receipt of which the

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deeming himself aggrieved by the decision of any justice, judge or magistrate, or by the decision of any court except in the supreme court, or by the verdict of a jury, at any time before execution thereon is fully satisfied, within six months from the rendition of judgment. (L. 1892, c. 95, s. 1; C. L. s. 1443.)

"Sec. 1870. In Jury Waived Cases.—Writs of error shall lie to any decision or ruling by a judge in any case in which jury has been waived. (L. 1892, c. 95, s. 2; C. L. s. 1444.)

"Sec. 1871. To Correct What.—A writ of error may be had to correct any error appearing on the record, either of law or fact, or for any cause which might be assigned as error at common law; *provided*, however, that no writ of error shall issue for any defect of form merely in any declaration, nor for any matter held for the benefit of the plaintiff in error. (L. 1892, c. 95, s. 3; C. L. s. 1445.)

"Sec. 1872. No Reversal When.—There shall be no reversal on error of any finding depending on the credibility of witnesses or the weight of evidence. (L. 1892, c. 95, s. 5; C. L. s. 1447.)

"Sec. 1873. Record.—For all purposes of sections 1869–1883 the record shall be deemed to include all pleadings, motions, notes or bills of exceptions, exhibits, clerk's or magistrate's notes of proceedings, and, if so desired by the plaintiffs in error, a transcript of the evidence in the case. (L. 1892, c. 95, s. 4; C. L. s. 1446.)"

judgment in the Circuit Court if it had been entered but suspended pending the exceptions by the provisions of sections 1861 and 1865, R. L., remains in full force, requiring no affirmance or other recognition from this court. If no judgment was entered on the verdict it is entered by the Circuit Court upon notice of the overruling of the exceptions. This result follows as a matter of law and not in consequence of any direction of this court."

In the same case the court also took occasion to condemn the practice stated to be sometimes followed, of sending to the appellate court, with a bill of exceptions, "the records of the case and all papers filed in the Circuit Court."

So, also, as also said by the territorial court in this case, in passing upon the motion of the Territory to quash or dismiss the exceptions (17 Hawaii, 374, 379):

"Exceptions and error are inherently proceedings of different character. On exceptions, various specific rulings, whether interlocutory or final, whether brought up immediately or only after final judgment, are made direct and independent subjects for review; only so much of the record is brought here as is necessary for passing upon the specific exceptions; the decision usually is that the exceptions be sustained or overruled and that such further proceedings be had as the rulings on the exceptions call for. On error the final judgment alone is brought up, and specific rulings, whether excepted to or not, are considered only incidentally in passing upon the correctness of the final judgment; the entire record is brought up, and the judgment of the appellate court is such as the facts and law warrant as shown by the entire case."

Applying the construction thus given by the Supreme Court of Hawaii to the statutes of the Territory, there being no reason to doubt its correctness, it clearly follows that the mere entry by the clerk, on the minutes, of the decision of the court overruling the exceptions did not constitute a final judgment subject to review by this court. Of course, our decision is confined to the case before us. We must not there-

fore be considered as holding that if, on a case before it on exceptions, the Supreme Court of the Territory in sustaining exceptions considered that the effect of its ruling was such as to justify the entry of a judgment finally disposing of the cause under the discretionary power conferred by § 1867 of the Revised Laws of Hawaii, previously cited in the margin, that such a judgment, depending upon the circumstances of the case, might not be a final judgment within our competency to review.

Coming then to test whether we have jurisdiction to review the action of the Supreme Court of the Territory reversing the order granting a new trial, it is apparent that our power must rest either upon the proposition that the order overruling the granting of a new trial was a final judgment in an independent proceeding or was but an interlocutory step in the cause, which would be subject to our review, because of jurisdiction to revise the action of the territorial court in ruling on the exceptions, under the assumption that such ruling was a final judgment. The latter is disposed of by what we have previously said. As to the former, if the premise upon which the proposition rests be assumed it would follow that we are without power to review the judgment, for the reason that this writ is directed alone to the so-called judgment of September 27, 1906, and the record of that judgment cannot be regarded as embracing the proceedings had below in respect to the matter of a new trial.

Writ of error dismissed for want of jurisdiction.

BOWERS HYDRAULIC DREDGING COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 9. Argued November 11, 1908.—Decided November 30, 1908.

Where words used in a contract are plain and unambiguous, expert testimony, as to their commercial signification, is not admissible for the purpose of destroying the plain and obvious intendment of a contract; and so held that where a Government dredging contract by its terms expressly excluded material which slid into the excavation from the slope outside of the stakes, expert testimony to show that the trade meaning of the words "measured in place" includes such sliding material if dredged was properly excluded.

After the Government has, against the contractor's protest, affixed a meaning to terms used in a contract, the contractor cannot reassert the same claim in regard to a supplementary contract for additional work of the same nature even if the original contract were susceptible of the construction claimed by him.

41 C. Cl. 214, 498, affirmed.

THE facts are stated in the opinion.

Mr. L. T. Michener, with whom *Mr. W. W. Dudley* and *Mr. P. G. Michener* were on the brief, for appellant:

The language of the contract is plain. The decision of the engineer in charge was required; not the decision of the chief of the corps; not the decision of the Secretary of War; not obedience to instructions. *Mansfield &c. R. Co.* v. *Veeder*, 17 Ohio, 204, 385; *Baldwin's Case*, 15 C. Cls. 297, 303; *King's Case*, 37 C. Cls. 428; *Kendall* v. *United States*, 12 Pet. 524, 608.

The power vested in the engineer in charge was such that he could not delegate it, nor could any one else, assume it, no matter how high his station, nor could it be discharged by a subordinate. *Archer* v. *Williamson*, 2 Harris & Gill (Md.), 62; *Wilson* v. *York &c. R. Co.*, 11 Gill & J. (Md.) 59, 72; *Weeks* v. *Boynton*, 37 Vermont, 297; *Eastern R. Co.* v. *Eastern Union R. Co.*, 68 Eng. Ch. 463; *Lingnood* v. *Eade*, 2 Atk. 501; *Proctor* v. *Williams*, 8 C. B. (N. S.) 386; *Whitmore* v. *Smith*, 5 H. & N. 824; *Little* v. *Newton*, 2 Scott N. R. 509.

The engineer in charge had the right to ask information from disinterested persons, but not from his superior officers, for they were not disinterested. *Soulsby* v. *Hodson*, 3 Burr. 1474; *Caledonia Ry. Co.* v. *Lockhart*, 3 Macq. 808; *Anderson* v. *Wallace*, 3 Cl. & Fin. 26; *Eads* v. *Williams*, 3 DeG., M. & G. 674; *Hopcraft* v. *Hickman*, 3 L. J. Ch. 43.

If the engineer officer proceeded upon a wrong or mistaken interpretation of the contract, the court will give relief, notwithstanding the provision that his decision shall be final. *Robertson* v. *Frank Brothers Co.*, 132 U. S. 17; *Lewis* v. *Chicago &c. R. R.*, 49 Fed. Rep. 708; *Alton R. R. Co.* v. *Northcott*, 15 Illinois, 49; *Starkey* v. *DeGroff*, 22 Minnesota, 431; *M. & G. R. R. Co.* v. *Veeder & Co.*, 17 Ohio, 385; *McAvoy* v. *Long*, 13 Illinois, 147; *Williams* v. *Chicago &c. Ry. Co.*, 112 Missouri, 463, 493–495; *Herrick* v. *Ver. Cent. R. Co.*, 27 Vermont, 673; *Kidwell* v. *B. & O. R. R. Co.*, 11 Gratt. 376; *Kistler* v. *I. & St. L. R. Co.*, 88 Indiana, 460; *Beckwith Case*, 38 C. Cls. 295, 314.

In performing the functions conferred by such stipulations, the engineer must have strict regard to the terms of the contract. His duties are to be ascertained from it, and his powers are limited to what it confers, or clearly implies. He cannot go beyond it nor behind it. His powers are not to be enlarged by implication beyond the plain words used. *Launman* v. *Younge*, 13 Pa. St. 306; *Williams* v. *Chicago Ry. Co.*, 112 Missouri, 466; *Sawtelle* v. *Howard* (Mich.), 62 N. W. Rep. 156.

In the case at bar, the engineer went beyond the contract and asked his superior officers to instruct him how to decide, although the sole power of decision was vested in him by the terms of the contract and specifications prepared and furnished by the United States and which are to be taken most strictly against the Government, liberality of construction being in favor of the contractor. *Edgar Thompson Works Case*, 34 C. Cls. 205, 219; *Chambers Case*, 24 C. Cls. 387.

The subject-matter of the controversy must be clearly within the contract or specifications to take away the rights

of the court or jury, and the engineer's determination will be conclusive only when clearly within the powers conferred upon him. *Sanders* v. *Hutchinson*, 26 Illinois, 633; *Mills* v. *Weeks*, 21 Illinois, 596; *Launman* v. *Younge*, 13 Pa. St. 306.

The engineer has no power to bind the parties when he goes beyond the terms of the contract or misinterprets it. *Starkey* v. *DeGroff*, 22 Minnesota, 431; *Alton R. R. Co.* v. *Northcott*, 15 Illinois, 49; *Grant* v. *Savannah R. Co.*, 51 Georgia, 348; *Kistler* v. *I. & St. L. R. Co.*, 88 Indiana, 460.

The engineer's decision or estimate is a conclusive adjudication only upon the condition that it is made according to the contract. *Drehew* v. *Altoona*, 121 Pa. St. 401; *Williams* v. *Chicago &c. Ry. Co.*, 112 Missouri, 463, 472, 473, 493-495; *The Beckwith case*, 38 C. Cls. 295, 299, 314.

The engineer should have determined the amount of the material excavated and removed by means of surveys made before and after dredging and by calculations based thereon.

When the contract provides that the engineer shall determine the amount of work, it does not give him the exclusive determination of the manner in which it shall be done according to contract. It does not give him the interpretation of the contract. *G. H. & S. A. Ry. Co.* v. *Henry*, 65 Texas, 685; *G. H. & S. A. Ry. Co.* v. *Johnson*, 74 Texas, 256; *Williams* v. *Chicago Ry. Co.* (Mo.), 20 S. W. Rep. 631.

The contractor may show that the engineer misconstrued the contract in his classifications of the work, and did not measure the work according to the contract, and he may show these things by evidence without alleging fraud. *Collins and Farwell case*, 34 C. Cls. 294, 332; *Beckwith case*, 38 C. Cls. 294, 299; *Williams* v. *Chicago Ry. Co.*, 112 Missouri, 463; *Lewis* v. *Chicago Ry. Co.*, 49 Fed. Rep. 708; *Summers* v. *Chicago Ry. Co.*, 49 Fed. Rep. 714; *Bridge Co.* v. *City of St. Louis*, 43 Fed. Rep. 768; *Lewis* v. *C. S. F. Ry. Co.*, 49 Fed. Rep. 708, 710.

The Government did not put language in the contract and specifications stating that material coming in from the sides should not be paid for.

There seems to be no reason why there should not be applied to the contract and the specifications here the principle so often applied to statutes by this court, that if Congress desires to grant a given power, right or authority, it says so in express terms; and where it does not say so, the conclusion is that it did not intend to give any such power. *Tillson* v. *United States*, 100 U. S. 46; *Vicksburg R. R. Co.* v. *Dennis*, 116 U. S. 669; *United States* v. *Chase*, 135 U. S. 259.

The principles of interpretation are very similar, whether applied to contracts, to deeds, or to statutes. 2 Parsons on Cont., side p. 494.

The Court of Claims should have considered and given due weight to the evidence about the trade meaning of the words "measured in place," and should have found the technical or trade meaning of the words in connection with the other language of the specifications; evidence as to the meaning of those words and specifications was admissible and should have been considered by the court. 2 Parsons on Cont. (7th ed.), side pp. 555, 556; 1 Greenleaf on Ev. (14th ed.), § 280; 1 Elliott on Ev., § 605; 4 Wigmore on Ev., §§ 2458–2467; 1 Starkie on Ev., side pp. 653, 701; Jones on the Const. of Com. and Trade Contracts, §§ 62, 204.

See rule as stated by Mr. Justice Campbell in *Garrison* v. *Memphis Ins. Co.*, 19 How. 312, 313.

Mr. Assistant Attorney General John Q. Thompson, with whom *Mr. Philip M. Ashford*, Special Attorney, was on the brief, for appellee:

The construction or interpretation of the contract is the ascertainment of the intention of the parties as expressed therein. 17 Am. & Eng. Ency. L. (2d ed.), 2; Jones on the Const. of Com. and Trade Contracts, 1; Anderson's Law Dictionary, 240.

The very idea and purpose of construction implies a previous uncertainty as to the meaning of the contract, for where this is clear and unambiguous there is no room for construction and

nothing for construction to do. 2 Parsons, 9th ed., 655; 17 Am. & Eng. Ency. of Law, 4; 21 Am. & Eng. Ency. of Law, 1109; Jones on Construction, etc., 31, 111, 237, 267; *Moran* v. *Prather*, 23 Wall. 492, 500; *Culber* v. *Wilkinson*, 145 U. S. 205, 212; *Iron World* v. *Cottrell*, 31 Fed. Rep. 254, 256.

The first duty of the trial court in the case at bar in considering the question of the admissibility of the expert testimony offered was to examine the contract with a view of discovering whether or not there was any ambiguity, patent or latent, therein, or any uncertainty or doubt as to the meaning of any of its terms or provisions, and, none being found, it was both proper and right to exclude said testimony.

The first duty of the court was to give force and effect to the contract as written, if possible.

On the other hand, if the court, upon such examination of the contract, should be in doubt as to the meaning of any of its terms or provisions, it might then proceed to apply the well-known rules of construction, among which, though not of first importance, is the rule that expert testimony may be admitted to explain the trade, or technical, meaning of words or phrases.

But an examination of the contract which is the subject of controversy herein shows that its language is so plain and unambiguous as to leave no room for construction or interpretation, nor for the introduction of evidence as to the trade meaning of any of its terms and provisions, and the Court of Claims properly so decided.

Mr. Justice White delivered the opinion of the court.

The appellant, the dredge company, sued to recover $28,321.76. The relief sought was based on the averment that under a contract for dredging a channel, in the Christiana River and in or about the harbor of Wilmington, Delaware, made in 1899, and a supplementary contract made in June, 1901, the dredge company had excavated 260,430 cubic yards

of earth, for which, at the contract price, it should have been paid the sum sued for, but that the United States, in making settlement under the contract, despite the protest of the dredge company, had declined to pay, upon the ground that excavating and removing the earth referred to was not within the contract. The pertinent facts found by the court below are these (41 C. Cl. 214, 498):

Prior to September, 1899, the United States was engaged in excavating a channel in the Christiana River and about the harbor of Wilmington, Delaware. The work, in September, 1899, was in process of execution, under a contract between the United States and the New York Dredging Company. In the office of the United States engineer in charge of the work there existed maps or drawings showing the condition of the river prior to any work being done by the New York Dredging Company, the location of the channel in which the work was being done, and the specifications controlling the contract, as well as the progress made in the work. Of these facts the dredge company had knowledge. On September 18, 1899, the United States engineer office at Wilmington, through William F. Smith, United States agent, advertised for proposals for the dredging and removing of about nine hundred thousand cubic yards of material in connection with the work then being done, as previously stated. In the advertisement inviting the proposals it was stated that specifications, blank forms for proposals, and all available information would be furnished on application to the engineer office. The specifications for the work in question recited:

"The project, for the completion of which contracts are authorized in the law above quoted, requires the dredging of the Christiana River to a depth of 21 feet at mean low water from the 21-foot curve in the Delaware River to the upper line of the pulp works; thence to the draw pier of the Shellpot branch, No. 4, of the P., W. & B. R. R., so as to give a depth which gradually diminishes to 10 feet at mean low water at the latter-named place and the removal of shoals having less

than seven (7) feet of water over them; thence to Newport—the width to be 250 feet to the mouth of the Brandywine, 200 feet thence to the upper line of the pulp works, and 100 feet above. Work is now in progress under contracts for dredging to a depth of 18 feet up to the pulp works, the width to be made being 200 feet, and for all above-described dredging above the pulp works. The work required under these specifications is the dredging that remains to complete the project additional to that done or to be done under the contracts above referred to until their termination or completion. It is estimated that about 900,000 cubic yards will have to be removed."

The character of the work required, the method of carrying on the same and the steps to be taken to fix the amount to become due under the contract when fully performed were stated in the specifications as follows:

"The amount of material removed will be paid for by the cubic yard measured in place, and shall be determined by surveys made before dredging is commenced and after it is completed. All surveys and measurements are to be made under the direction of the engineer in charge by persons employed by him for that purpose. The decision of the engineer in charge as to the amount of material excavated and removed, as well as to its location and deposit, shall be final and without appeal on the part of the contractor.

"The location of the work shall be plainly located by stakes and ranges. The level of mean low water as established by the engineer in charge shall not be changed during the progress of the work. The contractor shall be required to supply the lumber for the necessary stakes and ranges, and shall at all times when called upon furnish men and boats to set them and keep them set under the direction of the inspector, the expense thereof to be included in the contract price for the dredging.

"No guarantee is given as to the nature of the bottom, but as far as it is known it is sand, mud, clay, and gravel. Bidders

are requested to satisfy themselves upon this point and to examine all other local conditions, as it will be assumed that their bids are based upon personal information. No extra allowance will be made for excavating material differing from that herein described.

"It is understood and agreed that the quantities given are approximate only, and it must be understood that no claim will be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders are expected to examine the drawings, and are invited to make the estimate of quantities for themselves. It is not expected that the actual quantities will vary more than 10 per centum from the estimates.

"Payments will be allowed for actual dredging to twenty-one (21) feet below mean low-water level. Work done outside of the designated lines of excavation or below the specified depth will not be paid for, and any material deposited otherwise than specified and agreed upon must be removed by the contractor at his own expense."

On November 20, 1899, the claimant (dredge company), whose proposal had been accepted, entered into a contract with the United States through General William F. Smith, United States agent, for the performance of the additional dredging, in conformity with the advertisements and specifications referred to in the preceding findings. It was provided in the contract that "the said Bowers Hydraulic Dredging Company shall furnish all labor, machinery and appliances necessary or proper for the faithful execution of the contract, and shall do the work called for, and in all respects carry out and comply with the said specifications for dredging." The sum to be paid was fixed by the contract at $10\frac{7}{8}$ cents for each and every cubic yard of material dredged, "measured in place," the said price including removal and redeposit.

Presumably, in consequence of knowledge on the part of the dredge company of a refusal by the Government to pay the New York Dredging Company for the work being done by

it for the removal of any earth from the excavated channel, derived from the sliding from slopes of the same, the dredging company, before commencing work, addressed a letter to General Smith, engineer in charge, requesting to know whether its contract would be construed as excluding payment for removing such earth. General Smith replied "that payment will be made for the quantity of material removed within the designated lines of excavation as determined by measurement before and after the dredging, and that such measurement does not include material which comes in from the sides during the progress of dredging." The letter stated: "I deem it proper to add that this is in conformity with the instructions received from the chief of engineers on the subject." The dredge company thereupon replied, protesting against this construction, declaring that it was not bound thereby, and that its performance of the work must not be construed as an acceptance of the correctness of such interpretation.

The work was commenced. Whenever a payment was made under the contract the dredge company, in receiving the same, asserted that it was entitled to be paid for removing any earth which had fallen into the excavation from the slopes and which had been removed by it, and on payment for such work being refused it protested. On June 21, 1901, while the work on the contract was proceeding, the dredge company made a supplementary contract, increasing the amount to be by it excavated, in accordance with the terms and specifications of the prior contract, from 900,000 to 1,300,000 cubic yards. As the work thereafter progressed under both contracts payments were continued to be made by the Government and received by the dredge company under protest, as before stated, until the work under the contracts was finally completed.

The court below found:

"The amount of material that fell or slid from the sides or slopes of the vertical walls in front of the dredge and that was removed thereby along with the excavated material within the

designated lines for dredging as provided by the contract, was more than 30,000 cubic yards, which, at the contract price of 10⅞ cents per cubic yard, would amount to over $3,000."

In the opinion delivered by the court below it was said:

"We are therefore of the opinion that the specifications, which are made part of the contract, are plain and unambiguous, and that they not only furnish the basis of *measurement in place* of the material to be excavated, but that the measurements made by the engineer in charge were in strict accord therewith. This being so, any other method of *measurement in place*, even though customary, is excluded by the terms of the contract, and, therefore, expert testimony is not admissible to explain language that needs no explanation."

And for these reasons the right of the dredge company to recover was denied. A new trial was asked, among others, on the ground that error had been committed in not finding the trade meaning of the words, "measured in place," and because the amount of cubic yards of earth which had slid in from the sides or slopes of the excavation while the contract was being performed, and which had been removed by the company, had not been fixed at 260,430 instead of "as above 30,000," as stated in the findings. In addition a request was made that the findings be amended so as to qualify the finding that the price paid should be 10⅞ cents for each and every cubic yard of material dredged, measured in place, by adding the words, "the same being the trade meaning or understanding of the words 'measured in place.'" In addition it was asked that the finding as to the amount of cubic yards removed of matter that fell from the sides or slopes be increased from above 30,000 to 260,430. The motion for a new trial and the motion to amend the findings were overruled. The court, in its reasons for denying the motion, while stating that certain expert testimony had been offered as to the meaning of the words "measured in place," further stated that it had declined to consider the same and make a finding thereon,

as it concluded, as said in its previous opinion, that the import of the words "measured in place," as used in the contract, was so free from ambiguity that it did not consider the testimony relevant. This was based upon the opinion that whatever might be the commercial signification of the words that meaning could not be imported into the contract for the purpose of destroying its plain and obvious intendment when the terms of the entire contract and the specifications forming part of the same were given their proper weight.

The errors complained of are all embraced under the following headings:

a. The refusal of the court to receive and consider testimony offered as to the trade meaning of the words "measured in place" and its refusal to make a finding on the subject. It being contended that the action of the court in refusing to amend its findings and the statement, in its opinion, that it declined to consider such testimony, adequately preserves the question for review.

b. The refusal of the court to find the precise amount removed of earth which slid in from the sides or slopes, thus leaving the finding uncertain on that subject.

c. The attributing of conclusive efficacy to the action of the officer in charge.

And finally,

d. The construction given by the court to the contract.

It is apparent that the question of construction last stated lies at the foundation of all the assignments, and therefore first commands consideration. We say this because if it be that the court below was correct in its conclusion that the contract gave to the words "measured in place," as therein used, a plain and unambiguous signification, it is obvious that the abstract or commercial meaning of those words, upon the hypothesis that they have such meaning, was rightly held to be irrelevant. And it is equally plain that if the court below rightly construed the contract in the particular mentioned it will be unnecessary to consider the effect which was given

to the action of the officer in charge, since that action was in accordance with the meaning which the court gave to the contract.

Coming to consider the contract, we are of opinion that the court below correctly enforced its self-evident meaning. The requirement that the amount of material removed should be paid for by the cubic yard measured in place, and should be determined by surveys made before dredging is commenced and after its completion, clearly in and of itself established a method for fixing the amount of material which might be excavated, and which was to be paid for, absolutely incompatible with the contention that the contract contemplated that payment should be made for excavated earth which might slide into the channel from the slopes of the same during the progress of the work. And this is fortified by the requirement as to the location of the stakes and the keeping of them continually in place during the performance of the work under the contract. It is, moreover, additionally sustained by the provision, "that no extra allowance will be made for excavating material different from that herein prescribed," and by the stipulations, "that work done outside of the designated lines of excavations or below the specified depth will not be paid for," and "that any material deposited other than that specified and agreed upon must be removed by the contractor at his own expense." When these provisions are read in connection with the specification stating that "no guarantee is given as to the nature of the bottom, but, as far as it is known, it is sand, mud, clay and gravel, bidders are requested to satisfy themselves as to this point, and to examine all other local conditions, as it will be assumed that their bids are based upon personal information" in connection with the statement of the approximate quantity, and the further condition that "no claim will be made against the United States on account of any excess or deficiency, absolute or relative in the same," we think the conclusion is beyond reasonable controversy that the contract, by its express terms and without ambiguity, ex-

cludes the possibility of holding that earth which might slide from the slopes during the excavation was to be paid for by the United States. To separate the words "measured in place" from all the other provisions of the contract in order to give them an assumed or proven abstract trade meaning repugnant to their significance in the contract would be to destroy and not to sustain and enforce the contract requirements. Lest our silence upon the subject may give rise to misconception, we deem it well to observe that even if the original contract was susceptible of a different construction from that which we hold arises from its plain import, such result could have no possible influence on the asserted claim of the dredge company, in so far as that claim is based upon excavation done under the supplementary contract. We say this because that contract was made with the full knowledge of the meaning affixed by the United States to the terms of the contract, and which had been insisted upon in the carrying on of the previous dredging operations.

Affirmed.

PHŒNIX BRIDGE COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 26. Argued November 12, 13, 1908.—Decided November 30, 1908.

In a contract with the Government for the reconstruction of a draw-span bridge which provides for completion before opening of navigation, permission to use false work during construction does not permit such use after the opening of navigation; and where the completion is delayed through negligence of the contractor until after opening of navigation and he is obliged by reason of destruction of the false work to substitute a lift span, he cannot recover the extra cost occasioned thereby.

Quære and not decided, whether a receipt for final payment on a Government contract, given without protest, amounts to an accord and satisfaction so as to be a bar to a claim for extra work in connection with the subject-matter of the contract but not specified therein.

38 C. Cl. 492, affirmed.

THE facts are stated in the opinion.

Mr. Frederic D. McKenney and *Mr. John Spalding Flannery* for appellant.

Mr. Assistant Attorney General John Q. Thompson, with whom *Mr. A. C. Campbell* was on the brief, for appellee.

MR. JUSTICE WHITE delivered the opinion of the court.

This appeal is prosecuted to obtain the reversal of a judgment rejecting a claim of the Phœnix Bridge Company for $6,958.14. The bridge company based its right to recover upon the averment that, during the performance of a contract entered into by it with the United States for the partial reconstruction and remodelling of a bridge belonging to the United States, spanning the Mississippi River between Davenport, Iowa, and Rock Island, Illinois, the company had, under the orders of the United States officer in charge of the work, expended the amount claimed for work not specified in the contract, and for the value of which therefore the United States came under an obligation to respond. Not following the precise order in which the court below recited the facts by it found, we reproduce from such findings the statements made therein of such facts as are in anywise pertinent to the questions which we think the controversy involves.

In July, 1895, the Government of the United States issued a circular advertisement, signed by A. R. Buffington, Colonel of Ordnance, U. S. Army, inviting proposals for the construction of a new superstructure and making alterations in the abutments and piers of the Government bridge over the Mississippi River connecting Davenport, Iowa, and Rock Island, Illinois. The bridge company in answer to this advertisement submitted a formal proposition, and in addition addressed a letter to Colonel Buffington, dated August 10, 1895, which, among other things, contained the following:

"Col. A. R. Buffington, Col. Ord., Commanding Rock Island Arsenal, Rock Island, Ill.

"DEAR SIR: Appreciating the importance of finishing the proposed new bridge at Rock Island at the earliest possible date we have been making a very careful study of the best method of removing the present structure and erecting the new spans, and have finally decided upon a plan which will enable us to work on the structure regardless of floods and ice in the river, and thereby give you the work at least five or six months before the time mentioned in your letter of July 27th. Our plan of erection is shown in detail on prints 1 and 2 sent herewith.

"The erection of the drawspan of course must be done during the closing of navigation, between the 20th of November and the 15th of March of the following year, and this span will be removed in the ordinary manner, by placing false work in the river to support temporarily the old structure and the railway traffic during the removal of the present span, and for supporting the new work during erection, the various parts being put in position by the ordinary overhead traveler shown on plan 2. This particular part of the erection does not need any special explanation. As we have made a specialty of drawspan work and have every facility in our shops for building such a span, we have named a date of completion for the new drawspan of March 1st, 1896. The first small span, 'E,' we will erect in advance of the drawspan, and will have the same in position on Feb. 1st, 1896. We erect this small span in advance of the draw that we may bring these two spans up to the new grade together."

In August, 1895, the bridge company was notified of the acceptance of its proposition, such notification stating, however, that decision upon the character of the stone to be used and the form of the solid steel railroad floor was reserved. On October 2, 1895, the contract for the performance of the work was executed.

At the Rock Island end of the bridge there was a stationary

span, and next to that there was a drawspan, and beyond that there were several more stationary spans, extending to the Iowa end of the bridge.

The plan adopted for the erection of the bridge contemplated the substitution of new material for the old superstructure without interruption to the railroad traffic over the bridge, and the scheme adopted was to carry such traffic upon false work, consisting of timbers extending from the bed of the stream to the old superstructure, for the purpose of supporting the tracks for such traffic. This false work under the drawspan made a barrier across that portion of the stream, which would have rendered navigation impossible in case such false work was not removed prior to the opening of navigation.

The drawspan was intended for the convenience of navigation upon the river, and said draw was the only means that vessels and other craft on the river had of going from one side of the bridge to the other.

The specifications as originally prepared called for the erection of the drawspan by January 1, 1896, and the completion of the bridge on November 1, 1896. Subsequently the specifications were modified so as to fix March 1, 1896, as the date for the erection of the drawspan, and September 15, 1896, for the final completion of the whole bridge.

The object of fixing March 1, 1896, for the completion of the drawspan was that navigation, which was likely to open at that place in the middle of March, should not be interrupted by the work of construction upon the bridge. This object was well understood by both parties to the contract.

The specifications forming a part of the contract provided that the dates given above were of the essence of the contract, and that no payment would be made for any work or material, as provided by the specifications and the contract, to be made with the contractor while he was in arrears in delivery or erection, and in case of the failure of the contractor to have the work completed by November 1, 1896,

he would be required to pay two hundred dollars ($200) per day as liquidated damages in consequence of such delay.

The specifications besides contained full details as to the method of doing the work and the supervision thereof by the Government officer in charge. They provided that the contractor would be required to remove the old superstructure without disturbing trains, and contained many express exactions looking to the execution of the work so as to enable the bridge to be continuously operated for the passage of trains during the progress of the contract. The contract contained the following clause:

"5th. If any default shall be made by the party of the first part in delivering all or any of the work mentioned in this contract, of the quality and at the times and places herein specified, then in that case the said party of the second part may supply the deficiency by purchase in open market or otherwise (the articles so procured to be of the kind herein specified as near as practicable), and the said party of the first part shall be charged with the expense resulting from such failure. Nothing contained in this stipulation shall be construed to prevent the chief of ordnance, at his option, upon the happening of any such default, from declaring this contract to be thereafter null and void, without affecting the right of the United States to recover for defaults which may have occurred; but in case of overwhelming and unforeseen accident, by fire or otherwise, the circumstances shall be taken into equitable consideration by the United States before claiming forfeiture for nondelivery at the time specified."

No provision was made for payment as such for any of the false work by which it was stipulated the whole bridge, including the drawspan, should be supported during the work of reconstruction, nor for the cost of removal of the same. The compensation stipulated was a given price per pound for the material to be placed in the new superstructure, and a fixed price per cubic yard for alterations in the old masonry

work, and for excavations for additional foundations in the new masonry work required.

"The claimant proceeded to fulfill the obligations of its contract, and erected the necessary false work, including that for the drawspan, and was proceeding with the erection of the drawspan itself on February 25, 1896, when, as a result of a rise in temperature, the ice in the river at that point moved, taking with it the false work and a substantial portion of the drawspan then in place. In the condition in which the work was at that time nothing could have been done to prevent the destruction of the work. In case the accident had not happened, the drawspan would have been completed by March 15, 1896, to such an extent that it could have been swung so as not to impede navigation. The claimant did not proceed with the erection of the drawspan as expeditiously as it might have done, particularly in that it did not procure the necessary material in the order necessary for erection of the drawspan. Said span might have been completed a considerable time before February 25, 1896, although the claimant was not bound to have it completed until March 1, 1896, by its contract. The United States was in no way responsible for any delays in the fulfillment of said contract, and was in no wise in default.

"After said accident Col. A. R. Buffington, United States ordnance officer in charge of the construction, together with several of his assistants, had a conference with the representatives of the claimant at the site of the bridge, and it was determined that the most feasible way of repairing the damage and going on with the construction of the drawspan was to erect said span upon the pivot pier running up and down the river, so that the erection of said drawspan should not interfere with navigation, which was likely to open at any time after March 1. It was further determined that the most feasible way of providing for railroad traffic during the erection of said drawspan was to put in place a temporary liftspan, which could be so operated as to allow the passage of vessels. There-

upon Colonel Buffington ordered the claimant to erect such liftspan, which the claimant did, at the expense of $6,683.59.

"Colonel Buffington's order was intended to meet an exigency caused by the imminence of an immediate opening of navigation, and to avoid the consequent large damage which would have been done to the shipping of the river and the property interests employed therein by the obstruction which would have been caused by work under the contract if navigation had opened about March 1, as might have been apprehended upon February 26.

"At the time of the conference . . . representatives of the claimant demurred to the erection of such liftspan. They claimed that the bridge company could proceed to repair the damage done by the accident and erect the drawspan on false work across the channel of the river prior to the opening of navigation. Colonel Buffington and his assistants maintained that this could not be done.

"Navigation opened in the season of 1896, on March 27. At the time of the accident it could not have been foreseen that navigation would not open several weeks prior to that date. Navigation on the river at this point is heavy and continuous from the opening of navigation. In case navigation had been interrupted up to the date when the drawspan could have been ready to swing, the damage to persons engaged in such navigation would have been greater than the expense of the erection and operation of such liftspan.

"The erection of the liftspan was necessary in order to provide for railroad traffic and the navigation on the river, and was the most feasible and the least expensive method of so doing.

"After the accident on February 25, 1896, the claimant proceeded to erect the drawspan, in accordance with the contract, and said drawspan was ready to swing June 1, 1896."

After the completion of the work a voucher was drawn for the final payment under the contract. This voucher recited the total sum agreed to be paid by the contract, deducted the

previous payments made to the bridge company and stated the balance, it being explained that this balance constituted the full and final payment to the contractor. The amount thus stated to be the sum finally due under the contract was received by the company and a receipt was signed on December 11, 1896, declaring that the amount received was "acknowledged as the final and full payment for all the material furnished, and for all the work performed under the said contract, and in full for all charges, claims, adjustments, differences or other alleged indebtedness incident to the work, or related to it in any manner whatever."

"At the time of signing this paper the claimant made no protest and understood that it covered all claims it had against the United States growing out of the erection of said bridge. The final completion of the work provided for in the contract was several months later than the time limited in said contract, and at the time said instrument was presented to plaintiff's agent for his signature he objected to signing it. Buffington then informed him if he did not so sign it as a final release of all claims, his instructions were to refer the whole matter, including claims for delay in the completion of the work, to the department. Claimant's agent then advised directly with his principal, after which he signed the instrument and received the final payment, at the same time, in reply to an inquiry by Colonel Buffington whether he signed without reservation, replied, 'You have our signature to the release as you handed it to me.' Before that time there had been dispute between the parties, both as to the liability of defendant for the liftspan and the plaintiff for delay in the completion of the work. No damages for delay were afterwards claimed or sought to be enforced against the claimant."

Upon these findings it is insisted that the court below erred in holding that the bridge company was not entitled to recover the amount by it expended for the erection of the temporary liftspan, because that work, done by the direction of the officer representing the United States, was not within the contempla-

tion of the contract, and no duty rested upon the bridge company to do such work. In other words, the contention is that as the contract provided for supporting the old structure across its entire length, including the drawspan, by false work which was to hold the old structure until the new was completed, when the false work should be removed, that the bridge company, when the damage caused by the melting of the ice took place, was entitled to continue the use of the false work for supporting the drawspan, although in so doing the navigation of the river would be entirely obstructed. And upon the assumption that such is the true interpretation of the contract it is urged the final receipt which was given did not constitute accord and satisfaction for the expenditure made concerning the liftspan. In logical order the question of accord and satisfaction resulting from the giving of the receipt when the final payment was made would first arise for solution. As, however, the contention that accord and satisfaction did not result from the giving of the receipt rests upon the assumption that the work done in the temporary erection of the liftspan was not within the contract, and therefore was not embraced by the receipt, it follows that we must, in order to dispose of the controversy as to accord and satisfaction, consider and determine the nature and character of the obligations which the contract imposed concerning the work done as to the liftspan. For this reason, to avoid repetition, we come at once to the fundamental question, that is the interpretation of the contract, for the purposes of ascertaining whether the work referred to was within the purview of the contract, for if it was that will dispose of the whole controversy, including the claim of accord and satisfaction.

The argument by which it is sought to support the contention that the bridge company was entitled after the accident to continue the construction of the drawspan by the erection of false work which would entirely bar the navigable channel, insists that as the contract alone provided for the method of construction by means of false work as a support

for the old structure during the performance of the contract, the contract must be construed as having authorized the bridge company to continue the use of the false work after the accident, even across the navigable channel, despite the injurious consequences to navigation which would have resulted. And from this right to use the false work to the destruction of navigation it is contended that there was no authority to direct the erection of the liftspan, and consequently an implied and contract liability on the part of the United States to pay the cost of the same when the span was erected under the order of the officer of the United States in charge. But we are of opinion that the interpretation of the contract upon which this proposition must rest is unsound, because it is not supported by the text of the instrument, and is not consonant with the intention of the parties as manifested by the text and as established as a necessary result of the findings below made.

In considering the text of the contract attention is at once attracted to the important stipulations as to the period in which the work should be carried on and completed, and to the difference between the time fixed for the completion of the work as to the drawspan and that as to the remaining spans. When the fact that the bridge spanned a great navigable river, and the duty of the Government to protect that navigability is borne in mind, moreover when the facts found by the court below as to the period when navigation would be suspended as the result of natural causes, is also considered in connection with the obligation which the contract imposed of completing the drawspan within such non-navigable period, we are of opinion that the contract must be interpreted as exacting that the means employed in constructing the drawspan should be such as would not operate to impede navigation. We think, therefore, that the contract must be held to have empowered the bridge company to use and retain the false work in the navigable channel only during the time expressly stipulated in the contract, and therefore to have im-

posed the duty after that period, if the exigencies of the situation required it, to perform the work on the drawspan in some other suitable manner consistent with the non-interruption of the navigation of the river.

This interpretation, which we think the contract requires, as we have said, is directly in accordance with the finding below, that the object of fixing March 1, 1896, for the completion of the drawspan was that navigation, which was likely to open at that place in the middle of March, should not be interrupted by the work of construction upon the bridge, and that this object was well understood by both parties to the contract.

The argument that because the contract and its specifications contained many minute stipulations looking to prevent the interruption of railroad traffic across the bridge, and no express requirement as to the preservation of the navigability of the river, therefore, under the rule that the inclusion of one is the exclusion of the other, it should be interpreted as not having contemplated the necessity for preservation of navigability when the terms of the contract are accurately considered, is self-destructive. We say this because if the provision of the contract as to the time for completing the drawspan be given its necessary significance as elucidated by the intention of the parties as expressly established by the findings below, it must result that the insertion of the requirement as to the construction of the drawspan within the period fixed, which was safely within the time when by the operation of nature there would be no navigation on the river, excludes the conception that the minds of the parties could have deemed it necessary to expressly provide for the contingency of the interruption of navigation by the execution of the work, when such interruption was impossible to arise if the duties which the contract imposed were executed according to their express requirements.

As the findings, beyond peradventure, establish that the liftspan was the most feasible and least expensive substitute

for the false work which could have been employed after the accident, and, as they also established, that the objection of the bridge company to pursuing that method was alone based upon the assumed right to complete the work by the use of false work in the navigable channel after the period stipulated in the contract—a right which we hold the bridge company did not enjoy—we think no express or implied obligation rested upon the United States to pay for the cost of the temporary liftspan and that the court below was correct in so holding.

Disposing of the case, as we do, upon the interpretation of the contract heretofore made, it is unnecessary to consider whether, even assuming that there could be a different interpretation, the bridge company would be entitled to recover, in view of the facts found below as to the state of the work on the drawspan at the time the accident occurred, that is, the backwardness of such work, which it was expressly found was due solely to the negligence of the bridge company.

Affirmed.

PICKFORD *v.* TALBOTT.

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

No. 13. Argued October 26, 1908.—Decided November 30, 1908.

Crime and credulity are not the same and mere neglect on the part of a prosecuting officer to investigate the character of witnesses on whose testimony an indictment is based is not tantamount to deliberate design; and in a suit for libel brought by such an officer against the owner of a journal charging him with blackmail, evidence as to whether he had made such investigation was properly excluded as irrelevant, the court not having excluded evidence as to the plaintiff's character.

In this case the court below rightly held the defendant responsible for the publication of the libel.[1]

28 App. D. C. 498, affirmed.

THE facts are stated in the opinion.

Mr. Henry E. Davis, with whom *Mr. Samuel Maddox* and *Mr. H. Prescott Gatley* were on the brief, for plaintiffs in error:

The cross-examination of the plaintiff was being properly conducted when interrupted by the court.

The "good faith" of the defendant in error in procuring the Rockville indictment went to the very heart of the action. If it could have been made to appear by the admissions of the witness, testifying in his own behalf, that while State's attorney he was in league with the man Hudson and the insurance companies, in a scheme which his predecessor denominated "blackmailing," the jury would have made short work of the case when they retired to consider of their verdict; and it was impossible to do this except by probing the conscience of the witness through the medium of cross-examination.

As tending to show that he was not a man of good character, evidence of particular acts of misconduct would not have been admissible except in the way attempted—by cross-examination when he tendered himself as a witness in his own behalf.

The rule is now well settled that this may be done. Wigmore on Evidence, § 981, and cases there cited; *Eames* v.

[1] The syllabus in the report of this case below, 28 App. D. C. 498, on the question of responsibility, is as follows:

"A charge to the jury in a libel case is correct which in effect states that one who procures the publication of a newspaper article libelous *per se*, or the circulation of copies of a newspaper containing such an article, is liable to the person defamed, no matter who wrote the article; and that a principal is responsible for a libelous newspaper article written by his agent, if the agent's general authority was such as fairly carried with it the authority to express in the principal's behalf what the article contains."

Kaiser, 142 U. S. 491; *Griffin* v. *Henderson*, 117 Georgia, 383; Townshend on Slander, 669, § 406; Newell on Libel and Slander, 290, § 39; *Earl of Leicester* v. *Walter*, 2 Camp. 251; *Witherbee* v. *Marsh*, 20 N. H. 563; *Wilson* v. *Noonan*, 27 Wisconsin, 598; *Conroe* v. *Conroe*, 47 Pa. St. 198; *Varnum* v. *Townsend*, 21 Florida, 447; *Treat* v. *Browning*, 4 Connecticut, 409; *Williams* v. *Miner*, 18 Connecticut, 477; Odgers on Libel and Slander, Bigelow's Notes, §§ 304, 305.

The greatest latitude is and should be allowed on cross-examination, especially of a party to the suit, for the purpose of sifting the conscience of the witness, touching his accuracy of statements, veracity, and credibility; and even specific, extraneous offenses and other matters material to the issues may be inquired into, if they have any bearing thereon. 1 Greenleaf, § 446; 3 Jones on The Law of Evidence, § 826; Taylor on Evidence (8th ed.), § 1459; *Kirschner* v. *The State*, 9 Wisconsin, 137; *Hitchcock* v. *Moore*, 70 Michigan, 112; *Hay* v. *Reid*, 85 Michigan, 296, 307; *State* v. *Merriman*, 34 S. Car. 39.

The line of examination which was interrupted by the court was entirely material. If the defendant in error, vested with the power of destroying the character of his fellow citizens, undertook so to do upon the unsupported statements of a perfect stranger, into whose character he made no inquiry before using that power against plaintiffs in error, he manifested in himself a character so far below the standard as to make the injury to him proportionately less than would be the injury to a man whose character is normal.

In many of the later cases the rule has been modified to the extent that matter tending to mitigate damages, even though, at the same time, bearing in the direction of testimony tending to prove the truth of the libel, might be admitted as mitigating damages upon both the grounds above indicated, namely, first, as derogating from the character of the plaintiff, and, second, as reducing the malice involved in publishing the libel. Had the testimony here excluded been admitted, it would have been a fair and forcible argument to

make to the jury both that the defendant in error, being a man so reckless of regard for his duty and the rights of others, had not the character entitling him to the solace for its injury, which a man of normal character might demand, and also that the plaintiffs in error, smarting under the infliction of an injury growing out of such recklessness, could not be held guilty of the extent of malice to be imputed to one without any such instigation publishing a libel against another.

The trial court in the matter of the rule that the truth cannot be given in evidence on the issue of not guilty, gave undue weight to the case of *Underwood* v. *Parkes*, 2 Strange, 1200. See *Bush* v. *Prosser*, 11 N. Y. 362; *Van Derveer* v. *Sutphin*, 5 Ohio St. 302; *Huson* v. *Dale*, 19 Michigan, 29, 30.

The result of the authorities is that while in impeaching the character of a witness the inquiry is, in general, limited to his general reputation, yet where the feature or trait of character sought to be inquired into touches, or is involved in, any issue in the case, such feature or trait may properly be gone into, especially where the witness is a party and the feature or trait in question is directly pertinent to the gravamen of the action or the peculiar ground of damage alleged.

In a case of libel involving the character of the plaintiff, any matter tending to show that his character is of a sort not susceptible to damage is clearly pertinent; and how much more pertinent is an inquiry tending to show that in respect of a particular character, as that of probity in office, the plaintiff lacks it; and that he lacks it is, as of course, better shown by proof of specific acts of dishonor, brought directly home, than by proof of the general estimation in which he may be held by those ignorant of such acts. In the case at bar the interrupted attempt was to show that the defendant in error, by reason of his conduct in the very matter in controversy, was not entitled to and did not have the peculiar character in respect of which he claimed to have been injured, namely, a character for probity in office; and the refusal to permit this matter to be gone into on cross-examination

worked injury to the plaintiffs in error so manifest as of itself to call for a reversal of the judgment.

Mr. Andrew Lipscomb and *Mr. John Ridout* for defendant in error:

The line of interrogation was not true cross-examination because not responsive to the direct examination.

It was obviously useless because the court cannot suppose that the defendant in error would have admitted that he had acted in bad faith in submitting the matter to the grand jury and preparing an indictment upon their presentment so that no harm to plaintiffs in error ensued although palpable injury to defendant in error did result because he was thereby precluded from giving his version of the finding of the indictment.

Upon familiar principles the court cannot deal with the supposed error because there is nothing in the record in the nature of an offer to prove any definite fact by the witness, so that the court cannot tell what the effect of the ruling was except that it can be plainly seen that it was more injurious to defendant in error than to plaintiffs in error.

This clearly appears by Mr. Lipscomb's statement in the record that he was willing the so-called cross-examination should proceed on the lines indicated.

It was a clear attempt to prove by cross-examination and in advance a part of the defendant's case in chief.

It is well settled that this cannot be done over objection, either by the court or by counsel. Jones on Evidence, §§ 820, 821, 837; *Philadelphia Ry. Co.* v. *Stimpson*, 14 Pet. 461; *Northern Pacific Ry. Co.* v. *Urlin*, 158 U. S. 271.

The "English rule" allowed practically a cross-examination of a witness on the whole case, but it is by the "American rule" equally well settled in a large majority of States and all the Federal courts that it is limited to matters brought out by the direct. *Houghton* v. *Jones*, 1 Wall. 702; *Philadelphia R. R. Co.* v. *Stimpson*, 14 Pet. 448.

It was also plainly an attempt to prove justification without pleading it, and this as the record discloses, was the controlling reason for the *sua sponte* ruling by the court.

Justification cannot be proved in this jurisdiction unless specially pleaded, and here the only plea was the general issue. The doctrine on this subject is stated by Mr. Newell in his work on Libel and Slander, §§ 68 to 76 and the notes thereto.

The doctrine briefly stated and established beyond any peradventure is that "the truth" or "justification" must be specially pleaded and with sufficient precision and particularly to enable the plaintiff to know precisely what is the charge he is to meet. *Richardson* v. *State*, 66 Maryland, 205; *Smith* v. *Tribune*, 22 Fed. Rep. 13, 118; *Woodruff* v. *Richardson*, 20 Connecticut, 238; *Knight* v. *Foster*, 39 N. H. 576; *Smith* v. *Blanchard*, 42 N. H. 137.

The scope and extent of the cross-examination like the order of proof are within the sound judicial discretion of the trial court, and such rulings will not be disturbed unless they clearly amount to an abuse of that discretion.

The bad character either generally or in the office as State's attorney of defendant in error may be shown, but such showing should be made by, and only by independent proof, as part of defendant's case. Such proof was not offered and at the argument counsel for appellants admitted that it could not be obtained. This admission sustains the contention already made that the so-called examination would have been not only useless but injurious to appellants.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action for libel brought in the Supreme Court of the District of Columbia. The plaintiff in the action, defendant in error here, secured a verdict for $8,500, upon which judgment was entered. It was affirmed by the Court of Appeals. 28 App. D. C. 498.

The facts are set out at some length in the opinion of the Court of Appeals, and need not be repeated. It is enough to say that defendant in error Talbott was, at the time of the publication of the libel, State's attorney for the county of Montgomery, in the State of Maryland. During his incumbency of that office an indictment was found upon the testimony of one Hudson, charging plaintiffs in error with the crime of arson, for having set fire, it was charged, to a building owned by them in Montgomery county. The building was insured for $30,000, of which, after controversy, there was paid $21,000. The libelous article was published in a paper published in the city of Washington, called the Sunday Globe, and copies circulated in the county of Montgomery, Md. The article was entitled "History of a Crime in which District Attorney Talbott, of Maryland, Enacts a Leading Role." It accused Tabott of entering into a "criminal scheme" with Hudson, and a man by the name of Hopp, to blackmail Pickford and Walter, plaintiffs in error, which "culminated" in the "nefarious indictment," and, in order that the actors in it might be "unmasked," the facts were said to be stated as they were learned "after a thorough investigation." Certain facts and instances were detailed, among others the association of Hudson and Hopp, an attempt by the latter to obtain money from Pickford to stop the prosecution of the indictment, the payment of Pickford to Hopp of certain marked bills, the arrest of Hopp, the advancement of money by Talbott to Hudson, the demand of Pickford's attorney for trial of the indictment, and motions to continue the same by Talbott, and the final dismissal of the same by him when the court peremptorily ordered him to proceed. The article concluded with these words: "The district attorney [Talbott] thereupon, by leave of the court, entered a *nol. pros.* and the great conspiracy thus came to an inglorious end."

It appeared from the evidence that the predecessor in office of Talbott (Alexander Kilgour) had refused to prosecute plaintiffs in error, and to him, plaintiff in error, Pickford, in his

testimony, attributed the declaration that the "whole thing" was a "blackmailing scheme." Kilgour, in his testimony, stated that he did not recall using the word "blackmailing," but said that in all probability he had done so, and "that it was an effort on the part of the insurance companies to use his office for the purpose of collecting their money."

The declaration contained four counts, the first of which was taken from the jury. In all of them, however, Talbott alleged his incumbency of the office of State's attorney for the county of Montgomery, and that, as "such officer, he was always reputed amongst the citizens of said county" and of the United States, "and deservedly so reputed, to be upright, honest, just and faithful in the performance of the public duties imposed upon him by his oath of office and the laws of the State of Mayland." Injury to his good name and credit was alleged. The defendants pleaded the general issue.

At the trial, Talbott being on the stand, testified that he had investigated the crime for which Pickford and Walter were indicted, and that it had been brought to his attention by a man by the name of Thompson, "in a vague and indefinite letter," which was followed by another letter, in which it was stated the crime was arson. He testified that Thompson was a newspaper man, whom he had never seen before, and on whom he called in response to the second letter. He also testified that Thompson told him that Hudson would be a witness, but did not tell him who Hudson was, but that he (Hudson) was thoroughly in touch with the situation. Subsequently he went with Thompson to see Hudson, taking a stenographer with him. He further testified that he did not know whether he asked Thompson if the matter had been brought to the attention of Mr. Kilgour. And further testified that the fire occurred during Kilgour's incumbency, and that he had not inquired of Kilgour about it. He also testified that the fire occurred in September, 1897, two years and four months before he qualified. He testified further that both Thompson and Hudson were strangers to him. At this point

the court interrupted the examination, and the following occurred:

"The COURT. On what line are you pursuing this inquiry?

"Mr. MADDOX. I am going to show, if I can, the absence of good faith in this indictment on the part of the district attorney.

"Thereupon, after discussion and explanation on the part of counsel for defendants, the following occurred:

"The COURT. I think I have heard enough to know what your proposition is. I cannot see but that it is an attempt to prove the truth without pleading it. . . . You may prove anything Pickford heard the witness say, before the article was published.

"Mr. MADDOX. I want to prove by this witness first by his own testimony in connection with the transaction complained of in this article, that he is not a man of good character, which he says he is.

"Mr. LIPSCOMB. I do not object *by our* [to your] asking him that, Mr. Maddox.

"Secondly. I want to show that Mr. Pickford, from what he heard the plaintiff say, had reasonable grounds to believe that he was mixed up in some way with this conspiracy.

"The COURT. You may prove anything Pickford heard the witness say before the article was published.

"Mr. MADDOX. I understand the court will not let me go into the inquiry as to whether or not the plaintiff knew the man Hudson before he made this presentment to the grand jury and whether he investigated the character of the man.

"The COURT. Under your statement that you propose by that line of testimony to prove that the district attorney acted in bad faith, I will not hear it, because I do not think it is relevant for that purpose."

This ruling is assigned as error here, as it was in the Court of Appeals, and it is attacked on the ground that "the 'good faith' of the defendant in error in procuring the Rockville indictment went to the very heart of the action." And counsel

supplement this by saying that "if it could have been made to appear by the admission of the witness, testifying in his own behalf, that while State's attorney he was in league with the man Hudson and the insurance companies, in a scheme which his predecessor denominated 'blackmailing,' the jury would have made short work of the case when they retired to consider their verdict; and it was impossible to do this except by probing the conscience of the witness through the medium of cross-examination." It is obvious, by "good faith," counsel mean the truth of the charge. But in the subsequent discussion they seem to make it equivalent to good character, and contend that the examination was in rebuttal of the allegation of the declaration that defendant in error "was upright, honest and just" in the performance of his official duties.

For the right to show the character of the witness counsel adduce many cases, and assert besides the freedom that may be exercised in cross-examination. But the counsel who tried the case marked a distinction between the character of the witness and his good faith, and on that distinction the court made its ruling. It will not do now to identify them and claim a right that was not denied. The attorney for defendants (plaintiffs in error) was careful to say that he made no objections to questions directed to character, and the final purpose as declared had no reference to that. But what is the testimony and what is the argument built upon it? Counsel who conducted the defense said: "I understand the court will not let me go into the inquiry as to whether or not the plaintiff knew the man Hudson before he made this presentment to the grand jury, and whether he investigated the character of the man." It is now argued that this was an inquiry of a specific fact affecting the character of Talbott, showing that he exhibited a "reckless disregard of the rights of others," and this, taken in connection with certain facts mentioned, "shows," it is said, "a readiness on the part of the defendant in error to smirch the character of plaintiffs in error amounting to recklessness, such that if the defendant in error were at

bar for his conduct in the premises would be held to show malice of the degree calling for punitive damages." And it is urged, after considerable discussion, that "the interrupted attempt was to show that the defendant in error, by reason of his conduct in the very matter in controversy, was not entitled to and did not have the peculiar character in respect to which he claimed to have been injured, namely, a character for probity in office. . . ."

We are not able to concur in the conclusion. A charge of using an office to procure an indictment as part of a conspiracy to blackmail could not be justified or in any degree excused by the facts offered to be proved. One might be a careful and zealous officer and not stop to investigate the characters of prosecuting witnesses. Besides, the charge was not of careless credence of an accusation of crime against innocent men, but of a scheme deliberately planned, through a "nefarious indictment," to use the words of the libel, to extort money from innocent men. We think, therefore, that the trial court was right in rejecting the proffered evidence as irrelevant. We could not hold otherwise, unless we should hold that crime and credulity are one and the same thing, and we repeat that the mere neglect to investigate the character of witnesses is not equivalent to such disregard of the rights of others as to be tantamount to deliberate design, certainly not a deliberate design to blackmail. We say "mere neglect," because this was all the offer amounted to. It was already in evidence for what it was worth that Hudson was a stranger to Talbott.

The second assignment of error is based upon the contention that the court erroneously instructed the jury in regard to the responsibility of the plaintiff in error for the libel.

It is not necessary to give the testimony. We will assume that it might have been contended that plaintiffs in error were not connected with either the printing or publishing of the first article or the second (there were two), or with either. The instruction asked and the instructions given by the court

are too long to be copied and difficult to summarize. They are set out in the opinion of the Court of Appeals, and it will be seen from them that those given by the court, which were not objected to, embodied all, as the Court of Appeals held, that was contained in the instruction refused, adapted to the testimony and the consideration which the jury might give to its various phases.

Judgment affirmed.

PRENTIS *et al.*, CONSTITUTING THE STATE CORPORATION COMMISSION OF VIRGINIA, *v.* ATLANTIC COAST LINE COMPANY.

SAME *v.* CHESAPEAKE AND OHIO RAILWAY COMPANY.

SAME *v.* CHESAPEAKE WESTERN RAILWAY.

SAME *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

SAME *v.* NORFOLK AND WESTERN RAILWAY COMPANY.

SAME *v.* SOUTHERN RAILWAY COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Nos. 270, 271, 272, 273, 274, 275. Argued October 16, 19, 20, 1908.—Decided November 30, 1908.

So far as the Federal Constitution is concerned, a State may, by constitutional provision, unite legislative and judicial powers in the same body.

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under existing laws, while legislation looks to the future and changes conditions, making new rules to be thereafter applied.

The making of a rate by a legislative body, after hearing the interested parties, is not *res judicata* upon the validity of the rate when questioned by those parties in a suit in a court. Litigation does not arise until after legislation; nor can a State make such legislative action *res judicata* in subsequent litigation.

Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stat. § 720, no matter what may be the character of the body in which they take place.

Whether a railroad rate is confiscatory so as to deprive the company of its property without due process of law within the meaning of the Fourteenth Amendment depends upon the valuation of the property, the income derivable from the rate, and the proportion between the two, which are matters of fact which the company cannot be prevented from trying before a competent tribunal of its own choosing.

Where a state railroad commission, which is granted power by the state constitution to make and enforce rates, enacts and attempts to enforce rates which are so low as to be confiscatory, the proper remedy is by bill in equity to enjoin such enforcement, and such a suit against the members of the commission will not be bad as one against the State, but it should not be commenced until the rate has been fixed by the body having the last word.

While a party does not lose his right to complain of action under an unconstitutional law by not using diligence to prevent its enactment, on a question of railroad rates, when an appeal to the Supreme Court of the State from an order of the State Corporation Commission fixing such rates is given by the state constitution, it is proper that dissatisfied railroads should take this matter to the Supreme Court of their State before bringing a bill in the Circuit Court of the United States. Under the circumstances of this case action on a bill was suspended to await the result of such an appeal.

THE facts are stated in the opinion.

Mr. William A. Anderson, Attorney General of the State of Virginia, *Mr. John W. Daniel* and *Mr. A. Caperton Braxton*, for appellants:

Regulation of transportation companies, particularly as to *intra*state rates is an essential attribute of the State government, a legitimate and necessary part of the police power, to be exercised by such body as the State may select and clothe with the necessary powers. *Munn* v. *Illinois*, 94 U. S. 113; *Granger Cases*, 94 U. S. 155; *Railroad Commission Cases*, 116 U. S. 307; *Smythe* v. *Ames*, 169 U. S. 523; *Minn. &c. R. R. Co.* v. *Minnesota*, 186 U. S. 257; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 394, 413; *St. Louis &c. R. R. Co.* v. *Gill*, 156 U. S. 658.

The experience of the States through more than half a century of governmental dealings with such companies had demonstrated that these powers and duties of regulation could not be efficiently, or satisfactorily exercised by an ordinary legislature, or by a body invested merely with executive or administrative powers, not proceeding judicially, nor according to the parties in interest due process of law, and equal protection of the laws, as required by the Fourteenth Amendment.

It had been also demonstrated that the ordinary courts of the country could not afford adequate relief for a situation so difficult and complex. Such a court might determine that a particular rate or schedule of rates was unjust, unreasonable and illegal, because confiscatory; but it could not prescribe the rate or schedule which should be adopted. Any redress such courts could give was and is purely negative in its character, and absolutely inadequate to meet the requirements of conditions which demand constant supervision and prompt and positive relief.

The Virginia State Corporation Commission was accordingly created under the express provisions of the Virginia constitution, and endowed by it and by the statutes subsequently passed with all necessary powers.

It was constituted therefore in the first place as a judicial tribunal, distinctly and expressly a court in respect to its more important functions, equipped with all the machinery and invested with all of the powers of a court within its broad but special jurisdiction. It is in fact and in law a court.

In ascertaining and deciding what intrastate rates are just and reasonable, the commission acts judicially, and after ample notice to all parties in interest accords all appropriate judicial process, and all due process of law, every opportunity to be heard, and a full and fair trial.

As a further protection against possible injustice, an appeal of right to the Supreme Court of Appeals is given to any aggrieved party, and if denied by that appellate court any right assured by the Constitution and laws of the United States,

redress may be had by invoking the paramount jurisdiction of this court.

While its most important powers and duties in determining rates are judicial, the tribunal is also endowed with extra judicial powers, essential to the just and effective regulation of such companies—technically defined as "legislative," namely, the power of tentatively proposing, and after having judicially investigated, considered and ascertained the rates which are just and reasonable, of formally prescribing the rates so judicially ascertained to be reasonable and just.

This commission was so constituted not to evade, but to do, justice; not to oust the jurisdiction of any court which could afford adequate relief, but to give to the transportation companies and to the Commonwealth a tribunal appropriately clothed with complex powers to deal justly and effectively with complex problems, and a complex subject.

The commission is a valid tribunal.

It is sanctioned by the state constitution, for it is the creature of that instrument.

It is not repugnant to the Federal Constitution; it not only does not deny, but is required to accord, to litigants, due process of law and the equal protection of the laws, and to give as full and fair a hearing and trial as it would be possible for any court to give. Nor does, nor can it, without committing reversible error, deprive any one of the equal protection of the laws.

The Federal Constitution does not inhibit the blending by the States of the powers of two, or even of all three of the great departments of government in the hands of a single officer or a single official body. See *Tinsley* v. *Anderson*, 171 U. S. 101, 106; *Railroad Commission Cases*, 116 U. S. 307; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 394, 413; *St. Louis &c. R. R. Co.* v. *Gill*, 156 U. S. 658; *Smythe* v. *Ames*, 169 U. S. 524; *Minneapolis & St. L. R. R. Co.* v. *Minnesota*, 186 U. S. 257; *Missouri R. R. Co.* v. *Mackey*, 127 U. S. 209; *Barbier* v. *Conally*, 113 U. S. 32; *Soon Hing* v. *Crowley*,

113 U. S. 703; *Kentucky Ry. Tax Cases*, 115 U. S. 321; *Home Ins. Co.* v. *New York*, 134 U. S. 606; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 562; *Atchison, Topeka & Santa Fé R. R. Co.* v. *Matthews*, 174 U. S. 95; *Fischer* v. *St. Louis*, 194 U. S. 361; *Fidelity Mut. Life Association* v. *Mettler*, 185 U. S. 308, 325, 327; *Spring Valley Water Works Co.* v. *Schottler*, 110 U. S. 347, 354; *C., B. & Q. R. R. Co.* v. *Nebraska*, 170 U. S. 57, 75, 76; *Louisville & Nashville R. R. Co.* v. *Kentucky*, 183 U. S. 503; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 108, 109; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 508, 509; *Dreyer* v. *Illinois*, 187 U. S. 57, 84; *Reetz* v. *Michigan*, 188 U. S. 505, 507.

These suits are in contravention of § 720, Rev. Stat. The commission being thus to all intents and purposes a validly constituted court, the grant of an injunction as prayed for by appellees, is in direct violation of that section which forbids any United States court from granting a writ of injunction to stay proceedings in any court of a State, except where such injunction may be authorized by any law relating to proceedings in bankruptcy. *Peck et al.* v. *Jenness et al.*, 7 How. 612, and cases there cited; *Harkrader* v. *Wadley*, 172 U. S. 148; *United States* v. *Parkhurst-Davis Mercantile Co.*, 176 U. S. 317; *Haines* v. *Carpenter*, 91 U. S. 254–257.

The doctrine of *res judicata* applies. Whether the commission be regarded as a court, or as a legislative body, or whatever its distinctive characteristics as related to the great departments of government, it is unquestionably a tribunal fully and validly empowered by the constitution and laws of Virginia, and under the Constitution and laws of the United States, to hear, try, and finally determine the very case which it did hear and try during the twelve months prior to April 27, 1907, and did adjudicate and decide by its final findings, order, and judgment rendered and pronounced upon that day, which findings, order, and judgment were and are conclusive upon the appellees here, the defendants in that proceeding, and upon

the world; and under the Constitution and laws of the United States and of Virginia, can be reviewed or reversed only upon appeal taken in the manner provided by the Constitution and laws of Virginia and of the United States.

All matters and questions presented by the bills in these causes, or on the merits, were presented in the *Virginia Passenger Rate Case* already decided by said commission on April 27, 1907.

As the acts or findings of a town council, or of any tribunal whatsoever, however humble or important, done in the exercise of a lawfully conferred discretion, and within the scope of their validly conferred authority, can never be either directly or collaterally attacked for errors of judgment, of law, or of fact, by any court, State or Federal, however exalted, except in such manner as may be prescribed by law, so the acts and findings of the Virginia State Corporation Commission, done within the limits of its lawful authority and jurisdiction, cannot be attacked or impeached except upon appeal to the Supreme Court of Virginia, or to the Supreme Court of the United States in the manner provided by law.

These suits, in their last analysis, are suits against the State, and cannot be maintained. The members of the commission have no personal or individual connection with the subject-matter of these suits, no personal interest whatever in the suits or in the proceedings and order and judgment which it is the object of these suits to impeach. They constitute the official personnel of the corporation commission, an integral coördinate department of the state government, and only as such are impleaded here. *Ex parte Ayers*, 123 U. S. 443; *Louisiana* v. *Jumel*, 107 U. S. 711; *Antoni* v. *Greenhow*, 107 U. S. 769; *Cunningham* v. *Macon & B. R. R. Co.*, 109 U. S. 446; *Haygood* v. *Southern*, 117 U. S. 52; *Fitts* v. *McGhee*, 172 U. S. 516; *Smith* v. *Reeves*, 178 U. S. 440; *Minnesota* v. *Hitchcock*, 185 U. S. 386.

For the Federal court to entertain these suits operates as a great injustice to the State of Virginia. It is a hardship

and a grievous wrong to her for any court, after these matters have already been exhaustively litigated before the state tribunal and after fair trial brought to final decision there, to require these matters to be again, at great inconvenience and enormous cost to Virginia, litigated, and not only this, but permit the appellees to "mend their hold," and to make up a new case.

On the other hand, no hardship or injustice whatever will be done to the appellees by remanding them to their ample remedy by appeal from the judgment of the commission to the supreme court of the State and thence, if they find occasion for it, to this court by writ of error.

The sections of the Virginia constitution and the statutes from which the commission derives its existence and its powers, violate no provisions of the Federal Constitution, are in conflict with no principle essential to the preservation of liberty, but are competent, valid, and constitutional enactments; the judgments and orders of the tribunal thus constituted, cannot be collaterally attacked in the United States Circuit, or in any other, court, and can only be reviewed, brought in question, and if erroneous, be reversed and set aside, by the court of appeals of the State, or by this court in the regular and orderly mode of procedure by appeal prescribed by the Constitution and laws of the State, and of the United States.

Mr. Alfred P. Thom, for appellees, with whom *Messrs. Alexander Hamilton, William B. McIlwaine, Henry T. Wickham, Henry Taylor, Jr., S. S. P. Patteson, Geo. H. Taylor, H. L. Stone, Jos. I. Doran, Lucian H. Cocke* and *John K. Graves* were on the briefs. *Mr. Henry L. Stone* filed a separate brief for Louisville & Nashville Railroad Company on the arbitrary classification by the State Corporation Commission of Virginia in fixing the rates complained of:

It is unnecessary to discuss whether the rates complained of are confiscatory, the fact that they are confiscatory being

admitted by the pleadings of the appellants for the purposes of these cases. No question was made in the Circuit Court, and none is made here, as to the truth of the allegations of the several bills of complaint, the truth of these allegations being for the purposes of these cases admitted by the pleadings and the entire objection insisted on by the appellants being to the jurisdiction of the Circuit Court. The bills filed in the Circuit Court show grounds of Federal jurisdiction. The allegations of each of the bills show a case of confiscation, and the bills of The Chesapeake & Ohio Railway Company, Norfolk & Western Railway Company and Southern Railway Company allege the necessary facts to show that the rates complained of violate a valid contract between them and the State of Virginia. *City Railway Co.* v. *Citizens' Ry. Co.*, 166 U. S. 557; *Walla Walla City* v. *Walla Walla Water Co.*, 172 U. S. 1; *Detroit* v. *Detroit Citizens' Ry. Co.*, 184 U. S. 368.

Even on the argumentative concession that the Virginia commission is a constitutional body, notwithstanding the Fourteenth Amendment to the Constitution of the United States, its members were in this case subject to be enjoined by the Circuit Court.

The Virginia commission is vested by the Virginia constitution [§ 156, (a), (b), (c), (d), (e), (g), (h),] with the full power of the State over transportation companies in their public relations, and is the department through which the whole body of the State's laws in respect to them is administered. *Norfolk & Portsmouth Belt Line R. Co.* v. *Commonwealth*, 103 Virginia, 294. The commission possesses the whole power of confiscation from the initial to the final step.

It is not competent for the State of Virginia, even if it tried, to accomplish an invasion of property rights in violation of the Constitution of the United States by the device of conferring the power of confiscation on a tribunal which it denominates a court. Whether or not the Federal Circuit Court has power to enjoin an unconstitutional invasion of property rights attempted by state officers depends on the character of

the act sought to be enjoined, and not on the title of the officer or of the tribunal attempting to perform it. *Marbury* v. *Madison*, 1 Cranch, 137; *Gordon* v. *United States*, 117 U. S. 697; *Weil* v. *Calhoun*, 25 Fed. Rep. 865; *August Busch & Co.* v. *Webb*, 122 Fed. Rep. 665; *Louisville & Nashville R. Co.* v. *Brown*, 123 Fed. Rep. 948; *Western Union Tel. Co.* v. *Myatt*, 98 Fed. Rep. 341; *Ex parte Candee*, 48 Alabama, 399; *Roley* v. *Prince George's County*, 92 Maryland, 163; *Upshur County* v. *Rich*, 135 U. S. 467, 473; *Ex parte Virginia*, 100 U. S. 339; *McNeill* v. *Southern Railway Co.*, 202 U. S. 543, affirming *Southern Railway Co.* v. *Greensboro Ice &c. Co.*, 134 Fed. Rep. 82.

If an act is in essence legislative, the fact of a notice and hearing does not constitute the body performing it a judicial body, and does not make the act a judicial act. The contention of appellants that the notice and hearing before the act is made, and as part of the process of performing the act of establishing a rate is "anticipatory litigation" and judicial in character is unsound. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *Commonwealth* v. *Atlantic Coast Line R. Co.*, 106 Virginia, 61; *Southern Ry. Co.* v. *Commonwealth*, 107 Virginia, 771; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 460; *Southern Pacific Co.* v. *Board of R. R. Commissioners*, 78 Fed. Rep. 236, 259, 260; *Interstate Commerce Commission* v. *Cincinnati &c. R. Co.*, 167 U. S. 499; *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 168; *Western Union Tel. Co.* v. *Myatt*, 98 Fed. Rep. 341, 342, 345; *Chicago &c. R. Co.* v. *Smith*, 110 Fed. Rep. 473; *Louisville & Nashville R. Co.* v. *Brown*, 123 Fed. Rep. 948; *Chicago &c. R. Co.* v. *Dey*, 35 Fed. Rep. 866; *Chicago &c. R. Co.* v. *Becker*, 35 Fed. Rep. 883; *Northern Pacific R. Co.* v. *Keyes*, 91 Fed. Rep. 47; *Metropolitan Trust Co.* v. *Houston &c. R. Co.*, 90 Fed. Rep. 683; *Kansas City S. R. Co.* v. *Board of R. R. Commissioners*, 106 Fed. Rep. 353; *Wallace* v. *Arkansas Central R. Co.*, 118 Fed. Rep. 422; *Houston &c. R. Co.* v. *Storey*, 149 Fed. Rep. 499; *Perkins* v. *Northern Pacific R. Co.*, 155

Fed. Rep. 445; *Railroad Commission of La.* v. *Texas &c. R. Co.*, 144 Fed. Rep. 68; *Mississippi R. R. Commission* v. *Illinois Central R. Co.*, 203 U. S. 335; *Norwalk Street Ry. Co.'s Appeal*, 69 Connecticut, 176; *United States* v. *Ferreira*, 13 How. 40; *McNeill* v. *Sou. Ry. Co.*, 202 U. S. 543.

If a State by requiring a notice and hearing as preliminary to legislation could make judicial that which in essence is legislative, it could by a very simple device destroy the jurisdiction in equity of the Federal courts. Whether or not a tribunal is a court within the meaning of § 720, when taking any action that may be under consideration is necessarily a question for the United States courts to determine. At the time the bills in these cases were filed no court had taken jurisdiction of the matters in controversy. See cases cited in preceding paragraph. The writ of injunction furnishes no prototype to show that the making of rates is a judicial function. The propositions advanced by appellants based upon § 720, Rev. Stat., were made by counsel in the *Reagan Case*, 154 U. S. 362, and overruled by this court.

The constitution of Virginia has not attempted to make the commission a court while engaged in rate-making or in the proceedings preparatory thereto. Various provisions of Virginia constitution examined. *Atlantic Coast Line R. Co.* v. *Commonwealth*, 102 Virginia, 621; *Southern Ry. Co.* v. *Commonwealth*, 107 Virginia, 771. The Virginia commission not being a court when making rates, neither its order establishing the rates nor its conclusions on matters of fact or law leading up to it are *res judicata*, and its members are not protected by § 720 of the Revised Statutes from injunction issuing from the Federal court when attempting to enforce a confiscatory rate.

Due process of law requires that the company complaining of a rate shall, after it is fixed, have the right to a judicial investigation by due process of law, under the form and with the machinery provided by the wisdom of successive ages for an investigation judicially of the truth of the matter in con-

troversy. *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 172; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 456, 458, 461; *Smyth* v. *Ames*, 169 U. S. 526, 527; *Ex parte Young*, 209 U. S. 166; *St. Louis &c. R. Co.* v. *Gill*, 156 U. S. 649, 659, 666. Due process of law must be such a proceeding as is appropriate to the nature of the case. What is sufficient for one case may be inapplicable to and insufficient in another. Cooley, Constitutional Limitations (7th ed.), 502, 506; *Chicago &c. R. Co.* v. *Chicago*, 166 U. S. 240; *Hagar* v. *Reclamation Dist.*, 111 U. S. 708; *Davidson* v. *New Orleans*, 96 U. S. 107. What is necessary to due process of law in a rate case is very different from what is required in a tax case. *Chicago &c. R. Co.* v. *Minnesota*, 134 U. S. 460; *State Railroad Tax Cases*, 92 U. S. 613; *Murray* v. *Hoboken Land Co.*, 18 How. 282; *Ex parte Young*, 209 U. S. 166.

The appeal provided for in the Virginia constitution to the Supreme Court of Appeals of the State from the commission's action in making the rates complained of does not constitute due process of law, and does not destroy the equity jurisdiction of the Federal court. *Smyth* v. *Ames*, 169 U. S. 474; *Mississippi Mills* v. *Cohn*, 150 U. S. 204; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 391; U. S. Statutes, 25 Stat. L. 434.

The Circuit Court of the United States had jurisdiction in equity to consider and determine these cases, notwithstanding an appeal allowed by the state laws. *Chicago &c. R. Co.* v. *Minnesota*, 134 U. S. 460; *Ex parte Young*, 209 U. S. 142, 143, 166; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 400; Posthumous note of Chief Justice Taney in *Gordon* v. *United States*, Appendix, 117 U. S. 697; *Wallace* v. *Adams*, 204 U. S. 415. Equity has jurisdiction in such cases in the interest of the public so that an orderly and comprehensive settlement may be made as a basis of doing a business essential to the public welfare; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 460; *Ex parte Young*, 209 U. S. 166; and also to prevent a multiplicity of actions. See above cases.

The contention of appellants that the act sought to be en-

joined is part of a legislative act, and hence cannot be enjoined, is unsound. *Southern Pacific Co.* v. *Board of R. R. Commissioners*, 78 Fed. Rep. 246; *State ex rel. Morris* v. *Mason*, 43 La. Ann. 590; *Gaines* v. *Thompson*, 7 Wall. 347; High on Injunctions, § 135; *Wolfe* v. *McCaull*, 71 Virginia, 876; *Wise* v. *Bigger*, 79 Virginia, 269; *Reed* v. *Mayor &c. of Woodcliff* (N. J.), 60 Atl. 1128; *Chicago &c. R. Co.* v. *Dey*, 35 Fed. Rep. 866; *Northern Pacific Co.* v. *Keyes*, 91 Fed. Rep. 47; *Minneapolis Street Ry. Co.* v. *City of Minneapolis*, 155 Fed. Rep. 992; *McChord* v. *Louisville & Nashville R. Co.*, 183 U. S. 497; *Marbury* v. *Madison*, 1 Cranch, 137; *Mississippi* v. *Johnson*, 4 Wall. 498; *Ex parte Young*, 209 U. S. 159; *Alpers* v. *San Francisco &c. R. Co.*, 32 Fed. Rep. 503; *New Orleans Water Works Co.* v. *New Orleans*, 164 U. S. 481, 482. See *Chicago &c. R. Co.* v. *Chicago*, 166 U. S. 235.

The order of the commission was a finality and the bills were not prematurely filed. *Atlantic Coast Line R. Co.* v. *Commonwealth*, 102 Virginia, 599; *Southern Ry. Co.* v. *Commonwealth*, 107 Virginia, 771; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Chicago &c. R. Co.* v. *Tompkins*, 176 U. S. 168; *Chicago &c. Ry. Co.* v. *Dey*, 35 Fed. Rep. 866; *Northern Pacific R. Co.* v. *Keyes*, 91 Fed. Rep. 47; *Chicago &c. R. Co.* v. *Becker*, 35 Fed. Rep. 833; *Western Union Tel. Co.* v. *Myatt*, 98 Fed. Rep. 335.

The Virginia system deprives appellees of the equal protection of the laws, in that it denies to transportation companies access to courts of equity, declared by the Supreme Court of the United States to be the proper, if not the only, mode of judicial relief against a multiplicity of suits, while all other interests in the State are given such remedy in equity and such defense. *Gulf &c. R. Co.* v. *Ellis*, 165 U. S. 150; *Smyth* v. *Ames*, 169 U. S. 466; *Chicago &c. R. Co.* v. *Minnesota*, 134 U. S. 460; *Railway Company* v. *Gill*, 156 U. S. 666; *Detroit* v. *Detroit Citizens' Street R. Co.*, 184 U. S. 381; *Haverhill Gaslight Company* v. *Barker*, 109 Fed. Rep. 694.

Independently of the foregoing, however, the commission,

because the Virginia constitution undertakes to unite in it the whole power of the State, legislative, executive and judicial, in respect to the rates in controversy, is by the law of its creation made a partial tribunal, and therefore its judgments cannot satisfy the requirements of due process of law. The law creating this union of powers, not being separable in its several provisions conferring them, is itself unconstitutional under the Fourteenth Amendment, in so far as it confers the powers referred to. The commission, therefore, can have no valid existence. An unconstitutional act is no law, creates no office and confers no authority. *Norton* v. *Shelby*, 118 U. S. 425; *Chicago &c. R. Co.* v. *Dey*, 35 Fed. Rep. 866; *Dash* v. *Van Kleeck*, 7 Johns. 447; Story, Constitution (5th ed.), 393; *Western Union Tel. Co.* v. *Myatt*, 98 Fed. Rep. 344, 346, 352; *State* v. *Johnson*, 61 Kansas, 603; *Norwalk Street Ry. Co's. Appeal*, 69 Connecticut, 576; Paley's Moral Philosophy; Montesquieu, "Spirit of Laws," Book 2, c. 6; *Pennoyer* v. *Neff*, 95 U. S. 733; *Ex parte Wall*, 107 U. S. 289; *Murray's Lessees* v. *Hoboken Land Co.*, 18 How. 276; *Burns* v. *Multonomah R. Co.*, 15 Fed. Rep. 183; *Railroad Tax Cases*, 13 Fed. Rep. 752; *Davidson* v. *New Orleans*, 96 U. S. 102; *Weimer* v. *Bunberry*, 30 Michigan, 201; *Dr. Bonham's Case*, 8 Coke, 118; *Violett* v. *Alexandria*, 92 Virginia, 567; *Meyers* v. *Shields*, 61 Fed. Rep. 725; 8 Cyc. 1084; *London* v. *Wood*, 12 Mod. 687; *Hesketh* v. *Braddock*, 3 Burr. 1856; *Meyer* v. *City of San Diego*, 121 California, 104; *Tootle* v. *Berkley*, 60 Kansas, 446; *State* v. *Crane*, 30 N. J. L. 394; *Washington Insurance Co.* v. *Price*, Hopkins Ch. 1; *Matter of Hancock*, 27 Hun, 78; *Lanfear* v. *Mayor*, 4 Louisiana, 97; Cooley, Constitutional Limitations (7th ed.), 413, 594; *Holden* v. *Hardy*, 169 U. S. 389; *Ex parte Ziebold*, 23 Fed. Rep. 791. The comparison sought to be made by counsel for appellants between the Virginia commission and the English Parliament can have no weight in determining the validity of the commission, because of the vital difference between the form of government in England and that in the United States. *Hurtado* v. *California*, 110 U. S. 531; Guthrie

"The Fourteenth Amendment to the Constitution of the United States," 68, 69.

The appeal provided for to the Supreme Court of Appeals of Virginia does not avoid the unconstitutionality referred to in the next preceding paragraph, but is itself invalid under the Fourteenth Amendment to the Constitution of the United States, because it unites in the Supreme Court of Appeals these same objectionable legislative and judicial functions in respect to the same subject-matter. If one remedy does not constitute due process of law, doubling it does not constitute due process of law. *Pittsburgh R. Co.* v. *Backus*, 154 U. S. 427; *Reetz* v. *Michigan*, 188 U. S. 508.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are bills in equity brought in the Circuit Court to enjoin the members and clerk of the Virginia State Corporation Commission from publishing or taking any other steps to enforce a certain order fixing passenger rates. The bills allege, with some elaboration of the facts, that the rates in question are confiscatory, and other matters not necessary to mention, and set up the Fourteenth Amendment, etc. The defendants appeared specially, and by demurrer and plea respectively put forward that the proceedings before the commission are proceedings in a court of the State, which the courts of the United States are forbidden to enjoin, Rev. Stats. § 720, and that the decision of the commission makes the legality of the rates *res judicata*. On these pleadings final decrees were entered for the plaintiffs, and the defendants appealed to this court. Therefore, as the case is presented, it is to be assumed that the order confiscates the plaintiffs' property and infringes the Fourteenth Amendment if the matter is open to inquiry. The question principally argued, and the main question to be discussed, is whether the order is one which, in spite of its constitutional invalidity, the courts of the United States are not at liberty to impugn.

The State Corporation Commission is established and its powers are defined at length by the constitution of the State. There is no need to rehearse the provisions that give it dignity and importance or that add judicial to its other functions, because we shall assume that for some purposes it is a court within the meaning of Rev. Stats. § 720, and in the commonly accepted sense of that word. Among its duties it exercises the authority of the State to supervise, regulate and control public service corporations, and to that end, as is said by the Supreme Court of Virginia and repeated by counsel at the bar, it has been clothed with legislative, judicial and executive powers. *Norfolk & Portsmouth Belt Line R. R. Co.* v. *Commonwealth*, 103 Virginia, 289, 294.

The state constitution provides that the commission, in the performance of the duty just mentioned, shall from time to time prescribe and enforce such rates, charges, classification of traffic, and rules and regulations, for transportation and transmission companies doing business in the State, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just. Before prescribing or fixing any rate or charge, etc., it is to give notice (in case of a general order not directed against any specific company by name, by four weeks' publication in a newspaper) of the substance of the contemplated action and of a time and place when the commission will hear objections and evidence against it. If an order is passed, the order again is to be published as above before it shall go into effect. An appeal to the Supreme Court of Appeals is given of right to any party aggrieved, upon conditions not necessary to be stated, and that court, if it reverses what has been done, is to substitute such order as in its opinion the commission should have made. The commission is to certify the facts upon which its action was based and such evidence as may be required, but no new evidence is to be received, and how far the findings of the commission can be revised perhaps is not quite plain. No other court of the State can review, reverse, correct or annul

the action of the commission, and in collateral proceedings the validity of the rates established by it cannot be called in doubt.

When a rate has been fixed, the commission has power to enforce compliance with its order by adjudging and enforcing, by its own appropriate process, against the offending company the fines and penalties established by law. But a hearing is required, and the validity and reasonableness of the order may be attacked again in this proceeding, and all defenses seem to be open to the party charged with a breach.

On July 31, 1906, under the provisions outlined, the commission published in a newspaper notice to the several steam railroad companies doing business in Virginia, and all persons interested, that at a certain time and place it would hear objections to an order prescribing a maximum rate of two cents a mile for the transportation of passengers, with details not needing to be stated. A hearing was had, and the complainants (appellees) severally appeared and urged objections similar to those set up in the bills. On April 27, 1907, the commission passed an order prescribing the rates, but in more specific form. For certain railroads named, including all of the complainants except as we shall state, the rate was to be two cents; for certain excepted branches of the Southern Railway Company, two and half; for others, including the Chesapeake Western Railway, three; and for others three and a half cents a mile, with a minimum charge of ten cents. Publication of the order was directed, and at that stage these bills were brought.

In order to decide the cases it is not necessary to discuss all the questions that were raised or touched upon in argument, and some we shall lay on one side. We shall assume that when, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned. *Dreyer* v. *Illinois*, 187 U. S. 71, 83, 84; *Winchester & Strasburg R. R. Co.* v. *Commonwealth*, 106 Virginia, 264, 268. We shall assume, as we have said, that some of the powers of the com-

mission are judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this order and to punish them for a breach, it then would be sitting as a court and would be protected from interference on the part of courts of the United States.

But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by § 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind, as seems to be fully recognized by the Supreme Court of Appeals, *Commonwealth* v. *Atlantic Coast Line Ry. Co.*, 106 Virginia, 61, 64, and especially by its learned President in his pointed remarks in *Winchester and Strasburg R. R. Co. and others* v. *Commonwealth*, 106 Virginia, 264, 281. See further *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 499, 500, 505; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 440.

Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats. § 720, no matter what may be the general or dominant character of the body in which they may take place. *Southern Ry. Co.* v. *Greensboro Ice & Coal Co.*, 134 Fed. Rep. 82, 94, affirmed *sub nom. McNeill* v. *Southern Ry. Co.*, 202 U. S. 543. That question depends not upon the character of the body but upon the character of the proceedings. *Ex parte Virginia*, 100 U. S. 339, 348. They are not a suit in which a writ of error would lie under Rev. Stats. § 709, and Act of February 18, 1875, c. 80, 18 Stat. 318. See *Upshur County* v. *Rich*, 135 U. S. 467; *Wallace* v. *Adams*, 204

U. S. 415, 423. The decision upon them cannot be *res judicata* when a suit is brought. See *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362. And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. A judge sitting with a jury is not competent to decide issues of fact; but matters of fact that are merely premises to a rule of law he may decide. He may find out for himself, in whatever way seems best, whether a supposed statute ever really was passed. In *Pickering* v. *Barkley*, Style, 132, merchants were asked by the court to state their understanding as an aid to the decision of a demurrer. The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law he must know or discover the facts that establish the law. So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. If a state constitution should provide for a hearing before any law should be passed, and should declare that it should be a judicial proceeding *in rem* and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutionality of the law *res judicata*, if it subsequently should be drawn in question before a court of the United States. And all that we have said would be equally true if an appeal had been taken to the Supreme Court of Appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called. We gather that these are the views of the Supreme Court of Appeals itself. *Atlantic Coast Line Ry. Co.* v. *Commonwealth*, 102 Virginia, 599, 621. They are im-

plied in many cases in this and other United States courts in which the enforcement of rates has been enjoined, notwithstanding notice and hearing, and what counsel in this case call litigation in advance. Legislation cannot bolster itself up in that way. Litigation cannot arise until the moment of legislation is past. See *Southern Ry. Co.* v. *Commonwealth*, 107 Virginia, 771, 772.

It appears to us that the most plausible objection to these bills is not the one most dwelt upon in argument, but that they were brought too soon. Our doubt is a narrow one and its limits should be understood. It seems to us clear that the appellees were not bound to wait for proceedings brought to enforce the rate and to punish them for departing from it. Those, we have assumed in favor of the appellants would be proceedings in court and could not be enjoined; while to confine the railroads to them for the assertion of their rights would be to deprive them of a part of those rights. If the railroads were required to take no active steps until they could bring a writ of error from this court to the Supreme Court of Appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent. "A State cannot tie up a citizen of another State, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts." *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391; *Smyth* v. *Ames*, 169 U. S. 466, 517. See *McNeill* v. *Southern Railway Co.*, 202 U. S. 543; *Ex parte Young*, 209 U. S. 123, 165. Other cases further illustrating

this point are *Chicago & N. W. Ry. Co.* v. *Dey*, 35 Fed. Rep. 866; *Northern Pacific Ry. Co.* v. *Keyes*, 91 Fed. Rep. 47; *Western Union Telegraph Co.* v. *Myatt*, 98 Fed. Rep. 335.

Our hesitation has been on the narrower question whether the railroads, before they resorted to the Circuit Court, should not have taken the appeal allowed to them by the Virginia constitution at the legislative stage, so as to make it absolutely certain that the officials of the State would try to establish and enforce an unconstitutional rule. Considerations of comity and convenience have led this court ordinarily to decline to interfere by *habeas corpus* where the petitioner had open to him a writ of error to a higher court of a State, in cases where there was no merely logical reason for refusing the writ. The question is whether somewhat similar considerations ought not to have some weight here.

We admit at once that they have not the same weight in this case. The question to be decided, we repeat, is legislative, whether a certain rule shall be made. Although the appeal is given as a right, it is not a remedy, properly so called. At that time no case exists. We should hesitate to say, as a general rule, that a right to resort to the courts could be made always to depend upon keeping a previous watch upon the bodies that make laws, and using every effort and all the machinery available to prevent unconstitutional laws from being passed. It might be said that a citizen has a right to assume that the constitution will be respected, and that the very meaning of our system in giving the last word upon constitutional questions to the courts is that he may rest upon that assumption and is not bound to be continually on the alert against covert or open attacks upon his rights in bodies that cannot finally take them away. It is a novel ground for denying a man a resort to the courts that he has not used due diligence to prevent a law from being passed.

But this case hardly can be disposed of on purely general principles. The question that we are considering may be termed a question of equitable fitness or propriety, and must

be answered on the particular facts. The establishment of railroad rates is not like a law that affects private persons who may never have heard of it till it was passed. It is a matter of great interest, both to the railroads and to the public, and is watched by both with scrutinizing care. The railroads went into evidence before the commission. They very well might have taken the matter before the Supreme Court of Appeals. No new evidence and no great additional expense would have been involved.

The State of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the State Corporation Commission, not only by the character of the members of that commission, but by making its decisions dependent upon the assent of the same historic body that is entrusted with the preservation of the most valued constitutional rights, if the railroads see fit to appeal. It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the State in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States.

If the rate should be affirmed by the Supreme Court of Appeals and the railroads still should regard it as confiscatory, it will be understood from what we have said that they will be at liberty then to renew their application to the Circuit Court, without fear of being met by a plea of *res judicata*. It will not be necessary to wait for a prosecution by the commission. We may add that when the rate is fixed a bill against the commission to restrain the members from enforcing it will not be bad as an attempt to enjoin legislation or as a suit against a State, and will be the proper form of remedy. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Tompkins*, 176 U. S. 167; *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543; *Mississippi Railroad Commission* v. *Illinois*

Central Ry. Co., 203 U. S. 335; *Ex parte Young*, 209 U. S. 123.

It is proper before closing to mention one decision that was relied upon by the appellees, and one or two other matters peculiar to the cases before the court. In *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543, the same moment was selected for bringing suit as in these cases, while an examination of the laws of North Carolina discloses that there were statutory provisions for appeal somewhat similar to those in the Virginia constitution, to which we now are referring. But, apart from other differences, in that case the ground of the decree was that the state commission was dealing with a subject-matter beyond its power; no regulation would have been valid, 202 U. S. 561, and the considerations to which we now are giving weight naturally were not urged. But this decision suggests that in three of the present cases an equally potent constitutional bar is alleged against the proceedings of the commission. The Chesapeake and Ohio, the Norfolk and Western and the Southern Railway Companies all set up general laws, alleged to be incorporated in their charters and to constitute contracts, providing that their tolls should not be diminished except under conditions of fact alleged not to exist.

If the State has bound itself by contract not to cut down the rates as contemplated, there would seem to be no reason why the suit should not be entertained now. See *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 393. But it would be premature and is unnecessary to decide whether the State has done so or not. No rate is irrevocably fixed by the State until the matter has been laid before the body having the last word. It may be that that body will adhere to the old rate or will establish one that will not be open to the charge of violating the contracts alleged. The contracts alleged do not prohibit a certain reduction if the profits heretofore realized have exceeded a certain amount. On the question of contract as on that of confiscation it is reasonable and proper

that the evidence should be laid, in the first instance, before the body having the last legislative word.

There is yet another difficulty in applying to these cases the comity which it is desirable if possible to apply. The Virginia statute of April 15, 1903, enacted to carry into effect the provision of the constitution, requires, by § 34, certain, if not all, appeals to be taken and perfected within six months from the date of the order. 1 Pollard's Code of Virginia, c. 56a, 714. It may be that when an appeal is taken to the Supreme Court of Appeals this section will be held to apply and the appeal be declared too late. We express no opinion upon the matter, which is for the state tribunals to decide, but simply notice a possibility. If the present bills should be dismissed, and then that possible conclusion reached, injustice might be done. As our decision does not go upon a denial of power to entertain the bills at the present stage but upon our views as to what is the most proper and orderly course in cases of this sort when practicable, it seems to us that the bills should be retained for the present to await the result of the appeals if the companies see fit to take them. If the appeals are dismissed as brought too late the companies will be entitled to decrees. If they are entertained and the orders of the commission affirmed, the bills may be dismissed without prejudice and filed again.

Decrees reversed.

MR. JUSTICE BREWER is of the opinion that the decrees should be affirmed.

MR. CHIEF JUSTICE FULLER, concurring in reversing the decrees, dissents from the opinion.

I preface what I have to say with a sketch of the record in these cases, abbreviated from the brief of counsel.

The Virginia State Corporation Commission was created and its functions, powers, duties and the essentials of its procedure

were prescribed in detail by the constitution of the State as well as by statute. It was made primarily a judicial court of record of limited jurisdiction, possessing also certain special legislative and executive powers. When it proposed to make a change in a rate of a public service corporation, or otherwise to prescribe a new regulation therefor, the commission was required, sitting as a court, to issue its process, in the nature of a rule, against the corporation concerned, requiring it to appear before the commission at a certain time and place and show cause, if any it could, why the proposed rate should not be prescribed. The judicial question involved on the return to such rule was whether or not the contemplated rate was confiscatory, or otherwise unjust or unreasonable, and in the hearing and disposition of this question the proceedings of the commission as prescribed by law were in every respect the same as those of any other judicial court of record. It issued, executed and enforced its own writs and processes; it could issue and enforce writs of mandamus and injunction; it punished for contempt, and kept a complete record and docket of its proceedings; it summoned witnesses and compelled their attendance, and the production of documents; it ruled upon the admissibility of evidence; it certified any exception to its rulings; and its judgments, decrees and orders had the same force and effect as those of any other court of record in the State, and were enforced by its own proper processes. It was not subject to restraint by any other state court, and from any and every ruling or decision by it an appeal lay to the Supreme Court of Appeals of the State, and was heard upon the record made for and certified by the commission, exactly as in the case of appeals from any other court; and pending the decision of such appeal the order appealed from might by a supersedeas be suspended in its operation.

Not only do the constitution and laws of Virginia make the commission a judicial court of record by clothing it with all the attributes of such a tribunal, but they expressly declare it a court, and require it to proceed only by due process of law

and inquire into and determine every judicial question coming before it. It has repeatedly held itself to be a court and subject to all the obligations thereof, and the Supreme Court of Appeals, the highest state judicial tribunal, has formally and expressly so held.

When this court shall have in the manner above indicated fully heard all parties interested, and, proceeding by due process of law as to them, has judicially determined that the proposed rate or regulation is not confiscatory, nor otherwise unjust or unreasonable, then, but not until then, it is authorized by the constitution and laws of Virginia to enter an order prescribing such rate or regulation, from which order an appeal lies to the Supreme Court of Appeals, with, as has been said, the right of suspension by supersedeas pending the appeal. Assuming that the prescribing of the rate after it has been judicially determined to be reasonable is necessarily a legislative act, then the constitution of the State expressly confers upon this commission the legislative power of prescribing a rate after it has judicially ascertained and decided it to be not below the limit of "reasonable."

On July 31, 1906, the State Corporation Commission issued and caused to be served a notice to the "steam railroad companies doing business in Virginia and all persons interested," that, at 12 o'clock noon, on November 1, 1906, at Richmond, the commission would "hear and consider any objections which may be urged against a rule, regulation, order or requirement of the commission fixing and prescribing a maximum rate of charge of two cents per mile for the transportation of passengers over the line of any railroad company in this State, operated by steam, between points within the State of Virginia."

Accordingly, on November 1, 1906, the appellee companies appeared before the commission, and filed their answers in writing, setting forth why, in their opinion, the proposed two cent rate would be less than reasonable.

The commission thereupon entered into a most thorough

hearing of this question of the reasonableness of the proposed rate, in which hearing the appellee companies were represented by counsel and introduced elaborate evidence.

No evidence was taken or considered, save publicly, in the open sessions of the commission, when appellees were given the fullest opportunity (of which they availed themselves) to be present, to introduce their own testimony, by witnesses and documents, to cross-examine opposing witnesses, to object to the introduction of witnesses or documents, and to except of record to any ruling whatever of the commission.

No evidence was rejected which any railroad company offered. The hearing was continued for several months, and the case was not closed until the companies involved had formally announced, in open court, that they had nothing more to offer.

On April 27, 1907, practically six months after the hearing began, the commission entered its order (which is the basis of appellees' complaint in this cause), accompanied with an elaborate written opinion, giving the grounds therefor.

By this order certain passenger rates—in no case less than two cents per mile—were prescribed for the defendant railroad companies, to go into effect on July 1, 1907, the commission being of opinion, and so deciding, that the rates therein fixed were not confiscatory nor otherwise unjust or unreasonable to said companies.

The appellee companies refused either to obey the order of the commission, or to appeal therefrom, and publication of the order was directed, but before it had been accomplished, and on May 15, 1907, appellees filed bills in the Circuit Court of the United States for the Eastern District of Virginia, to enjoin the commission from enforcing its order of April 27, 1907, or taking any other steps therein, and a restraining order was entered enjoining the members of the commission and their clerk from further proceeding in the matter until a motion for an injunction *pendente lite* could be heard, and requiring them to appear before the Circuit Judge in Asheville, North Carolina,

on June 27, 1907, to show cause why such injunction should not be granted. Appellants entered a special and limited appearance, and filed their joint and separate answers to the rule, in which they denied the jurisdiction of the court.

The cause having been heard on the rule and answers thereto, the Circuit Judge on July 10, 1907, overruled the objection to the court's jurisdiction, and granted injunctions *pendente lite*, as prayed for. Thereupon the defendant, Prentis, filed his demurrer, based on substantially the same grounds as those assigned in the answer to the rule, and the three other defendants filed their joint and separate plea, setting up specifically that the commission is a court within the purview of § 720 of the United States Revised Statutes, and on September 10, 1907, by leave of court, all four of the defendants filed their joint and separate plea of *res judicata*.

December 26, 1907, the court overruled the demurrer and both pleas, and the defendants declining to answer further, a final decree was on that day entered in each case taking the bills *pro confesso*, and perpetuating the injunctions, with costs. Thereupon appeals were allowed and prosecuted from said final decrees.

In my opinion, a preliminary objection is fatal to the maintenance of these bills. It appears on their face that the appellees did not avail themselves of the right of appeal to the Court of Appeals of Virginia, which was absolutely vested in them by the constitution and laws of that Commonwealth. Such an appeal would have brought up the question of the alleged unreasonableness of the designated rate, and appellees cannot assume that the decision of the commission would necessarily have been affirmed. If reversed or changed to meet appellees' views, the whole ground of equity interposition would disappear. In such circumstances it is the settled rule that courts of equity will not interfere. The transaction must be complete, and jurisdiction cannot be rested on hypothesis. *A fortiori*, this must be so where Federal courts are asked to interfere with the legislative, executive or judicial acts of a State, unless

some exceptional and imperative necessity is shown to exist, which cannot be asserted here.

Moreover, this is demanded by comity, and what comity requires is as much required in courts of justice as in anything else.

"'Comity,'" said Mr. Justice Gray in the leading case of *Hilton* v. *Guyot*, 159 U. S. 113, 163, "in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

And as applied to Federal interference with state acts, the observance of this rule of comity should be regarded as an obligation. It is recognized as such by § 720 of the Revised Statutes.

By the constitution of Virginia the commission is vested with legislative as well as judicial powers, and the validity of that union of powers has been repeatedly upheld by the highest judicial tribunal of that Commonwealth—the matter being committed to the determination of the State. It seems equally true, that whether an adjudication by the commission, on notice and hearing, that proposed rates are reasonable and not confiscatory, may lawfully be had prior to the legislative act of imposing the rates is also a matter for state determination, and at all events that question should, in the first instance, be decided on appeal by the Court of Appeals. I cannot see why the reasonableness and justness of a rate may not be judicially inquired into and judicially determined at the time of the fixing of the rate, as well as afterwards, but that and kindred questions should be tested as provided by this constitution and these laws before the controversy is precipitated into a Circuit Court of the United States. Power grows by what it feeds on, and to hold that state railroad companies can

take their chances for the fixing of rates in accordance with their views in a tribunal provided for that purpose by state constitutions and laws, and then, if dissatisfied with the result, decline to seek a review in the highest court of the State, though possessed of the absolute right to do so, and invoke the power of the Federal courts to put a stop to such proceedings, is, in my opinion, utterly inadmissible and of palpably dangerous tendency.

MR. JUSTICE HARLAN, also concurring in the reversal of the decree, but dissenting from the opinion of the court.

I concur in the general observations of the Chief Justice, and with him dissent from the opinion of the court. But I go somewhat further than he has done. I hold that the Circuit Court was entirely without authority, by injunction, to stay the proceedings of the State Corporation Commission. By § 720 of the Revised Statutes it is provided that "the writ of injunction shall not be granted 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 authorizing proceedings in bankruptcy." Such has been the law since 1793. In my judgment, the Virginia State Corporation Commission is, in every substantial sense, a court. It is conclusively shown to be such by the provisions of the constitution and laws of Virginia, as interpreted by the highest court of Virginia and as summarized in the opinion of the Chief Justice. If the commission is a court, within the meaning of § 720, then the Circuit Court of the United States was wholly without authority to stay the proceedings of that tribunal by the writ of injunction. The Circuit Court could not grant the writ of injunction in face of the act of Congress expressly forbidding such action. No one will question the authority of Congress to prescribe the limits of the jurisdiction of the courts created by it.

It is suggested that under this view there is danger that rights granted or secured by the Constitution may be violated

by the judgment of the commission or by the judgment of the Court of Appeals of Virginia. A conclusive answer to this suggestion is that if the final action of the commission, in any case of rate-making, amounts to confiscation of the property of the corporation whose rates are regulated, and therefore is to be held wanting in due process of law as taking private property for public use without just compensation, and if such action be sustained by the highest court of Virginia, then the way is plainly open to bring that question to this court upon writ of error. Rev. Stat. § 709. In this way any Federal right, specially set up and denied by the state tribunals, can be adequately protected by the final judgment of this court.

In my opinion, the decree should be reversed, with direction to dismiss the original suit brought in the Federal court.

WILDER,[1] ASSESSOR, *v.* INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 30. Submitted October 22, 1908.—Decided November 30, 1908.

Section 4536, Rev. Stat., providing that seamen's wages shall not be subject to attachment or arrestment, is to be construed in the light of other provisions of the same title and is to be liberally interpreted with a view to protect the seamen; and, as so construed, that section prevents the seizure of wages not only by attachment before, but execution after, judgment, and such wages cannot be seized under § 2118 of the Laws of Hawaii.

Quære and not decided whether the act of June 9, 1874, c. 259, 18 Stat. 64, repealed § 4536, Rev. Stat., so far as vessels engaged in the coastwise trade are concerned.

17 Hawaii, 416, affirmed.

THE facts are stated in the opinion.

[1] Substituted for Holt, Assessor.

Mr. Charles R. Hemenway, Attorney General of the Territory of Hawaii, and *Mr. Mason F. Prosser,* for plaintiff in error:

Sections 2117, 2121, Rev. Laws of Hawaii, though providing for garnishment, are in fact proceedings supplementary to execution as known in the various States of the Union.

Section 4536, Rev. Stat., does not exempt wages of seamen from execution or in proceedings supplementary thereto.

Seamen's wages by the act in question are exempt from arrestment or attachment, but not from execution. For definition of "arrestment"—a term used in Scotch law—see Bouvier, 169; Erskine, Inst. 3, 6, 1; 1, 2, 12. There is a clear distinction, however, between attachment and execution. *Thompson* v. *Baltimore,* 33 Maryland, 312; *Johnson* v. *Foran,* 58 Maryland, 148.

The above provision of the Revised Statutes does not apply to cases where judgment has been recovered against the defendant in a court of competent jurisdiction. It is only intended to prevent hasty judgment against defendants, who by reason of the fact that they are seamen and not properly versed in business methods, would be only too apt to allow claims against them to go by default. For the reason stated, in cases in the United States courts the strong arm and protection of the law is by this statute thrown around a class of persons notoriously improvident. But where such persons, even though they be seamen, and within the protection of § 4536, have been proceeded against according to law, and a valid claim against them has been adjudicated by a court of competent jurisdiction, the protection of the statute in question can no longer avail and prevent the collection of a just debt legally proven. *Telles* v. *Lynde,* 47 Fed. Rep. 912; *In re The Queen,* 93 Fed. Rep. 834, 835; *Eddy* v. *O'Hara,* 132 Massachusetts, 56; *White* v. *Dunn,* 134 Massachusetts, 271; *Ayer* v. *Brown,* 77 Maine, 195.

Mr. A. Lewis, Junior, for defendant in error.

Mr. Justice Day delivered the opinion of the court.

This case is one of a number of similar cases arising within

the Territory of Hawaii, and is brought here for the purpose of settling the liability of seamen's wages to seizure after judgment by attachment or proceedings in aid of execution. The Inter-Island Steam Navigation Company, defendant in error, was directed by order and judgment of the district magistrate of Honolulu to pay into court on account of a judgment rendered in favor of plaintiff in error against one A. Tullet the sum of $65.00. Tullet is a seaman, being master of the steamer *Keauhou*, plying between ports within the Territory. The sum of $65.00 was due to Tullet from the Inter-Island Steam Navigation Company for wages for the months of January and February, 1906. The judgment was recovered against Tullet on September 5, 1905, for the sum of $120.38 and costs. An execution was issued thereon and returned unsatisfied. Upon affidavit being filed an order was issued attaching the sum of $65.00, due in manner aforesaid from the navigation company to Tullet. The navigation company filed an answer setting forth that Tullet was an American seaman in the employ of the company, and that the money attached was due to Tullet as wages, and under § 4536 of the Revised Statutes of the United States the same were not subject to arrestment nor attachment, and that the territorial court had no jurisdiction in the premises. The lower court held that the wages could be attached in this manner. This judgment was reversed in the Supreme Court of Hawaii.

The laws of Hawaii regulating attachments in cases, such as are now under consideration, authorize proceedings supplementary to execution, as follows (chap. 135, Laws 1905):

"SEC. 2118. *Attachment of debts, order.*—It shall be lawful for a judge of any court upon the *ex parte* application of such judgment creditor either before or after such oral examination and upon affidavit by the judgment creditor or his attorney stating that judgment has been recovered and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor and is within the jurisdiction, to order that all debts owing or accruing from such third person

(hereinafter called the 'garnishee') to the judgment debtor, shall be attached to answer the judgment debt, and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the judgment debt; provided that the judge may in his discretion, refuse to interfere when from the smallness of the amount to be recovered, or of the debt sought to be attached or otherwise, the remedy sought would be worthless or vexatious."

It was under this section of the Hawaiian statute that the order was made for the payment of the judgment out of the wages due to Tullet, and the question for decision in this case is: Can such an order be made consistently with the maritime law as declared in the Revised Statutes of the United States? The section of the statute construed in the Supreme Court of Hawaii is 4536, which provides:

"No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages, or of any attachment, incumbrance or arrestment thereon; and no assignment or sale of wages, or of salvage, made prior to the accruing thereof, shall bind the party making the same, except such advance securities as are authorized by this title."

This section was first enacted into the statutes of the United States in 1872, and was § 61 of the act of June 7, 1872, entitled "An Act to authorize the Appointment of Shipping-commissioners by the several Circuit Courts of the United States, to superintend the Shipping and Discharge of Seamen engaged in Merchant Ships belonging to the United States, and for the further Protection of Seamen." 17 Stat. 262, 276. It afterwards became, in the revision of 1874, § 4536, Rev. Stat. This section appears to have been copied from § 233 of the 17 and 18 Victoria, 1854, chap. 104, which act provides:

"No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of such wages, or of any attachment, incumbrance, or arrestment thereon; and no assignment or sale of such wages, or of salvage made prior to the accruing thereof, shall bind the party making the same, and no power of attorney or authority for the receipt of any such wages shall be irrevocable."

We have been unable to discover any English case construing this statute, and none has been called to our attention. In MacLachlan on Merchant Shipping (4th ed.), 231, that author states the effect of the statute to be to except seamen's wages from liability to attachment by a judgment creditor, as payment of such wages is valid, notwithstanding any previous sale or assignment thereof, or any attachment, incumbrance, or arrestment thereon. In this country the cases, state and Federal, in which this statute has been under consideration are not in accord. In *Telles* v. *Lynde*, 47 Fed. Rep. 912, and *The Queen*, 93 Fed. Rep. 834, the Circuit Court in the Ninth Circuit reached the conclusion that the statute did not prevent the seizure of seamen's wages after judgment upon proceedings in aid of execution, although the seamen's wages were not liable to attachment in advance of judgment.

The question was very fully considered by Judge Benedict in the case of *McCarty and another* v. *Steam Propeller City of New Bedford*, 4 Fed. Rep. 818. In that case Judge Benedict held the view that the statute of 17 and 18 Victoria, above cited, was but declaratory of the law of England as it theretofore existed, and that in view of the remedies given in the United States courts in admiralty, and the provisions of the Federal statutes enacted in reference to the recovery and protection of the wages of seamen, there was no jurisdiction in the state courts to garnishee the wages of seamen at the instance of a creditor.

With Judge Benedict's opinion before him, Mr. Justice Gray, then of the Supreme Judicial Court of Massachusetts, in the case of *Eddy* v. *O'Hara*, 132 Massachusetts, 56, said that the court, although recognizing the elaborate and forcible argument of Judge Benedict, had not been able to satisfy itself that such an exemption from attachment had ever been recognized, except as created or limited by express statutes or ordinances. The learned justice conceded that a determination of that question was not necessary to the decision then made, because the court held that the trustee in foreign attachment, having been compelled by process from the admiralty court to pay the amount of wages, could not be charged again for the same sum. In the subsequent case of *White* v. *Dunne*, 134 Massachusetts, 271, the question was directly presented, and the former opinion of Mr. Justice Gray, in 132 Massachusetts, 56, was approved; and it was held that the wages of seamen engaged in the coastwise trade (the act of June 9, 1874, c. 260, 18 Stat. 64, being construed to exempt coastwise trading vessels from the provisions of the act of 1872, which included what is now § 4536) are subject to attachment by the trustee process. The court expressed regret at its inability to agree with the Circuit Court of the United States for the Southern District of New York, evidently referring to Judge Benedict's opinion above cited, and expressed the opinion that no practical injustice would grow out of the conflict, as the Supreme Judicial Court of Massachusetts had recently held, in *Eddy* v. *O'Hara*, *supra*, that where the wages of seamen had been obliged to be paid by a decree in admiralty, a party could not again be charged under attachment proceedings, and the court expressed the opinion that, as the wages were paid upon the judgment upon which trustee process had issued a court of admiralty of the United States would not compel the owners to pay a second time.

In the case of *The City of New Bedford*, 20 Fed. Rep. 57, Judge Brown sitting in admiralty in the Southern District of New York, adhered to the views expressed by Judge Benedict

in *McCarty* v. *City of New Bedford, supra,* notwithstanding the decision in *Eddy* v. *O'Hara,* 132 Massachusetts, 56, *supra,* but held that a compulsory payment under garnishee process in Massachusetts, under principles of comity, should be recognized in the admiralty court. In *Ross* v. *Bourne,* 14 Fed. Rep. 858, Judge Nelson, sitting in the United States District Court in Massachusetts, held that a suit at law against a seaman, wherein his wages had been attached by a trustee process but not yet paid, would not bar the seaman's recovery of the whole wages by a suit in admiralty. Upon appeal to the Circuit Court of the same case (*Ross* v. *Bourne,* 17 Fed. Rep. 703), Judge Lowell said that "he did not dissent" from the learned opinion of Mr. Justice Gray, in *Eddy* v. *O'Hara, supra,* but held that such an attachment proceeding should be respected out of comity only, and that comity did not require actions in favor of seamen in admiralty to be hung up to await the dilatory proceedings of an attachment suit at common law.

From this conflict of views upon the subject we turn to the consideration of the section (4536) itself. We may premise that no contention was made in the Supreme Court of Hawaii, or in the assignments of error or argument in this court, that § 4536 was inapplicable because the steamship company was engaged wholly in the coastwise trade. This removes any question on that subject from the case and renders it unnecessary to decide whether the act of 1874, c. 259, 18 Stat. 64, had the effect to repeal § 4536, so far as vessels thus engaged are concerned. In the first clause of § 4536 it is provided that no wages due or accruing to any seamen shall be subject to attachment or arrestment from any court, and it is the contention of the plaintiff in error that the words "attachment" or "arrestment" only forbid such proceedings before judgment, but do not protect such wages from proceedings in attachment after judgment. Undoubtedly the word "attachment," as ordinarily understood in American law, has reference to a writ the object of which is to hold property to abide the order of the court for the payment of a judgment in the event

the debt shall be established. And as Mr. Justice Alvey says, in delivering the opinion of the Supreme Court of Maryland, *Thomson* v. *Baltimore and Susquehanna Steam Co.*, 33 Maryland, 312, 318:

"An attachment has but few of the attributes of an execution; the execution contemplated by the statute being the judicial process for obtaining the debt or damage recovered by judgment, and final in its character, while the attachment is but *mesne* process, liable at any time to be dissolved, and the judgment upon which may or may not affect the property seized."

"Arrestment," a word derived from the English statute, is a word of Scotch origin, and derived from the Scottish law, and thus defined by Bouvier:

"The order of a judge, by which he who is debtor in a movable obligation to the arrester's debtor is prohibited to make payment or delivery till the debt due to the arrester be paid or secured. Erskine, Inst. 3, 6, 1; 1, 2, 12. Where arrestment proceeds on a depending action it may be loosed by the common debtor's giving security to the arrester for his debt, in the event it shall be found due."

And in the Century Dictionary it is defined to be:

"A process by which a creditor may attach money or movable property which a third person holds for behoof of his debtor. It bears a general resemblance to foreign attachment by the custom of London."

Neither of the words used in the statute, "attachment" or "arrestment," considered literally, have reference to executions or proceedings in aid of execution to subject property to the payment of judgments, but refer, as we have seen, to the process of holding property to abide the judgment. But we are of opinion that this statute is not to be too narrowly construed, but rather to be liberally interpreted with a view to affecting the protection intended to be extended to a class of persons whose improvidence and prodigality have led to legislative provisions in their favor, and which has made them,

as Mr. Justice Story declared, "the wards of the admiralty." *Harden* v. *Gordon*, 2 Mason, 541.

We think too that the section is to be construed in the light of and in connection with the other provisions of the Title, of which it is a part. And we may notice that after providing against attachment or arrestment of wages, this very section goes on to enact that payment of wages to seamen shall be valid, notwithstanding any previous sale or assignment, or any attachment, incumbrance, or arrestment thereon; and that no assignment or sale of wages made prior to the accruing thereof shall bind the party making the same, except such advance securities as are authorized by this statute. When we look to the provisions of the Title we see that the field of "advanced securities" for which assignment is authorized is very narrow indeed. 3 United States Compiled Statutes, §§ 3079 *et seq.* It is made unlawful to pay any seaman his wages in advance, and an allotment of his wages is permitted only to grandparents, parents, wives, or children, or, under regulations of the Commissioner of Navigation, made with the approval of the Secretary of the Treasury, not to exceed one month's wages to a creditor in liquidation of a just debt for board or clothing. And it is provided that no allotment note shall be valid unless signed and approved by the shipping commissioner. This statute has been held a valid enactment (*Patterson* v. *Bark Eudora*, 190 U. S. 169) as to advancements.

Section 4536, therefore, has the effect of not only securing the wages of the seaman from direct attachment or arrestment, but further prevents the assignment or sale of his wages, except in the limited cases we have mentioned, and makes the payment of such wages valid notwithstanding any "attachment, incumbrance or arrestment thereon."

It seems to be clearly inferable from these provisions that wages which have thus been carefully conserved to the seaman were not intended to be subject to seizure by attachment, either before or after judgment.

Furthermore, there are other sections in the Title which

strongly support the conclusion that it was not intended that seamen's wages should be seized upon execution or attachment to collect judgments rendered at common law. Section 4535 provides that no seaman shall forfeit his lien upon the ship or be deprived of any remedy for the recovery of his wages by an agreement other than is provided for by this Title "Loss of lien." 3 U. S. Comp. Stat. § 3082. Section 4530 provides for the payment of seamen's wages, one-half at every port where such vessel shall load or deliver its cargo, and when the voyage is ended the remainder of his wages, as provided in § 4529. Section 4546 provides for the summons of the master when wages are unpaid within ten days to show cause why process should not issue against the vessel according to the rules of courts of admiralty. Section 4547 provides for process against a vessel in case a seaman's wages are not paid, or the master does not show that the same are otherwise "satisfied or forfeited," and all the seamen having like cause of complaint may be joined as complainants in a single action.

We think that these provisions, read in connection with § 4536, necessitate the conclusion that it was intended not only to prevent the seaman from disposing of his wages by assignments or otherwise, but to preclude the right to compel a forced assignment, by garnishee or other similar process, which would interfere with the remedy in admiralty for the recovery of his wages by condemnation of the ship. These provisions would be defeated if the seaman's wages, to be recovered at the end of the voyage, could be at once seized by an execution or attachment after judgment in an action at law. The evident purpose of the Federal statutes, that the seaman shall have his remedy in admiralty, would be defeated, and the seaman, in many cases, be turned ashore with nothing in his pocket, because of judgments seizing his wages, rendered, it may be, upon improvident contracts, from which it was the design and very purpose of the admiralty law to afford him protection.

"Ordinarily," says Judge Nelson, in *Ross* v. *Bourne*, 14

Fed. Rep. 862, *supra*, "the sailor's only means of subsistence on shore are his wages earned at sea. If these may be stopped by an attachment suit the instant his ship is moored to the wharf, a new hardship is added to a vocation already subject to its full share of the ills of life."

We think that § 4536, construed in the light of the other provisions of the same Title, prevents the seizure of the seaman's wages, not only by writs of attachment issued before judgment, but extends the like protection from proceedings in aid of execution, or writs of attachments, such as are authorized by the Hawaiian statutes, after judgment.

Finding no error in the decision of the Supreme Court of Hawaii, the same is

Affirmed.

GARFIELD, SECRETARY OF THE INTERIOR, *v.* UNITED STATES *ex rel.* GOLDSBY.

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

No. 248. Argued October 15, 18, 1908.—Decided November 30, 1908.

While acts of public officials which require the exercise of discretion may not be subject to review in the courts, if such acts are purely ministerial or are undertaken without authority the courts have jurisdiction, and mandamus is the proper remedy.

There is no place in our constitutional system for the exercise of arbitrary power, and the courts have power to restore the status of parties aggrieved by the unwarranted action of a public official.

One who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and opportunity to be heard; such deprivation would be without due process of law.

After the Secretary of the Interior has approved a list containing the name of a person found by the Dawes Commission to be entitled to enrollment for distribution he cannot, without giving that person

notice and opportunity to be heard, strike his name from the list. It would not be due process of law.

30 App. D. C. 177, affirmed.

THE facts are stated in the opinion.

The Attorney General and *Mr. Assistant Attorney General Fowler*, with whom *Mr. William R. Harr* was on the brief, for plaintiff in error:

The matters referred to in the petition are within the exclusive jurisdiction of the Secretary of the Interior and not subject to judicial review.

The matters referred to in the petition relate to the allotment of land and distribution of the property of the Chickasaw Nation, one of the Five Civilized Tribes in the Indian Territory. As to this there can be no question. Enrollment is merely an incident of the allotment scheme.

The allotment and distribution of the tribal lands and other tribal property of the Chickasaw Nation is a political matter and within the exclusive jurisdiction of Congress, except as it has otherwise provided. The agencies which Congress chose to execute this work were the Commission to the Five Civilized Tribes, which it especially created for the purpose, and the Secretary of the Interior. Act of March 3, 1905, 33 Stat. 1048–1050.

No court has jurisdiction, unless authorized by Congress, and Congress has expressly refrained from conferring any jurisdiction upon the courts in that regard, although at the same time it has conferred certain jurisdiction upon the Circuit Courts of the United States in respect to allotments elsewhere. Indian appropriation act of August 15, 1894, 28 Stat. 286, 305, as amended by the act of February 6, 1901, 31 Stat. 760; *McKay* v. *Kalyton*, 204 U. S. 458, 468; *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S. 413; *The Rickert Case*, 188 U. S. 432.

The political character of the legislation of Congress with respect to the allotment and distribution of the property of

the Indian tribes, its plenary authority with respect thereto, and its freedom from judicial control in that regard, have been frequently maintained by the Supreme Court. *Stephens* v. *Cherokee Nation,* 174 U. S. 445; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294; *Lone Wolf* v. *Hitchcock,* 187 U. S. 553.

Even if respondent's predecessor may have acted hastily or illadvisedly, this would not be a sufficient reason to give the courts jurisdiction. *Blackfeather* v. *United States,* 190 U. S. 373.

The legal title to the lands claimed by the relator being still in the United States and the Choctaw and Chickasaw Nations, the lower court should have declined to interfere.

The approval of the Secretary of the Interior of allotments is required by §§ 11, 12 of the act of June 28, 1898, 30 Stat. 495. These provisions, not being inconsistent with the act of July 1, 1902, 32 Stat. 641, are still in force. See par. 68 of the latter act. Under the practice in these matters the Secretary's approval of an allotment is given when he approves the patent therefor. In an opinion rendered May 22, 1905, 25 Opin. A. G. 460, the Attorney General held that the approval of the Secretary of the Interior of patents for allotments in the Choctaw and Chickasaw Nations was necessary in order to transfer the interest of the United States. *Brown* v. *Hitchcock,* 173 U. S. 473, 476; *United States* v. *Schurz,* 102 U. S. 378, 396; *Humbird* v. *Avery,* 195 U. S. 480, 505; *United States* v. *Detroit Lumber Co.,* 200 U. S. 321, 337, 338; *Love* v. *Flahive,* 205 U. S. 195, 198.

The Secretary of the Interior is given exclusive jurisdiction of all matters relating to the allotment of land. Par. 24, act of July 1, 1902, 32 Stat. 641. This declaration immediately follows the statement in the preceding paragraph that allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein.

The power of the Land Department to cancel the final receiver's certificate has been often adjudged. *Orchard* v.

Alexander, 157 U. S. 372; *Parsons* v. *Venzke*, 164 U. S. 89; *Thayer* v. *Spratt*, 189 U. S. 346; *Hawley* v. *Diller*, 178 U. S. 476.

The courts will not interfere, by injunction or mandamus, with the action of executive officers requiring the exercise of judgment and discretion. *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 324.

Whether a patent shall issue is certainly a matter involving the exercise of judgment and discretion. Mandamus will not lie to compel its issuing. *United States* v. *Commissioner*, 5 Wall. 563; *Secretary* v. *McGarrahan*, 9 Wall. 298.

The utmost the courts have ever done is to compel the delivery of a patent where it has been recorded and the title has passed. *United States* v. *Schurz*, 102 U. S. 378.

The Secretary of the Interior, in the light of the provisions of the statutes relating to these allotments, felt himself authorized to correct any mistakes that might have been made in the approved lists of members of such tribes prior to the time fixed for the completion of the same.

The matter before the court is not affected by the question of vested rights. If by reason of the selection of land made to him the relator has acquired any vested rights therein, as he alleges, he can assert them in the proper court after the title to the land has passed from the United States and the Chickasaw Nation. But that the mere expectation of a share in the property of the nation arising from the fact of his once having been enrolled does not create a vested right therein is settled by the decisions of the Supreme Court. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Morris* v. *Hitchcock*, 194 U. S. 384; *Wallace* v. *Adams*, 204 U. S. 415.

Mr. Charles H. Merillat, with whom *Mr. Charles J. Kappler* and *Mr. James K. Jones* were on the brief, for defendants in error:

The Secretary of the Interior neither by express grant nor

necessary implication was given authority to strike names from final approved rolls. His jurisdiction ceased with approval of final rolls.

The Secretary of the Interior, having been invested with authority to approve the rolls, his approval, whether right or wrong, is not open for review here. *Steel* v. *St. Louis Smelting Co.*, 106 U. S. 228; *Johnson* v. *Towsley*, 13 Wall. 83.

Having approved the final rolls, the Secretary had exhausted his discretion. His approval of enrollment ended authority in him. *United States* v. *McDaniel*, 7 Peters, 1, 14; *United States* v. *Thurber*, 28 Fed. Rep. 56; *Mosgrove* v. *Harper*, 33 Oregon, 252.

Once declared to be citizens, by operation of law defendants in error became entitled absolutely and of right to a vested interest in tribal lands and funds.

Congress has conferred no power upon the Secretary of the Interior to cancel an allotment certificate. The right to cancel an allotment is a very different thing from the right to cancel a receiver's certificate, and even a receiver's certificate carries with it property rights which may not be lightly set aside by the Secretary. *Orchard* v. *Alexander*, 157 U. S. 372; *Brown* v. *Gurney*, 201 U. S. 192.

The allotment certificates, like certification of lists of lands under these special acts, convey a title as complete as patents. See *Frasher* v. *O'Connor*, 115 U. S. 102; *Noble* v. *Union River Logging Co.*, 147 U. S. 165; *Stark* v. *Starr*, 6 Wall. 402; *Barney* v. *Dolph*, 97 U. S. 652.

Patent to the public lands, it has been held, is but evidence of the right and title thereto of the patentee. The patent being but evidence, relates back to the inception of the equitable right. *Detroit Lumber Co.* v. *United States*, 200 U. S. 335. The allotment certificate by statute is not the equitable right, but the "conclusive evidence" of the right of the allottee. Sec. 23, Choctaw-Chickasaw agreement of July 1, 1902. Enrollment gave a vested right to an undivided share, and the allotment certificate was the conclusive evidence of the right

to a particular segregated tract, and the patent but a more formal and recorded muniment of title. *Wallace* v. *Adams*, 143 Fed. Rep. 716; *Garfield* v. *Frost*, 30 App. D. C. 165.

Even were jurisdiction to cancel names on the final approved rolls conceded, notice and opportunity of hearing in defense are absolute prerequisites to its exercise. *United States* v. *Detroit Lumber Co.*, 200 U. S. 335; *People ex rel. Van Petten* v. *Cobb*, 13 App. Div. N. Y. Reps. 56; *Orchard* v. *Alexander*, 157 U. S. 382; *Atl. Del. Co.* v. *James*, 94 U. S. 207; *Conner* v. *Groh*, 90 Maryland, 686.

While mandamus will not lie to control the discretion of an executive officer or other tribunal, it is the appropriate remedy where the officer charged with a public duty exceeds his jurisdiction, or where, having exercised his discretion, he has exhausted his jurisdiction and subsequently attempts notwithstanding to exceed and abuse his discretion and authority.

The enrollment of defendants in error exhausted judgment, discretion and controversy. *Linn* v. *Belcher*, 24 How. 526; *Steel* v. *St. Louis Smelting Co.*, 106 U. S. 228; *Johnson* v. *Towsley*, 13 Wall. 83; *Noble* v. *Union River Logging Co.*, 147 U. S. 170; *Ex parte Virginia*, 100 U. S. 338; *Ex parte Roberts*, 15 Wall. 385; *People ex rel. Burroughs* v. *Brinkerhoff*, 68 N. Y. 262; *Wise* v. *Biggar*, 79 Virginia, 269; *Crane* v. *Barry*, 47 Georgia, 476; *Raymond* v. *Villere*, 42 La. Ann. 490; *State* v. *Mitchell*, 31 Ohio St. 592; *State ex rel. Brickman* v. *Wilson*, 123 Alabama, 259. See also *Romero* v. *Cortelyou*, 26 App. D. C. 298; *West* v. *Hitchcock*, 19 App. D. C. 333; *Union Pacific R. R.* v. *Hall*, 91 U. S. 343–353; *Illinois Central R. R.* v. *Illinois*, 163 U. S. 142; *Boston T. Co.* v. *Pomfret*, 20 Connecticut, 590; *Schmulbach* v. *Speidel*, 50 W. Va. 553; *Baltimore Univ.* v. *Colton*, 98 Maryland, 623; *Harwood* v. *Marshall*, 9 Maryland, 83; *Jackson* v. *State*, 57 Nebraska, 183; *Dawson* v. *Thurston*, 3 Hen. and M. (Va.) 132; *In re Strong*, 20 Pickering (Mass.), 484; *Puford* v. *Fire Dept.*, 31 Michigan, 000.

The courts have jurisdiction in the premises, inasmuch as the Secretary's discretion had been exhausted. *Foltz* v *St.*

Louis R. R., 19 U. S. App. 581; *Cooper* v. *Reynolds*, 10 Wall. 308; *McLeod* v. *Receveur*, 71 Fed. Rep. 455; *Romero* v. *Cortelyou*, 26 App. D. C. 298.

MR. JUSTICE DAY delivered the opinion of the court.

This action was brought in the Supreme Court of the District of Columbia for a writ of mandamus against the Secretary of the Interior in his official capacity, to require him to erase certain marks and notations theretofore made by his predecessor in office upon the rolls, striking therefrom the name of the relator Goldsby as an approved member of the Chickasaw Nation, and to restore him to enrollment as a member of the nation.

Goldsby, in his petition, claimed that he was a recognized citizen of the Chickasaw Nation and entitled to an equal undivided interest in the lands of the Choctaw and Chickasaw Nations; that he was an owner of an allotment of land which had been made to him as hereinafter stated, and that he was entitled to an equal undivided distributive share of the funds and other lands of the nation. The petition for the writ recites at length the acts of Congress supposed to bear upon the subject, and avers that the Secretary of the Interior on October 6, 1905, affirmed a decision of the Commission to the Five Civilized Tribes, holding that the petitioner and his children were entitled to enrollment, and that relator's name was placed on the final roll of citizenship by blood of the Chickasaw Nation, and that the list was approved by the Secretary of the Interior on November 27, 1905, and that thereafter the petitioner secured an allotment of 320 acres of the allotable lands of the Chickasaw Nation, and an allotment certificate was issued to him by the Commission to the Five Civilized Tribes for the lands thus selected, and the same are now held by him. The petition then goes on to aver, in substance, that relator's name was stricken from the rolls on March 4, 1907. And it is averred that this action was unau-

thorized, was beyond the power of the Secretary, and deprived the relator of valuable rights in the lands and funds of the Choctaw and Chickasaw Nations without due process of law.

The Supreme Court of the District of Columbia issued an order to show cause and the Secretary appeared and answered. The answer, we think, may be fairly construed to contain a denial of the allegation, if the petition might be construed to make the claim, that the relator was an enrolled member of the Chickasaw Nation, but it does admit that he had been enrolled by the Commission to the Five Civilized Tribes; that the list had been approved by the First Assistant Secretary of the Interior, and averred that before the time fixed by Congress for the completion of the rolls of members of the nation the then Secretary of the Interior had disapproved the enrollment of the petitioner and stricken his name from the rolls. The answer admits that the certificate of allotment had been issued to petitioner by the Commission to the Five Civilized Tribes for lands selected by petitioner; and further avers that the Secretary of the Interior had not approved of such allotment, and no patent had been issued therefor.

The answer also admits that it had been the practice of Secretaries of the Interior to give notice before striking names from the approved lists of the Five Civilized Tribes, and avers that owing to the limited time before the expiration of the time fixed by Congress for the completion of the rolls, March 4, 1907, it was impossible to give notice and opportunity to be heard to relator and a large number of other persons. The answer avers that the respondent's predecessor, the then Secretary of the Interior, had no jurisdiction or authority to enroll the petitioner. It also avers that the allotment of lands in severalty of the Chickasaw Nation was delegated exclusively to the Secretary of the Interior. That by the acts of Congress exclusive jurisdiction in matters involving the making of rolls of citizenship of the Five Civilized Tribes was conferred

upon the Secretary of the Interior, and the determination of such matters was within his exclusive judgment and discretion.

A general demurrer was filed to the answer with a note thereto stating that one matter to be argued on demurrer is that the answer sets forth no sufficient reason in law for the cancellation of relator's enrollment by the Secretary of the Interior without notice or hearing. In the Supreme Court of the District of Columbia the demurrer to the answer was sustained upon that ground. The respondent elected to stand upon his answer. Judgment was entered requiring the Secretary to erase from the rolls the statements placed thereon derogatory to the relator's rights in said tribe, and to recognize relator as an enrolled member of the nation. Upon appeal to the Court of Appeals of the District of Columbia this judgment was affirmed (30 App. D. C. 177), and the case comes here.

While it does not appear from the allegations and admissions of the pleadings that Goldsby was an original enrolled member of the tribe, it does appear that under the act of Congress of June 10, 1896, c. 398, 29 Stat. 339, Goldsby made application to the Dawes Commission and was enrolled as a member of the Chickasaw Nation. It appears from a letter of the Secretary of the Interior to the commission, attached as an exhibit to the petition, and dated October 6, 1905, that the Commission to the Five Civilized Tribes, on May 24, 1905, following instructions of the department of April 2, 1905, and in accordance with the opinion of the Assistant Attorney General of March 24, 1905, in the case of *Vaughn et al.*, rescinded its action of September 23, 1904, dismissing the application for the enrollment of Goldsby and his minor children, and held that they should be enrolled as citizens, by blood, of the Cherokee Nation, and that on July 7, 1905, the Indian Office recommended that the commission's decision be approved. The Secretary's letter of October 6, 1905, concluded with a finding that the applicants, including Goldsby, should be enrolled as citizens of the Chickasaw Nation, affirming the commission's

decision. The Secretary of the Interior, on April 26, 1906, reported his approval to the Dawes Commission, the roll as approved was kept in the Secretary's office, and copies sent out as the statute required.

Goldsby selected his land and received a certificate of allotment from the commission, but no patent has been issued for the same. On March 4, 1907, the Secretary of the Interior without notice to the relator and without his knowledge, erased his name from the rolls and opposite the same caused the entry to be made, "canceled March 4, 1907."

In the view which we take of this case it is unnecessary to recite at length the numerous acts of Congress which have been passed in aid of the purpose of Congress to extinguish the tribal titles to Indian lands and to allot the same among the members thereof with a view of creating a State or States which should embrace these lands.

The act of June 10, 1896, c. 398, 29 Stat. 339, empowered the Dawes Commission to hear and determine applications for citizenship, and gave an appeal to the United States court in the Indian Territory from the decisions of the commission; made the judgment of that court final, and required the commission to complete its roll of citizens of the several tribes, and to include therein the names of citizens, in accordance with the requirements of the act. And the commission was required to file the list of members as they finally approved them, with the Commissioner of Indian Affairs.

The act of June 28, 1898, c. 517, 30 Stat. 497, § 11, made provision that when the roll of citizenship of any one of the nations or tribes is complete, as provided by law, and a survey of the land is made, the Dawes Commission should proceed to allot the lands among the citizens thereof, as shown by the roll.

By the act of March 3, 1901, c. 832, 31 Stat. 1077, it was provided that the rolls made by the Commission to the Five Civilized Tribes, as approved by the Secretary of the Interior, should be final, and authorized the Secretary of the Interior to fix the time by agreement with the tribes for the closing

of the roll, and upon failure of such agreement then the Secretary of the Interior should fix the time for the closing of the rolls, and after which no name should be added thereto.

The act of July 1, 1902, c. 1362, 32 Stat. 641, ratifies an agreement with the Choctaw and Chickasaw Nations, providing for the allotment of lands, and provides in § 23:

"23. Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court."

Section 31 of the act made provision for the establishment of a citizenship court. The provisions of the act, in this respect, are fully reviewed in former decisions of this court. *Wallace* v. *Adams*, 204 U. S. 415.

It is sufficient to say that by the act of July 1, 1902, a suit was authorized in the citizenship court to annul the citizenship decrees made in the United States court in the Indian Territory, under the act of June 10, 1896; provision was made for general suits in which a nation might be represented by ten representative defendants, and it was provided that when citizenship judgments in the court of the Indian Territory were annulled in the authorized test suit, the party aggrieved, by being deprived of favorable judgment upon his claim of citizenship, might himself appeal to the citizenship court, and such proceeding should be had as ought to have been had in the court to which the same was taken from the commission as if no judgment or decision had been rendered therein. And it was further provided that no person whose name did not appear upon the rolls, as provided for in this act, should be entitled to participate in the common property of the Choctaw and Chickasaw tribes.

The act of April 26, 1906, c. 1876, 34 Stat. 137, provided that the rolls of the tribes should be fully complete on or before the fourth day of March, 1907, and after that day the Secretary of the Interior should have no jurisdiction to approve the enrollment of any person.

It is insisted by the learned counsel for the Government that the court had no jurisdiction to entertain this suit, because the legal title has not as yet passed from the Government, as no patent has passed. We have no disposition to question those cases in which this court has held that the courts may not interfere with the Land Department in the administration of the public lands while the same are subject to disposition under acts of Congress entrusting such matters to that branch of the Government. Some of these cases are cited in the late case of *United States* v. *Detroit Lumber Company*, 200 U. S. 321, and the principle to be gathered from them is, that while the land is under the control of the Land Department prior to the issue of patent, the court will not interfere with such departmental administration. This was held as late as the case of *Love* v. *Flahive*, 205 U. S. 195, 198.

But the question presented for adjudication here does not involve the control of any matter committed to the Land Department for investigation and determination. The contention of the relator is, that as the Secretary had exercised the authority conferred upon him and placed his name upon the rolls, and the same had been certified to the commission, and he had received an allotment certificate, and was in possession of the lands, the action of the Secretary in striking him from the roll was wholly unwarranted, and not within the authority and control over public land titles given to the Interior Department.

By the conceded action of the Secretary prior to the striking of Goldsby's name from the rolls he had not only become entitled to participate in the distribution of the funds of the nation, but by the express terms of § 23 of the act of July 1, 1902, c. 1362, 32 Stat. 641, it was provided that the certificate

should be conclusive evidence of the right of the allottee to the tract of land described therein. We have therefore under consideration in this case the right to control by judicial action an alleged unauthorized act of the Secretary of the Interior for which he was given no authority under any act of Congress.

It is insisted that mandamus is not the proper remedy in cases such as the one now under consideration. But we are of opinion that mandamus may issue if the Secretary of the Interior has acted wholly without authority of law. Since *Marbury* v. *Madison*, 1 Cranch, 137, it has been held that there is a distinction between those acts which require the exercise of discretion or judgment and those which are purely ministerial, or are undertaken entirely without authority, which may become the subject of review in the courts. The subject was under consideration in *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 171, and Mr. Justice Brown, delivering the opinion of the court, cites many of the previous cases of this court, and, speaking for the court, says:

"We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the Head of a Department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice Bradley in *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541: 'But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction

to prevent it. In such cases the writs of *mandamus* and injunction are somewhat correlative to each other.' "

We think this principle applicable to this case, and that there was jurisdiction to issue the writ of mandamus.

In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.

In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court.

The acts of Congress, as we have seen, have made provision that the commission shall certify from time to time to the Secretary of the Interior the lists upon which the names of persons found by the commission to be entitled to enrollment shall be placed. Upon the approval of the Secretary of the Interior these lists constitute a part and parcel of the final

rolls of citizens of the Choctaw and Chickasaw tribes and Chickasaw freedmen, upon which allotments of lands and distribution of tribal property shall be made.

The statute provides in § 30, act of July 1, 1902, *supra:*

"Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment the rolls shall be deemed complete. The rolls so prepared shall be made in quintuplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Choctaw Nation, one with the governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes."

The Secretary took the action contemplated by this section and acted upon the list forwarded by the commission. The roll was made up and distributed in quintuplicate, as required by the statute. Notice was given to the commission, and land was allotted to the relator, as provided by § 23 of the act of July 1, 1902, *supra.* The relator thereby acquired valuable rights, his name was upon the rolls, the certificate of his allotment of land was awarded to him. There is nothing in the statutes, as we read them, which gave the Secretary power and authority, without notice and hearing, to strike down the rights thus acquired.

Nor do we think it is an answer to the petition for a writ of mandamus to say, as is earnestly contended by the counsel for the Government, that Goldsby's case comes within the provisions of the act of July 2, 1902, establishing a citizenship court, as it appears in this record that he was one of the claimants whose judgment in the court of the Indian Territory was annulled by the subsequent procedure in the citizenship court, leaving to Goldsby the remedy of appealing himself to that court, which, having failed to do, he has lost all right to enrollment, and therefore the decision of the Secretary of March 4,

1907, striking him from the rolls ought not to be interfered with for the reason that the writ of mandamus, upon well-settled principles, ought not to issue to require the Secretary to do that which it now appears he never had any lawful authority to do. But we are of opinion that the facts now adduced are insufficient to require us to say that Goldsby could not establish a right to enrollment. The Government contends, and we have held, that it does not appear in this case whether Goldsby's name was on the original or other tribal rolls, a fact essential to be known in order to determine whether his contention be sound that such an enrollment gave him the right to participate in the division of the funds and lands of the nation irrespective of the action of the Dawes Commission, the court of the Indian Territory, or the citizenship court. The question here involved concerns the right and authority of the Secretary of the Interior to take the action of March 4, 1907, in summarily striking the relator's name from the rolls. That is the question involved in this case.

For the reasons given we think this action was unwarranted, and that the relator is entitled to be restored to the status he occupied before that order was made.

The judgment of the Court of Appeals of the District of Columbia is affirmed.

GARFIELD, SECRETARY OF THE INTERIOR, *v.* UNITED STATES *ex rel.* ALLISON.

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

Nos. 249, 250. Argued October 15, 18, 1908.—Decided November 30, 1908.

Decided on the authority of *Garfield* v. *Goldsby, ante,* p. 249.

THE facts are practically the same as those stated in the opinion of the preceding case.

The Attorney General and *Mr. Assistant Attorney General Fowler*, with whom *Mr. William R. Harr* was on the brief, for plaintiff in error.

Mr. Charles H. Merillat, with whom *Mr. Charles J. Kappler* and *Mr. James K. Jones* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

These cases were argued and submitted with the *Goldsby Case*, No. 248, just decided. In the case of George A. Allison, a patent had been issued for his lands and duly recorded. In the case of Ida Allison, an allotment certificate had been issued. The relators are Cherokees, but the legislation herein involved is not different from that governing allotments to members of the Chickasaw Nation.

The Allisons made application to the commission for admission to citizenship under the act of June 10, 1896. Their applications were denied and no appeal taken. Afterwards a decision by the commission, granting the application of the Allisons for enrollment as citizens by blood, was affirmed by the Department of the Interior as of April 16, 1904. Their names were summarily stricken from the rolls by the department's order of March 4, 1907. The cases are controlled by the decision in *Goldsby's Case*.

Judgments affirmed.

HOME TELEPHONE AND TELEGRAPH COMPANY *v.* CITY OF LOS ANGELES.

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

No. 173. Argued October 21, 1908.—Decided November 30, 1908.

Only the legislature of a State, or a municipality specifically authorized thereto by the legislature, can surrender by contract a governmental power such as fixing rates.

To grant a corporation the right to charge a specified rate for a specified

time suspends for such period the governmental power of fixing and regulating rates, and in construing a franchise all doubts, both as to existence of contract and authority to make it, must be resolved against such suspension of power.

Whether an inviolable contract for rates exists must be determined in each case on the particular facts involved; even slight differences may turn the balance.

A power given by the State to one of its municipalities to "fix and determine rates," does not authorize that municipality to abandon the power, and to irrevocably establish rates for the entire period of a franchise.

Rate regulation is a legislative, and not a judicial, function, and *quære* whether notice and hearing are necessary to constitute due process of law in fixing rates. Where notice and hearing are indispensable to due process of law, even though the charter does not require it, an ordinance will not be declared unconstitutional at the instance of parties who actually had notice and an opportunity to be heard, as depriving them of property without due process of law within the meaning of the Fourteenth Amendment.

In this case objections to a municipal ordinance requiring a telephone company to report expenditures and receipts are untenable.

A city council is not disqualified from acting in rate regulation because the city is a heavy ratepayer, or because the members might be politically affected by their action.

The rule that every presumption is in favor of the validity of legislation applies to a city ordinance and it will not be held to be unconstitutional within the meaning of the Fourteenth Amendment, as denying the equal protection of the laws, where the party attacking it as imposing unequal rates upon it does not clearly show an improper classification.

This court will not consider the legality or effect of a provision in a city charter for submission of ordinances adopted by the common council to the people on the petition of a specified number of voters, when the ordinance involved was not so submitted.

The ordinances of the city of Los Angeles, fixing telephone rates, *held* not to be unconstitutional either as impairing the obligation of the contract contained in the franchise, as depriving the corporation affected of its property without due process of law or as denying it the equal protection of the law.

155 Fed. Rep. 554, affirmed.

THE facts are stated in the opinion.

Mr. Oscar A. Trippet, with whom *Mr. A. Haines* was on the brief, for appellant:

In order to determine the power of the city of Los Angeles, in granting the franchise in question, to enter upon a contract with the grantee thereof as to rates for telephone service, it is necessary to examine first the nature and scope of the power delegated to make the grant; the express requirements to be complied with in making it, and the extent of the discretion left to the granting body.

As bearing upon the question of such power to contract, the Broughton Act of March 11, 1901, and the charter of the city of Los Angeles are to be regarded as concurrent laws. *Los Angeles* v. *Davidson*, 150 California, 59, 63. The principle that the right to compensation is an inseparable incident to every franchise affected with a public use, must be kept in view.

The right to reasonable compensation is an essential and inseparable incident to the exercise of every franchise and privilege affected with a public use. *Stockton Gas Co.* v. *San Joaquin County*, 148 California, 313, 321; *Truckee Turnpike Road* v. *Campbell*, 44 California, 89; *State* v. *Boston &c. R. R.*, 25 Vermont, 433; *State* v. *Laclede Gas Co.*, 102 Missouri, 472; *S. C.*, 15 S. W. Rep. 383; *Water Co.* v. *Los Angeles*, 88 Fed. Rep. 720, 731.

So vital is this right and so absolutely incident is it, that even when it is left to continuous public regulation, unrestrained by contract, it comes under the guaranty of the Fourteenth Amendment. *Smyth* v. *Ames*, 169 U. S. 466, 522–526.

The Broughton Act is vitally related to the power of the city to contract respecting telephone rates, primarily because it requires the franchise to be publicly sold by the city council and in its discretion. The procedure to sell, prescribed by the statute, is contractual at every stage.

The requirement in § 3 of the act, that the successful bidder and his assigns must, during the life of the franchise, pay the municipality two per cent of the gross receipts, shows that the act contemplates that terms of sale of the franchise may embrace an agreement as to rates.

Every consideration shows that the Broughton Act conferred power upon the municipalities of the State to contract as to rates for telephone service.

The legislature has power to confer this authority. *Detroit* v. *Detroit &c. Ry. Co.*, 184 U. S. 368; *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 495, 508. The Broughton Act more specifically contemplates authority to municipalities to contract than does any statute considered in the following cases, where the power of the municipalities to contract as to rates was upheld. *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 497; *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558, 570; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 3, 14; *Cleveland* v. *Cleveland R. Co.*, 194 U. S. 517; *Cleveland* v. *Cleveland E. R. Co.*, 201 U. S. 529, 540-541; *Omaha Water Company* v. *City of Omaha*, 147 Fed. Rep. 1, 5, 12, 13; *Santa Ana Water Co.* v. *Town of San Buena Ventura*, 56 Fed. Rep. 339; *State* v. *Laclede Gas Light Co.*, 102 Missouri, 485; *S. C.*, 14 S. W. Rep. 974; *City of Bessemer* v. *Bessemer Water Works*, 40 So. Rep. 662.

The city charter concurs with the Broughton Act in conferring power upon the city of Los Angeles to contract as to rates in the sale of a franchise. It expressly confers the power to fix and determine rates for a definite period. It places no limitation upon the period for which the council is so empowered to fix and determine telephone rates. The fixing and determining of rates for a definite period is neither an abandonment nor a suspension of the power to regulate by the exercise of it. *Bessemer* v. *Water Works*, 44 So. Rep. 663; *Vicksburg* v. *Water Works Co.*, 206 U. S. 510; *Cal. Reduction Works* v. *Sanitary Reduction Works*, 199 U. S. 306.

In California the right of a municipality to make a contract for a term of years, controlling the further exercise of legislative or governmental power over its subject-matter during such term, is judicially established. *McBean* v. *City of Fresno*, 112 California, 161; *San Francisco Gas Light Company* v. *Dunn*, 62 California, 585; *Contra Costa Water Co.* v. *Breed*, 139 Cali-

fornia, 432; *Dolan* v. *Clark*, 143 California, 176; *Los Angeles Water Co.* v. *City of Los Angeles*, 88 Fed. Rep. 720; *Santa Ana Water Co.* v. *Town of San Buena Ventura*, 56 Fed. Rep. 339.

The contemporaneous construction of the Broughton Act and of the powers of the city under its charter are controlling, and is in favor of our contention.

The ordinance "B," constituting the grant of complainant's franchise, embraces a contract as to maximum rates, mutually binding upon complainant and defendant.

When all the circumstances preceding, surrounding and entering into this grant of franchise by the ordinance are considered, it will clearly appear that it constitutes a contract, fixing maximum rates of charges for the term of the franchise. *Vicksburg* v. *Water Works Co.*, 206 U. S. 495; *Cleveland* v. *City Ry. Co.*, 194 U. S. 517; *Detroit* v. *City St. Ry. Co.*, 184 U. S. 368, 375, 389; *Water Co.* v. *Omaha*, 147 Fed. Rep. 1; *Detroit* v. *City Ry. Co.*, 60 Fed. Rep. 161, 171; *Bessemer* v. *Water Works* (Ala.), 44 So. Rep. 663; *State* v. *Laclede Gaslight Co.*, 102 Missouri, 472; *Pingree* v. *Michigan Central R. R. Co.*, 118 Michigan, 314; *State* v. *Yazoo & V. R. Co.*, 62 Mississippi, 607, 641.

Mr. Leslie R. Hewitt, with whom *Mr. John W. Shenk* and *Mr. W. B. Mathews* were on the brief, for appellees:

The State has power to regulate charges for telephone service, and this power may be delegated to municipalities. *Munn* v. *Illinois*, 94 U. S. 113; *Des Moines Gas Co.* v. *Des Moines*, 44 Iowa, 105; *People* v. *Suburban R. R. Co.*, 178 Illinois, 594; *St. Louis* v. *Bell Telephone Co.*, 96 Missouri, 623; McQuillan on Municipal Ordinances, § 583; *Danville* v. *Danville Water Co.*, 180 Illinois, 233.

The city of Los Angeles did not by the franchise ordinance surrender or suspend its power to regulate appellant's charges for telephone service. *Omaha Water Co.* v. *Omaha*, 147 Fed. Rep. 1, 5; *Munn* v. *Illinois*, 94 U. S. 124; *Budd* v. *New York*, 143 U. S. 517; *Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624, 629; *Los Angeles Water Co.* v. *Los Angeles*, 88 Fed. Rep. 721;

Walla Walla v. *Water Co.*, 172 U. S. 1, 15; *Central Trust Co.* v. *Citizens' Ry. Co.*, 82 Fed. Rep. 1, 8; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587; *Danville Water Co.* v. *Danville*, 180 U. S. 619; *Atlantic & Pacific R. R. Co.* v. *United States*, 76 Fed. Rep. 186.

The regulating ordinance does not contravene any of the provisions of the Constitution of the United States. *San Diego Water Co.* v. *San Diego*, 118 California, 556; *Moore* v. *Haddonfield*, 62 N. J. Law, 386; *Cleveland, C. C. & St. L. R. R. Co.* v. *St. Bernard*, 19 Ohio C. C. Rep. 299; *Water Works* v. *San Francisco*, 82 California, 286, 315; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 600; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 168; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Chicago &c. Ry. Co.* v. *Minnesota*, 134 U. S. 418; *San Diego Land Co.* v. *National City*, 174 U. S. 739, 748.

MR. JUSTICE MOODY delivered the opinion of the court.

This is a suit in equity brought in the Circuit Court of the United States by the appellant, a telephone company, against the city of Los Angeles, and its officers. The object of the suit is to restrain the enforcement of certain ordinances which fixed the rates to be charged for telephone service; required every person, firm or corporation supplying telephone service to furnish annually to the city council a statement of the revenue from, and expenditures in, the business, and an itemized inventory of the property used in the business, with its cost and value; and provided a penalty for charges in excess of the rates fixed and for failure to furnish the required statements. The defendants demurred to the bill, the demurrer was sustained, and an appeal was taken directly to this court on the constitutional questions, which will be stated.

The ordinances complained of were enacted by virtue of the powers contained in § 31 of the city charter, which is as follows:

"(Sec. 31.) The Council shall have power, by ordinance, to regulate and provide for lighting of streets, laying down gas pipes and erection of lamp posts, electric towers and other apparatus, and to regulate the sale and use of gas and electric

light, and fix and determine the price of gas and electric light, and the rent of gas meters within the city, and regulate the inspection thereof, and to regulate telephone service, and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service, and connections; and to prohibit or regulate the erection of poles for telegraph, telephone or electric wire in the public grounds, streets or alleys, and the placing of wire thereon; and to require the removal from the public grounds, streets or alleys of any or all such poles, and the removal and placing under ground of any or all telegraph, telephone or electric wires."

It was decided by the judge of the court below, and is agreed by the parties, that this section of the charter conferred upon the city council, in conformity with the constitution and laws of the State of California, the power to prescribe charges for telephone service. Not doubting the correctness of this view, we accept it without extended discussion. The power to fix, subject to constitutional limits, the charges of such a business as the furnishing to the public of telephone service is among the powers of government, is legislative in its character, continuing in its nature, and capable of being vested in a municipal corporation.

The company, however, insists that the city, having the authority so to do, has contracted with it that it may maintain the charges for service at a specified standard, and that as the rates prescribed in the ordinances complained of are less than that standard, the ordinances therefore impair the obligation of the contract, in violation of the Constitution of the United States. This is the first question to be considered, and the facts out of which the contention arises are alleged in the bill and admitted by the demurrer.

The company obtained its franchise under the provisions of a statute of the State enacted March 11, 1901 (Stats. 1901, p. 265[1]), which was later than the adoption of § 31 of the city charter. This statute provides that, among other franchises,

[1] Known, and referred to in the brief, as the Broughton Act.

the franchise "to erect or lay telephone wires . . . upon any public street or highway" shall be granted by municipal corporations only upon the conditions prescribed in the act. The conditions enumerated are, that an application for the franchise shall be filed with the governing body of the municipality, of which advertisement, in the discretion of the city council, shall be made; that the advertisement must describe the character of the franchise to be granted and state that it will be sold to the highest bidder, who must pay annually to the municipality, after five years, two per cent of the gross annual receipts of the business; that the franchise shall be struck off to the highest bidder; and that a bond must be given by the purchaser to secure the performance of "every term and condition" of the franchise. There are other provisions not material here. By proceedings conforming to this statute a franchise to construct and operate a telephone system for fifty years was sold to M. Adrian King, which, by assignment, assented to by the city, came into the hands of the plaintiff company, which constructed the works and has since operated them. The franchise was granted by an ordinance. In the view we take of the case we need do no more than state very briefly the main features of the ordinance. It grants a franchise for fifty years, which is to be enjoyed in accordance with terms and conditions named, stipulates for certain free service for the city, and the payment to it, after five years, of two per cent of the gross receipts, and provides that the charges for service shall not exceed specified amounts.

This ordinance, enacted by the city council, which exercises the legislative and business powers of the city, and, as has been shown, the charter power of regulating telephone service and of fixing the charges, contains, it is contended, the contract whose obligation the subsequent ordinances fixing lower rates, impaired. Two questions obviously arise here. Did the city council have the power to enter into a contract fixing, unalterably, during the term of the franchise, charges for telephone service and disabling itself from exercising the charter

power of regulation? If so, was such a contract in fact made? The first of these two questions calls for earlier consideration, for it is needless to consider whether a contract in fact was made until it is determined whether the authority to make the contract was vested in the city. The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the State) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the State are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon this point.

It has been settled by this court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 382; *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 496, 508. But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power. *Providence Bank* v. *Billings*, 4 Pet. 514, 561; *Railroad Commission Cases*, 116 U. S. 307, 325; *Vicksburg &c. Railroad Co.* v. *Dennis*, 116 U. S. 665; *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, 599, 611; *Stanislaus County* v. *San Joaquin C. & I. Co.*, 192 U. S. 201, 211; *Metropolitan Street Ry. Co.* v. *New York*, 199 U. S. 1. And see *Water, Light & Gas*

Co. v. *Hutchinson*, 207 U. S. 385. It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences, slight in themselves, may, through their relation with other facts, turn the balance one way or the other. Illustrations of the truth of this may be found in the cases of *Freeport Water Co.* v. *Freeport City, supra; Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624, and *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, where no authorized contract was found, as contrasted with *Detroit* v. *Detroit Citizens' St. Ry. Co., supra*, and *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517, where a contrary conclusion was reached.

The facts in this case which seem to us material upon the questions of the authority of the city to contract for rates to be maintained during the term of the franchise are as follows: The charter gave to the council the power "by ordinance . . . to regulate telephone service and the use of telephones within the city, . . . and to fix and determine the charges for telephones and telephone service and connections." This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance "to fix and determine the charges." It authorizes the exercise of the governmental power and nothing else. We find no other provision in the charter which by any possibility can be held to authorize a contract upon this important and vital subject. Those relied on for that purpose are printed in the margin.[1]

[1] Section 2. (Article I.)

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"(12.) To manage, control, sell, lease, or otherwise dispose of any

This being the condition of the charter powers, the act of 1901, under which the company derived its franchise, was passed. The first section of that act provided that franchises "shall be granted upon the conditions in this act provided *and not otherwise.*" Here is an emphatic caution against reading

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or all the property of the said corporation; and to appropriate the income or proceeds thereof to the use of the said corporation; provided that it shall have no power to mortgage or hypothecate its property for any purpose."

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"(17.) To provide and maintain a proper and efficient fire department, and make and adopt such measures, rules and regulations for the prevention and extinguishment of fires, and for the preservation of property endangered thereby, as may be deemed expedient."

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"(22.) To make and enforce within its limits such local, police, sanitary and other regulations as are not in conflict with general laws and are deemed expedient to maintain the public peace, protect property, promote the public morals and to preserve the health of its inhabitants."

"(23.) To exercise all municipal powers necessary to the complete and efficient management and control of the municipal property, and for the efficient administration of the municipal government, whether such powers be expressly enumerated herein or not, except such powers as are forbidden or are controlled by general law."

"(24.) The powers conferred by this article shall be exercised by ordinance, except as hereinafter provided."

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"(Section 12, Article III.) All legislative power of the city is vested in the Council, subject to the power of veto and approval by the Mayor, as hereinafter given, and shall be exercised by ordinance; other action of the Council may be by order upon motion."

"(Sec. 16.) Six members of the Council shall constitute a quorum for the transaction of business, but no ordinance shall be passed or other act done granting a franchise, making any contract, auditing any bill, ordering any work to be done, or supplies to be furnished, disposing of or leasing the city property, ordering any assessment for street improvement, or building sewers, or any other act to be done involving the payment of money, or the incurring of debt by the city, unless two-thirds of the members of the whole Council vote in favor

into the act any conditions which are not clearly expressed in the act itself. In view of this language it cannot be supposed that the legislature intended that so significant and important an authority as that of contracting away a power of regulation conferred by the charter should be inferred from the act in the absence of a grant in express words. But there is no such grant. The argument of the appellant that the authority was granted is based upon the provisions of the act that an application for the franchise must be filed, and, in the discretion of the council, published; that the publication must state "the character of the franchise;" that the city is entitled to a percentage of the receipts; that the grantee must give bond to perform "every term and condition of such franchise;" that no condition shall be inserted which restricts competition or favors one person against another; and that the franchise must be sold to the highest bidder. It is urged that though authority to contract for the maintenance of rates is not expressed in the act, it is necessarily implied from these provisions. But we are of the opinion that there is no such necessary implication, even if anything less than a clear and affirmative expression would be sufficient foundation upon which to rest an authority of this nature. The decisions of this court, upon which the appellant relies, where a contract of this kind was found and enforced, all show unmistakably legislative authority to enter into the contract. In *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558, the contract was in specific terms ratified and confirmed by the legislature. In *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, the contract was made in obedience to an act of the legislature that the rates should be "established by agreement between said company and the corporate authorities." The opinion of the court, after saying (p. 382),

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thereof. All other ordinances may be passed by a vote of a majority of the whole Council."

"(Sec. 33.) It shall, by ordinance, provide for maintaining a fire alarm and police telegraph system, and for the cleaning and sprinkling of graded and accepted streets."

"It may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinance in question, including rates of fare," pointed out (p. 386) that "it was made matter of agreement by the express command of the legislature." In *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517, the legislative authority conferred upon the municipality was described in the opinion of the court (p. 534) as "comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated." In *Cleveland* v. *Cleveland Electric Ry.*, 201 U. S. 529, precisely the same authority appeared. In *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S. 496, the court said (p. 508): "The grant of legislative power upon its face is unrestricted, and authorizes the 'city to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks.'" Moreover, in this case the construction of the Supreme Court of Mississippi of its own statutes was followed. On the other hand, it was held in *Freeport Water Co.* v. *Freeport City*, 180 U. S. 587, that two acts of the legislature passed on successive days, authorizing municipalities to "contract for a supply of water for public use for a period not exceeding thirty years," and to authorize private persons to construct waterworks "and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years," did not confer an authority upon the municipality to contract that the water company should be exempt from the exercise of the governmental power to regulate rates. In this case, too, the construction of the highest court of the State was followed. See *Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624. All these cases agree that the legislative authority to the municipality to make the contract must clearly and unmistakably appear. It does not so appear in the case at bar. The appellant has failed to show that the city had legislative authority to make

a contract of exemption from the exercise of the power of regulation conferred in the charter. It therefore becomes unnecessary to consider whether such a contract in fact was made. The appellant's contention, that there was a violation of the obligation of its contract, must therefore be denied.

The appellant also contends that the ordinances fixing rates are wanting in due process of law, and therefore violate the Fourteenth Amendment of the Constitution of the United States, because the section (31) of the charter, under whose authority they were enacted, does not expressly provide for notice and hearing before action. But rate regulation is purely a legislative function and, even where exercised by a subordinate body upon which it is conferred, the notice and hearing essential in judicial proceedings and, for peculiar reasons, in some forms of taxation (see *Londoner* v. *Denver*, 210 U. S. 373) would not seem to be indispensable. It may be that the authority to regulate rates, conferred upon the city council by § 31 of the charter, is not an authority, arbitrarily, and without investigation, to fix rates of charges, and that if charges were fixed in that manner the act would be beyond the authority of the council. It is not unlikely that the California courts would give this construction to the ordinance. *San Diego Water Co.* v. *San Diego*, 118 California, 556. Acting within the authority thus limited it would seem that the character and extent of the investigation made and notice and hearing afforded, in the exercise of this legislative function, would be left to the discretion of the body exercising it. It must not be forgotten that, presumably, the courts of the States, and certainly the courts of the United States, are open to those who complain that their property has been confiscated by an act of regulation of this kind, and that the latter courts will, under all circumstances, determine for themselves whether such confiscation exists. But we need not now decide whether notice and hearing were required. Both were given in this case. An ordinance of the city provided that the rates should be fixed at a regular and special meeting of the city council

held during the month of February of each year, and another ordinance, as has been shown, required the telephone company to render annually, in the month of February, to the city council a statement of its receipts, expenditures and property employed in the business, facts which would be material on the question of fixing reasonable rates. This shows that a sufficient notice and hearing were afforded to the appellant, if it had chosen to avail itself of them, instead of declining to furnish all information, as it did. If notice and an opportunity to be heard were indispensable, which we do not decide, it is enough that, although the charter be silent, such notice and hearing were afforded by ordinance, as in this case. So, it was held in *Paulsen* v. *Portland*, 149 U. S. 30, 38, and it was held in *San Diego Land Company* v. *National City*, 174 U. S. 739, that the kind of notice and hearing (in that case provided by statute) which the ordinance in this case afforded was sufficient. For these reasons the contention of the appellant on this part of the case is denied.

We do not understand that an objection to the ordinance requiring the statement of the appellant's receipts, expenditures and property is made, except in so far as it is a step in the rate-making process. If a further objection is made we see nothing in it. See *San Diego Land Co.* v. *National City*, *supra*.

The appellant further insists that the city council is not an impartial tribunal, because, in effect, it is a judge in its own case. It is too late, however, after the many decisions of this court, which have either decided or recognized that the governing body of a city may be authorized to exercise the rate-making function, to ask for a reconsideration of that proposition. In this connection the appellant calls attention to the fact that by the charter of the city twenty-five per cent of the electors may recall a member of the council and require him again to stand for election. Nevertheless, he takes part in the rate-making function under his personal responsibility as an officer, and it cannot be presumed, as matter of law, that the

keener sense of dependence upon the will of the people, which this feature of his tenure of office brings to him, will distort his judgment and sense of justice. It would be conceivable, of course, that the members of the legislature themselves might be subjected to the same process of recall, but it hardly would be contended that that fact would lessen the legislative power vested in them by the constitution and laws of the State. The charter of the city also contains a provision that upon petition of fifteen per cent of the voters of the city any ordinance proposed must be submitted to the people and may be by them adopted. It is said, therefore, that the power of rate regulation might be, in this manner, exercised directly by the electorate at large. It may well be doubted whether such a result was contemplated by the legislature. There are certainly grave objections to the exercise of such a power, requiring a careful and minute investigation of facts and figures, by the general body of the people, however intelligent and right-minded. But the ordinance was not adopted in this manner in this case, and it will be time enough for the courts of the States and of the United States to consider, when that is done, whether the objections only go to the expediency of such a method of regulation or reach deeper and affect its constitutionality.

Passing the questions of power, the appellant contends that it was denied the equal protection of the laws, because, contemporaneously with the fixing of rates for it, different rates were fixed for another telephone company doing business within the city. The only information we have on the subject is in the allegations of the bill, that a competitor of the complainant engaged in like business was allowed to charge for telephone service sums greatly in excess of those prescribed by the ordinance, and that these rates discriminated against the complainant and deprived it of the equal protection of the laws. An important question is thus suggested, but we think the allegations are so vague that we cannot pass upon it. Whether the two companies operated in the same territory,

or afforded equal facilities for communication, or rendered the same services does not appear. For aught that appears, the other company may have brought its patrons into communication with a very much larger number of persons, dwelling in a much more widely extended territory, and rendered very much more valuable services. In other words, a just ground for classification may have existed. Every presumption should be indulged in favor of the constitutionality of the legislation. In *Sweet* v. *Rechel*, 159 U. S. 380, 392, it was said: "But in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the Constitution. It is a well settled rule of constitutional exposition that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed."

It is to be taken into account in considering this, as well as other questions, that the appellant has declined to furnish to the council facts within its knowledge which would enable the council to exercise their powers intelligently and justly, and that there is no suggestion in the case at bar that the rates actually fixed were so low as to operate as a practical confiscation of property.

For the foregoing reasons we are of the opinion that the action of the court below in sustaining the demurrer was correct, and the decree is

Affirmed.

HONOLULU RAPID TRANSIT & LAND COMPANY *v.* TERRITORY OF HAWAII, BY HEMENWAY, ATTORNEY GENERAL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 412. Argued October 12, 1908.—Decided November 30, 1908.

The business of a transportation company operating under a franchise is not purely private, but is so affected by public interest that it is subject, within constitutional limits, to the governmental power of regulation.

The power to regulate the operation of railroads includes regulation of the schedule for running trains; such power is legislative in character, and the legislature itself may exercise it or may delegate its execution in detail to an administrative body, and where the legislature has so delegated such regulation the power of regulation cannot be exercised by the courts.

The boundaries between the legislative and judicial fields should be carefully observed.

By §§ 833–871 of chap. 66 of the Rev. Laws of Hawaii, the legislature having vested the regulation of the railway company thereby incorporated in certain administrative officers, it is beyond the power of the courts to independently regulate the schedule of running cars by decree in a suit; and so held without deciding as to the power of the courts to review the action of the administrative officers charged by the legislature with establishing regulations.

18 Hawaii, 553, reversed.

THE facts are stated in the opinion.

Mr. David L. Withington, with whom *Mr. Aldis B. Browne*, *Mr. Alexander Britton*, *Mr. W. R. Castle* and *Mr. A. Perry* were on the brief, for appellant:

Equity has no jurisdiction. Mandamus and not injunction is the remedy to enforce a statutory obligation. *Walkley* v. *City of Muscatine*, 6 Wall. 481; *Supervisors* v. *Rogers*, 7 Wall. 175; *Rees* v. *City of Watertown*, 19 Wall. 107; *People* v. *Albany & Vermont R. Co.*, 24 N. Y. 261; *Shackley* v. *Eastern R. R. Co.*,

98 Massachusetts, 93; *Moundsville* v. *Ohio River R. R. Co.*, 37 W. Va. 92. *In re Lennon*, 166 U. S. 556, and *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, discussed and distinguished.

That a railway company may be compelled by mandamus to perform its public duties specifically and plainly imposed by the franchise, and even to operate its road, has been held so many times that it seems to be unnecessary to cite further cases. *State* v. *Dodge City Ry. Co.*, 53 Kansas, 329; *S. C.*, 24 L. R. A. 564, and note; *State* v. *Bridgeton Co.*, 62 N. J. L. 592; *S. C.*, 45 L. R. A. 837, and note; *State* v. *Hartford & N. H. R. R. Co.*, 29 Connecticut, 583; *State* v. *Helena Power & Light Co.*, 22 Montana, 391; *San Antonio Street Ry.* v. *State*, 90 Texas, 520.

There is no ground for equitable relief. Whether a mandatory injunction can be obtained in Hawaii or not, equity will not interfere with the management of corporations or grant injunctions, except in clear cases and as a preventive measure against action which is likely to cause irreparable injury. *Brown* v. *Carter*, 15 Hawaii, 333, 350; *Wundenberg* v. *Markham*, 14 Hawaii, 167.

This action seeks to enforce a public right by the aid of an injunction, which is only done in a proper case for specific performance within the rules of equitable cognizance. The remedy is by mandamus, if the duty is specific; by *quo warranto*, if not. *Waianae Co.* v. *Bell Telephone Co.*, 6 Hawaii, 589.

An injunction does not lie to enforce a contract requiring continuous acts. 6 Pomeroy's Equity, 76.

The remedy in such a case is by mandamus or by proceedings in the name of the State for a forfeiture of the charter. A bill in chancery will not lie to enforce the specific performance of duties requiring continuous personal labor and care. *McCann* v. *South Nashville Ry.*, 2 Tenn. Chan. 773; *Marble* v. *Ripley*, 10 Wall. 358. And see *Northern Pacific R. R. Co.* v. *Dustin*, 142 U. S. 492, where the following cases are cited: *A., T. & S. F. R. R. Co.* v. *Denver & N. O. R. R. Co.*, 110

U. S. 667, 681, 682; *People* v. *N. Y., L. E. & W. Ry. Co.*, 104 N. Y. 58; *Commonwealth* v. *Eastern Ry. Co.*, 103 Massachusetts, 254; *Commonwealth* v. *Fitchburg R. R. Co.*, 12 Gray, 180; *Ohio & Miss. Ry. Co.* v. *People*, 120 Illinois, 200; *S. C.*, 11 N. E. Rep. 347; *Nashville, C. & St. L. Ry. Co.* v. *State*, 137 Alabama, 443; *Page* v. *L. & N. R. R. Co.*, 129 Alabama, 237; *State* v. *Helena Power & Light Co.*, 22 Montana, 391; *Mount Pleasant Cemetery Co.* v. *Patterson &c. Ry. Co.*, 43 N. J. L. 505; *Florida Ry. Co.* v. *State*, 31 Florida, 452; *State* v. *Kansas City Ry. Co.*, 51 La. Ann. 209; *Jones* v. *Newport News & M. V. Co.*, 65 Fed. Rep. 736; *San Antonio Street Ry. Co.* v. *State*, 90 Texas, 525; *People* v. *Long Island Ry. Co.*, 39 Hun (N. Y.), 125; *Minnesota* v. *Southern Minnesota R. R. Co.*, 18 Minnesota, 40; *People* v. *Brooklyn Heights R. Co.*, 172 N. Y. 95; *S. C.*, 64 N. E. Rep. 788, and cases there cited.

Under § 36 of the franchise the Superintendent of Public Works, with the consent of the Governor, is alone authorized to institute proceedings.

This is a special remedy provided in a special act, comprehensive in its nature, to be set in motion by the officers specifically charged with duties in connection with this corporation and the exercise of this franchise. *Bond* v. *Merchants' Tel. Co.*, 5 Quebec Super. 445; *State* v. *Manchester Ry. Co.*, 62 N. H. 29; *State* v. *Mobile & Montgomery Ry. Co.*, 59 Alabama, 321; *Anonymous*, 2 Ld. Raymond, 989; *Antoni* v. *Greenhow*, 107 U. S. 769.

Section 7 imposes no such specific duty to run the cars on any particular schedule as can be enforced by either mandamus or injunction.

The franchise reserves the power of controlling the discretion of the appellant in regard to regulations concerning the operation of the railroad to the Governor.

Mr. Charles R. Hemenway, Attorney General of the Territory of Hawaii, for appellee, submitted:

The equitable jurisdiction of the courts was properly in-

voked in this case. The fundamental difference between the remedies of injunction and mandamus is overlooked by appellant. In view of the facts alleged in the bill, and proved upon the hearing in this case, injunction was the proper remedy to seek in behalf of the public, and its relief was properly granted by the courts. The facts found show clearly the reasons for the granting of this relief, and show, too, a case proper for the intervention of equity.

Furthermore, when a corporation is acting or threatening to act in excess of its corporate power, or is misusing the franchise it possesses, to the injury of others, an injunction to restrain it is the proper remedy. *Grey, Attorney General,* v. *Greenville &c. Ry. Co.*, 60 N. J. Eq. 153, 158; *Chicago &c. Assn.* v. *People*, 60 Ill. App. 488, 496; *Attorney General* v. *Railway Cos.*, 35 Wisconsin, 425, 520, 523. See also *Craig* v. *People*, 47 Illinois, 487; *People* v. *Third Avenue Ry. Co.*, 45 Barb. 63; *People* v. *Albany Ry. Co.*, 11 Abb. Pr. 136; *Buck Mtn. Coal Co.* v. *Lehigh Coal Co.*, 50 Pa. St. 91; *Attorney General* v. *Patterson Ry. Co.*, 9 N. J. Eq. 526; *McNulty* v. *Brooklyn Heights Ry. Co.*, 66 N. Y. Supp. 57; *Volmer's Appeal,* 115 Pa. St. 166; *Frederick* v. *Groshon*, 30 Maryland, 436.

The English courts of chancery prevent by injunction violations of charter obligations at the suit of the public. *Attorney General* v. *London Ry. Co.* (1900), 1 Q. B. 78; *Attorney General* v. *Cockermouth Local Bd.*, L. R. 11 Eq. 172; *Ware* v. *Regents Canal Co.*, 3 De G. & J. 212; *Liverpool* v. *Chorley Waterworks Co.*, 2 De G., M. & G. 852; *Attorney General* v. *Mid. Kent Ry. Co.*, L. R. 3 Ch. 100.

Therefore, even though there may be a remedy by mandamus to compel appellant here to perform certain duties laid upon it, yet the mere existence of such a remedy is not sufficient to warrant the conclusion that equity cannot interfere to prevent in advance a company from performing some act or making some change in its system which would clearly violate both its duty at common law as a carrier and its duty under its charter to maintain a sufficient car service to meet

the public need and convenience. The facts disclosed here are so different from those involved in the numerous authorities cited by appellant as to make those authorities of little value in this case.

No absolute rule, as is contended for by appellant, can be laid down, but each case, of necessity, must be considered and determined on its merits.

The existence of a remedy at the suit of the Superintendent of Public Works for an annulment of the charter is not exclusive of the remedy invoked here. Some violations of charter obligations might warrant a forfeiture, but so harsh a remedy would be granted with great reluctance, and should be sought only when clearly necessary.

Under the franchise the company owed a specific duty to the public, enforceable through the courts. Section 7 of the franchise (§ 841, Rev. Laws) was properly construed by the territorial courts, and their construction was thoroughly consistent with the provisions as to executive control of regulations made by the company.

The local courts refused to accept the technical construction given these sections of the franchise by appellant which would limit them in meaning to such an extent as to give the public no redress through the courts for any act of the company's, but on the contrary correctly gave these sections a broad and comprehensive construction which would permit the public, which granted this franchise, to come into court and require by appropriate means a performance of corporate duty. This construction by the local courts is entitled to great weight in this court. *Kawananakoa* v. *Polyblank*, 205 U. S. 349; *Copper Queen Mining Co.* v. *Arizona*, 206 U. S. 474; *Kealoha* v. *Castle*, 210 U. S. 149, 153.

Mr. Justice Moody delivered the opinion of the court.

The appellant, hereafter called the Transit Company, was incorporated by a law of the Territory of Hawaii. Chapter 66,

§§ 835–871, Revised Laws of Hawaii. The corporation was granted the right to construct and operate a street railway for a term of thirty years in the District of Honolulu. The character of the construction was, in part, expressly prescribed by the statute, and, in some details, left to be determined by the Transit Company, subject to the approval of the Superintendent of Public Works. Section 841 enacted that—

"The said association . . . shall at all times maintain a sufficient number of cars to be used upon said railway for the carriage of passengers as public convenience may require, and such other cars designed for the carriage of mails, parcels and goods as they may deem necessary."

It was provided that, after paying from the income certain charges, including a dividend of eight per cent on the stock, the excess of the income should be divided equally between the Territory and the stockholders, and that "The entire plant, operation, books, and accounts . . . shall from time to time be subject to the inspection of the Superintendent of Public Works." Section 868. In certain parts of the field of operation a maximum rate of fare was established by the statute, and in certain other parts it was left to the Transit Company to fix, subject to the approval of the Governor. It was provided by § 843, paragraph 4, that—

"The said association . . . shall make reasonable and just regulations with the consent and approval of the Governor regarding the maintenance and operation of said railway on and through said streets and roads; and the said association . . . failing to make such rules and regulations, the Superintendent of Public Works, with the approval of the Governor, may make them. All rules and regulations may be changed from time to time as the public interests may demand at the discretion of the Governor."

The railway was constructed and its operation was in progress. On certain streets of its line the Transit Company had been running cars at intervals of ten minutes. It proposed to discontinue this schedule and establish one with

somewhat longer intervals, and had applied to the Superintendent of Public Works for permission to lay the switches necessary to put the proposed schedule into convenient operation. Thereupon the Territory, on the relation of its Attorney General, brought, in one of the Circuit Courts of the Territory, a suit in equity, in which an injunction was sought to prevent the company from running the cars in question at less frequent intervals than ten minutes. In the bill it was alleged that the convenience of the public required that the ten-minute schedule should be maintained and continued. The respondent answered, issue was joined by replication, evidence was taken, and the court found as a fact that the public convenience required the maintenance of the ten-minute schedule. An injunction against the change was accordingly granted. Upon appeal to the Supreme Court of the Territory the judgment of the lower court was affirmed, and findings of fact made, including the finding that the public convenience required the continuance of the ten-minute schedule. The Transit Company then appealed here, upon the ground, which is well taken, that the amount in controversy was more than five thousand dollars.

The dispute between the parties is whether the courts of the Territory had jurisdiction in equity to issue the injunction. The Transit Company contends that no such jurisdiction existed, and, in the alternative, that if there was jurisdiction in the courts over the subject it could only be exercised by mandamus. We think it unnecessary to consider the latter proposition, and confine ourselves to a consideration of the broad question whether the court had power, by any form of proceedings, thus to regulate and control the operations of the company. The courts below based the right to issue the injunction upon § 841, correctly interpreting that section as imposing the general duty upon the Transit Company to operate as well as to maintain such cars as the public convenience require. The section, however, is not a specific direction to keep in force on the streets covered by the order

of the court a defined schedule, with cars running at named intervals, and the right of a court to enforce by injunction or mandamus such a schedule need not be considered. But the action of the court below went much farther than this, and farther than is warranted by any decision which has been called to our attention. In the absence of a more specific and well-defined duty than that of running a sufficient number of cars to meet the public convenience, the court, in this case, inquired and determined, as matter of fact, what schedule the public convenience demanded, on particular streets, and then, in substance and effect, compelled a compliance with that schedule. And this was done, though, as will be shown, the full power to regulate the management of the railway in this respect was vested by the statute in the executive authorities. In form the order of the court was a mere prohibition against a change of an existing schedule, but its substantial effect was to direct the Transit Company to operate its cars upon a schedule found to be required by the public convenience. The effect of the order is not changed by the fact that the schedule enforced by the order of the court is that upon which the Transit Company was then running its cars. The order of the court was not founded upon the consideration that the schedule was the one existing, although that was taken into account, but upon the fact that it was the one which the public convenience required. The question to be determined is, whether a court, not invested with special statutory authority nor having the property in its control by receivership, may, solely, by virtue of its general judicial powers, control to such an extent and in such detail the business of a transportation corporation. The question can be resolved by well-settled principles applicable to the subject. At the threshold the distinction between the case at bar and those cases where there is an enforcement of a specific and clearly defined legal duty must be observed. This distinction was drawn and acted upon in the case of *Northern Pacific Railroad* v. *Dustin*, 142 U. S. 492. In that case it appeared that the railroad com-

pany was incorporated by an act of Congress, with power to construct and operate a railroad from Lake Superior to Puget Sound, with a branch to Portland. The charter directed that the railroad should be constructed "with all the necessary . . . stations." The Territory of Washington filed in the territorial court a petition for mandamus to compel the railroad company to erect and maintain a station at Yakima City and to stop its trains at that point. The petition alleged, and the jury found, facts which warranted the inference that a station at Yakima City was desirable and necessary for the proper accommodation of traffic. Thereupon a writ of mandamus issued as prayed for and upon appeal the judgment was affirmed by the Supreme Court of the Territory. Upon writ of error this court reversed the judgment. In the opinion of the court, delivered by Mr. Justice Gray, it was said: "A writ of mandamus to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty." And the charter direction, that the railroad should construct all necessary stations, was described as "but a general expression of what would be otherwise implied by law," and as not to "be construed as imposing any specific duty or as controlling the discretion in these respects of a corporation entrusted with such large discretionary powers upon the more important questions of the course and the termini of its road" (p. 500). Accordingly it was held that the determination of the directors with regard to the number, place and size of the station, having regard to the public convenience as well as the pecuniary interests of the corporation, could not be controlled by the courts by writ of mandamus. And see *People* v. *Railroad Co.*, 172 N. Y. 90.

The business conducted by the Transit Company is not purely private. It is of that class so affected by a public interest that it is subject, within constitutional limits, to the governmental power of regulation. This power of regulation

may be exercised to control, among other things, the time of the running of cars. It is a power legislative in its character and may be exercised directly by the legislature itself. But the legislature may delegate to an administrative body the execution in detail of the legislative power of regulation. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 393, 394; *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Railway Company*, 167 U. S. 479, 494. We need not consider whether that legislative power may be conferred upon the courts of the Territory, as it may be upon the courts of a State, so far as the Federal Constitution is concerned. *Prentis* v. *Atlantic Coast Line Co., ante*, p. 210. In this case the legislative power of regulation was not entrusted to the courts. On the contrary, it was clearly vested, by § 843, in the Governor and the Superintendent of Public Works. By that section the Transit Company was itself given authority, in the first instance, with the approval of the Governor, to make reasonable and just regulations regarding the maintenance and operation of the railway through the streets. The operation of a railway consists very largely in the running of cars, and the right of the Transit Company, to regulate, in the first instance, the operation of its railway clearly includes the power to decide upon time schedules. But the company cannot finally determine, as it chooses, the manner of operating its road in respect of the time, speed and frequency of its cars. Its primary duty is to operate a sufficient number of cars to meet the public convenience. This duty would rest upon the company, even if it were not expressed, as it is, in § 841. If the company itself complies with its duty by just and reasonable regulations of its own, it is enough. If the company fails in the performance of the duty, its performance is secured in the manner pointed out in the latter part of § 843. The Superintendent of Public Works may make, with the approval of the Governor, just and reasonable regulations, and they may be changed from time to time, as the public interests may demand, at the discretion of the Governor. Moreover, by an

amendment of the charter (Act 78, Session Laws 1905), the Superintendent of Public Works may prescribe the speed of cars. The precise function, therefore, which was exercised by the courts below is by the statute, confided primarily to the Transit Company, and ultimately to the discretion of the Governor and Superintendent of Public Works. The courts have no right to intrude upon this function, and subject the company to a species of regulation which the statute does not contemplate. If the courts were held to have the powers which were assumed in this case it would lead to great embarrassment in the operation of the railway, and perhaps to distressing conflict. Can it be that the courts can dictate the frequency of the running of the cars, and the Superintendent of Public Works their speed? If so, the lot of the company is indeed a hard one. The two incidents of operation are not only related, but inseparable. The authority which controls the one must control the other, or operation becomes impossible. Suppose, again, that the courts, upon hearing evidence, should be of opinion that one schedule is required for the public convenience and the Governor and Superintendent of Public Works should be of opinion that another schedule would better subserve that convenience, which order must the company obey? Must it choose between the liability to punishment for contempt for disobeying the order of the court and the liability to forfeiture of its franchise for failing to obey the order of the Governor and Superintendent of Public Works? [1] These and other like situations, which easily might

[1] SEC. 870. "Whenever the said association or any corporation which may have been duly organized under the laws of this Territory for the purpose of constructing, operating, and maintaining the lines of railway mentioned in this chapter, and as by this chapter provided, refuses to do or fails to do or perform or carry out or comply with any act, matter or thing requisite or required to be done under the provisions of this chapter, and shall continue so to refuse or fail to do or perform or carry out or comply therewith, after due notice by the Superintendent of Public Works to comply therewith, the Superintendent of Public Works shall with the consent of the Governor cause proceedings to be

be imagined, are signal illustrations of the importance of observing the boundaries between the judicial and legislative field, and of the confusion and injury which would follow from the failure to respect those boundaries. Nothing is decided as to the power of the courts to review the action of the Superintendent or Governor.

In our opinion, the injunction which was issued in this case, constituting in substance a regulation of the operation of the railway, was, in the first place, not within the limits of the judicial power, and, in the second place, totally inconsistent with the power of regulation vested unmistakably by the legislature in the executive authorities.

Decree reversed.

THE CHIEF JUSTICE dissents.

MILLER & LUX, INCORPORATED, *v.* EAST SIDE CANAL & IRRIGATION COMPANY.

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

No. 518. Submitted October 13, 1908.—Decided December 7, 1908.

While jurisdiction of the Circuit Court exists even if complainant's motive in acquiring citizenship was to invoke that jurisdiction, the citizenship must be real and actually acquired with the purpose of establishing a permanent domicil. *Morris* v. *Gilmer*, 129 U. S. 315.

Where the complainant corporation was organized for the sole purpose of invoking the jurisdiction of the Circuit Court, and any decree in its favor would be really under the control, and for the benefit, of another corporation of the same State as defendant, the suit should be dismissed as one in which the complainant was collusively

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instituted before the proper tribunal to have the franchise granted by this chapter and all rights and privileges granted hereunder, forfeited and declared null and void."

so organized for the purpose of creating a case cognizable in the Circuit Court within the meaning of § 5 of the act of March 3, 1875, c. 137, 18 Stat. 470, 472. *Lehigh Mining & Manufacturing Co.* v. *Kelly*, 160 U. S. 327.

THE facts are stated in the opinion.

Mr. Edward F. Treadwell for appellant:

The mere fact (if it be a fact) that complainant was formed and this property transferred to it for the purpose of conferring jurisdiction upon the Federal courts, can in no way affect the jurisdiction of those courts. *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 191; *McDonald* v. *Smalley*, 1 Pet. 620; *Smith* v. *Kernochen*, 7 How. 198, 216; *Barney* v. *Baltimore*, 6 Wall. 280; *Morris* v. *Gilmer*, 129 U. S. 315, 328; *Cross* v. *Allen*, 141 U. S. 528, 533; *Crawford* v. *Neal*, 144 U. S. 585; *Lake County Commissioners* v. *Dudley*, 173 U. S. 243, 254; *South Dakota* v. *North Carolina*, 192 U. S. 286, 310; *Blair* v. *Chicago*, 201 U. S. 400, 448; *Briggs* v. *French*, Fed. Cas. No. 1,871; *Case* v. *Clarke*, Fed. Cas. No. 2,490; *Van Dolsen* v. *New York*, 17 Fed. Rep. 817; *Neal* v. *Foster*, 36 Fed. Rep. 29, 41; *Ashley* v. *Supervisors*, 83 Fed. Rep. 534, 537; *Woodside* v. *Ciceroni*, 93 Fed. Rep. 1; *Collins* v. *Ashland*, 112 Fed. Rep. 175, 178; *Adams* v. *Shirk*, 117 Fed. Rep. 801, 805; *Cole* v. *Ry. Co.*, 140 Fed. Rep. 944, 946.

The transfer to the Nevada corporation was upon a valuable consideration, and consequently no trust resulted in favor of the California corporation. 15 Am. & Eng. Ency. of Law, 2d ed., p. 1125; *St. John* v. *Benedict*, 6 John Ch. N. Y. 111; Civil Code of Cal., § 1614.

The dissolution or non-dissolution of the California corporation is entirely immaterial.

The recital in the agreement that the stock of the Nevada corporation could not be distributed to the stockholders of the California corporation prior to dissolution correctly states the law. *Kohl* v. *Lilienthal*, 81 California, 378.

The provision, also, that the voting power of the stock should

be separated from the legal title and vested in the stockholders of the California corporation is entirely valid under the law of the State of California. *Smith* v. *S. F. & N. P. Ry. Co.*, 115 California, 584.

It follows from this that the California corporation was as effectually eliminated as if it had been absolutely dissolved. The transfer to the Nevada corporation was an absolute one, without any understanding, express or implied, that the property should ever be reconveyed, and the case of *Lehigh Min. & Mfg. Co.* v. *Kelly*, 160 U. S. 327, has no application to such a transfer.

It matters not how closely related two corporations may be, nor what similarity there may be in names, incorporators, stockholders, officers and purposes, they will be considered distinct so far as Federal jurisdiction is concerned. *Louisville Co.* v. *Louisville*, 174 U. S. 552, 563; *St. Louis* v. *James*, 161 U. S. 545, 559; *Lehigh M. & M. Co.* v. *Kelly*, 160 U. S. 327, 347; *Nashua & L. R. Corp.* v. *R. Corp.*, 136 U. S. 356, 373; *Muller* v. *Dows*, 94 U. S. 444; *Goodwin* v. *New York &c. Co.*, 124 Fed. Rep. 358, 364; *Missouri Pac. Ry.* v. *Meeh*, 69 Fed. Rep. 753, 755; *Farnham* v. *Canal Corp.*, 1 Sumn. 46, 62; *S. C.*, Fed. Cas. No. 4,675; *Racine Co.* v. *Farmers Co.*, 49 Illinois, 331.

Mr. James F. Peck and *Mr. Frederic D. McKenney*, for appellee:

The Circuit Court properly disregarded the superficial aspect of complainant as a separate and distinct corporation. In determining the jurisdictional question it had the right to look through the web of the artificial corporate entity and find the real parties in interest. *Oriental Investment Co.* v. *Barclay*, 25 Tex. Civ. App. 558; *Venner* v. *Great Northern Co.*, 209 U. S. 24; *Lehigh Mining &c. Co.* v. *Kelly*, 160 U. S. 327.

The interests of the California corporation in the Nevada corporation, this complainant, are exclusive and supreme. The two corporations are so identical in every material incident that the suit is not really and substantially between

citizens of different States. *Lehigh Mining &c. Co.* v. *Kelly*, 160 U. S. 327, 340; *Waite* v. *Santa Cruz*, 184 U. S. 325.

The pretended change of corporate residence was made for the purpose of creating a case for Federal jurisdiction, and the lands and water rights in dispute were conveyed to the Nevada corporation for that purpose. The Circuit Court was justified by the evidence in finding that fact.

There can be little, if any, doubt that the removal was not with a *bona fide* intention of changing the corporate domicil. *Butler* v. *Farnsworth*, 4 Wash. C. C. 101, 103; *Morris* v. *Gilmer*, 129 U. S. 328, 329; *Lehigh Mining &c. Co.* v. *Kelly*, 160 U. S. 327–340.

So far as Federal jurisdiction is concerned, and for jurisdictional purposes in a case like this, the citizenship of the California corporation of Miller & Lux determines the question of Federal jurisdiction in this case. *Goodwin* v. *Boston & M. R. R.*, 127 Fed. Rep. 986, 989.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was brought in the Circuit Court of the United States for the Southern District of California by "Miller & Lux, Incorporated," a corporation of Nevada, against the East Side Canal & Irrigation Company, a corporation of California.

The case is here upon a certificate under the act of Congress of March 3, 1891, c. 517, 26 Stat. 826, relating to the jurisdiction of the Circuit Court as affected by § 5 of the act of March 3, 1875, c. 137, 18 Stat. 470, 472. That section provides that if, in any suit commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear at any time to the satisfaction of said Circuit Court that such suit "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants,

for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just; but the order of said Circuit Court dismissing or remanding said cause to the state court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

In stating the object and scope of that act this court in *Williams* v. *Nottawa*, 104 U. S. 209, 211, referred to the act of 1875 and said: "In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction; for as was very properly said by Mr. Justice Miller, speaking for the court, in *Barney* v. *Baltimore*, 6 Wall. 280, 288, such transfers for such purposes are frauds upon the court, and nothing more."

In the answer of the defendant it is alleged that Miller & Lux, Incorporated, was organized as a corporation in Nevada, but to act only as an agent of "Miller & Lux," a corporation of California; that the California corporation was the owner of all the capital stock of Miller & Lux, Incorporated, which as a corporation had no existence except as a mere agency of Miller & Lux, the California corporation; that all the property held by the plaintiff was as such agent in order that suits could be brought and prosecuted in the United States courts; and that the plaintiff does not transact any business or do any act or thing other than such as may be necessary to carry out the purposes of the California corporation, "except to hold title to property for the purpose of prosecuting suits in the United States courts."

To these allegations the plaintiff made special replication,

evidence was taken as to their truth and the cause was submitted upon the issue thus made. The court found the allegation in the answer to be true; that the complainant held the title to the lands described in the bill for the purpose only of prosecuting and commencing this action in the Circuit Court of the United States, and that the lands were conveyed to plaintiff for that purpose; and it appearing to the satisfaction of the court that the Nevada corporation had been collusively made a party plaintiff for the purpose of creating a case cognizable by the Circuit Court of the United States, and that the suit did not really and substantially involve a dispute or controversy within the jurisdiction of that court, the bill was dismissed.

It was established by the evidence and the court found as follows:

Henry Miller and Charles Lux were partners prior to and up to the death of Lux, one of the parties, which occurred March 15, 1887.

In April, 1897, the heirs of the deceased partner and Miller, the surviving partner, wishing to have the partnership business liquidated and its assets distributed among those entitled thereto, made an agreement to form a corporation under the laws of California and transfer to it all the property of the partnership, each person to receive in lieu thereof capital stock proportioned to his interest in the partnership. Pursuant to that agreement the corporation of "Miller & Lux" was organized in California on the fifth day of May, 1897; to it was conveyed the property of the partnership and the stock of the corporation was distributed as provided in the agreement.

On the seventeenth day of December, 1900, the California corporation of Miller & Lux commenced an action in the Superior Court of Merced County, California, against the present defendant the East Side Canal & Irrigation Company, a California corporation. The object of that suit was to have the latter corporation perpetually enjoined from obstructing the natural flow of the waters of San Joaquin River and its branches, along and

bordering on which the California corporation of Miller & Lux claimed certain lands, as well as from interfering with the waters of that river, above those lands and to their injury.

On the twelfth day of June, 1905—the above suit in the state court still being on the docket—the California corporation and the stockholders owning more than two-thirds of its capital stock, entered into an agreement that they would at once form a corporation under the laws of Nevada with an authorized capital of $12,000,000—all of such capital stock to be issued and be deemed fully paid up—each director of the California corporation of Miller & Lux to be an incorporator of the Nevada corporation and to subscribe two shares of such capital stock to be issued as fully paid up stock of the new corporation.

That agreement stated that the laws of California were unsatisfactory and in many particulars uncertain and unsettled, "particularly as to dividends, a matter of the most vital importance to us, and as to which litigation is now pending and undetermined." These difficulties, it was said, did not exist to the same extent under the laws of Nevada. Among the reasons assigned in the agreement for the formation of the Nevada corporation was the belief, on the part of the stockholders of the California corporation, that their rights in litigated cases would be "most fully protected and conserved in the Federal courts, to which corporations formed in other States are entitled to resort."

The above agreement provided that upon the formation of the Nevada corporation all the property, real and personal, of the California corporation should be transferred and conveyed to the Nevada corporation, and that the capital stock of the latter corporation should be issued as fully paid up stock to the California corporation; and that after such transfer and conveyance were completed, and as soon as the law would permit, the California corporation should be dissolved by voluntary proceedings under the State Code of Civil Procedure of that State.

On the same day, June 12, 1905, the parties to that agree-

ment signed and acknowledged articles of incorporation for the proposed Nevada corporation of "Miller & Lux, Incorporated." All the capital stock of that corporation was issued to the California corporation. The directors of the California corporation became and are also the directors of the Nevada corporation. Each company had the same President, Vice-President, Secretary and Treasurer, and offices at the same place. "Said corporation," it was found, "are the same in name purposes, capitalization, directors, officers, office and place of business."

On the fifteenth day of June, 1905, the California corporation of Miller & Lux directed the dismissal of the suit brought in the state court. And on the same day the present suit was brought in the Circuit Court of the United States in the name of the Nevada corporation against the East Side Canal & Irrigation Company. The relief sought was substantially the same as that sought in the suit instituted in the state court.

Process in the suit brought in the Circuit Court by the Nevada corporation was served on June 17, 1905, and *on the same day* the California corporation formally dismissed its suit in the state court.

The California corporation had not been dissolved nor had it ceased to exist when the present suit was brought by the Nevada corporation. It was then in existence, with all of its powers unmodified. And it does not appear that any steps had or have been taken to disincorporate the California corporation. Nor can it be said when, if ever, that corporation will be dissolved.

We are of opinion that the court below did not err in dismissing the suit. The question raised by the record is substantially the same as that determined in *Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U. S. 327. That was an action involving the title to certain lands in Virginia in the possession of citizens of that Commonwealth, and of which lands a Virginia corporation claimed to be the owner. The individual stockholders and officers of the Virginia corporation organized a

corporation in Pennsylvania, to which the former corporation conveyed all its rights, title and interest in the Virginia lands, without any valuable consideration. The stockholders in both corporations were identical. The admitted purpose of organizing the Pennsylvania corporation and conveying to it the lands there in question was to give the Circuit Court of the United States, sitting in Virginia, jurisdiction to determine the disputed controversy as to the lands. All this having been done, the Pennsylvania corporation instituted a suit in the Federal court in Virginia against the individual citizens of Virginia to recover the lands. When that suit was instituted the Virginia corporation still existed with the same stockholders it had at the time of the conveyance by it to the Pennsylvania corporation.

This court said (p. 331) that "The Virginia corporation still exists with the same stockholders it had when the conveyance of March 1, 1893, was made; and that, as soon as this litigation is concluded, the Pennsylvania corporation, if it succeeds in obtaining judgment against the defendants, *can be required by the stockholders of the Virginia corporation,* being also its own stockholders, to reconvey the lands in controversy to the Virginia corporation without any consideration passing to the Pennsylvania corporation."

After referring to several cases, this court, among other things, also said (p. 336): "In harmony with the principles announced in former cases, we hold that the Circuit Court properly dismissed this action. The conveyance to the Pennsylvania corporation was without any valuable consideration. It was a conveyance by one corporation to another corporation—the grantor representing certain stockholders, entitled collectively or as one body to do business under the name of the Virginia Coal and Iron Company, while the grantee represented *the same stockholders,* entitled collectively or as one body to do business under the name of the Lehigh Mining and Manufacturing Company. It is true that the technical legal title to the lands in controversy is, for the time, in the Penn-

sylvania corporation. It is also true that there was no formal agreement upon the part of that corporation 'as an artificial being, invisible, intangible, and existing only in contemplation of law,' that the title should ever be reconveyed to the Virginia corporation. But when the inquiry involves the jurisdiction of a Federal court—the presumption in every stage of a cause being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record, *Grace* v. *American Central Insurance Co.*, 109 U. S. 278, 283; *Bors* v. *Preston*, 111 U. S. 252, 255—we cannot shut our eyes to the fact that there exists what should be deemed an equivalent to such an agreement, namely, the right *and power* of those who are stockholders of each corporation to *compel* the one holding the legal title to convey, *without a valuable consideration*, such title to the other corporation. In other words, although the Virginia corporation, as such, holds no stock in the Pennsylvania corporation, the latter corporation holds the legal title, subject *at any time* to be divested of it by the action of the stockholders of the grantor corporation who are also its stockholders. The stockholders of the Virginia corporation—the original promoters of the present scheme, and, presumably, when a question of the jurisdiction of a court of the United States is involved, citizens of Virginia—in order to procure a determination of the controversy between that corporation and the defendant citizens of Virginia, in respect of the lands in that Commonwealth, which are here in dispute, assumed, as a body, the mask of a Pennsylvania corporation, for the purpose, and the purpose only, of invoking the jurisdiction of the Circuit Court of the United States, retaining the power, in their discretion, and after all danger of defeating the jurisdiction of the Federal court shall have passed, to throw off that mask and reappear under the original form of a Virginia corporation—their right, in the meantime, to participate in the management of the general affairs of the latter corporation not having been impaired by the conveyance to the Pennsylvania corporation. And all this may be done, if the position of the plaintiffs be

correct, without any consideration passing between the two corporations." Observing that the Pennsylvania corporation received the technical legal title for the purpose only of bringing a suit in the Federal court, the court proceeded (p. 342): "As we have said, that corporation may be *required* by those who are stockholders of its grantor, and who are also its own stockholders, at any time, and *without receiving therefor any consideration whatever*, to place the title where it was when the plan was formed to wrest the judicial determination of the present controversy from the courts of the State in which the land lies. It should be regarded as a case of an improper and collusive making of parties for the purpose of creating a case cognizable in the Circuit Court. If this action were not declared collusive, within the meaning of the act of 1875, then the provision making it the duty of the Circuit Court to dismiss a suit, ascertained at any time to be one in which parties have been improperly or collusively made or joined, for the purpose of creating a case cognizable by that court, would become of no practical value, and the dockets of the Circuit Courts of the United States will be crowded with suits of which neither the framers of the Constitution nor Congress ever intended they should take cognizance."

The present case is controlled by the one just cited. The two cases are alike in all material respects. Looking at the facts as they were when this suit was instituted in the Circuit Court, it must be taken that the transfer of the property of the California corporation to the Nevada corporation was merely formal—only a device by which to have the rights asserted by the California corporation in the state court determined by the Federal court rather than by the state court. The agreement that all the property of the California corporation should be transferred to the Nevada corporation was attended by the condition that all the capital stock of the new corporation should be issued—and it was issued—to the California corporation which remained in existence with full power as the owner of such stock to control the operations of the

Nevada corporation. If before the institution of this suit the California corporation had distributed among those entitled to it the stock of the Nevada corporation, issued to it as fully paid up stock, and had then ceased to exist or been dissolved, a different question might have been presented. But such is not this case. As the facts were, when this suit was brought the California corporation could at any time, even after this suit was concluded, have required the Nevada corporation, without any new or valuable consideration, to surrender all its interest in the property which it had obtained from the California corporation for the purpose of acquiring a standing in the Circuit Court of the United States. In other words, the Nevada corporation had no real interest in the property. Its ownership was a sham, in that it could at any time after the bringing of this suit have been compelled by the California corporation to dismiss the suit and abandon all claim to the property in question. It took the title only as matter of form, in order that the California corporation, or the stockholders interested in it, might, under the name of the Nevada corporation, invoke the jurisdiction of the Federal court and avoid the determination of the rights of the parties in the courts of the State. *Barney* v. *Baltimore City*, 6 Wall. 280, 288. The prosecution of the suit was really for the benefit of those who were interested in the California corporation.

We do not intend by what has been said to qualify the general rule, long established, that the jurisdiction of a Circuit Court, when based on diverse citizenship, cannot be questioned upon the ground *merely* that a party's motive in acquiring citizenship in the State in which he sues was to invoke the jurisdiction of a Federal court. But that rule is attended by the condition that the acquisition of such citizenship is real, with the purpose to establish a permanent domicil in the State of which he professes to be a citizen at the time of suit, and not fictitious or pretended. *Morris* v. *Gilmer*, 129 U. S. 315, 328. In that case the question was whether the plaintiff who was residing with his adversary in Alabama actually acquired such

a domicil in Tennessee as entitled him to bring suit in the Federal court, sitting in Alabama. This court said: "Upon the evidence in this record, we cannot resist the conviction that the plaintiff had no purpose to acquire a domicil or settled home in Tennessee, and that his sole object in removing to that State was to place himself in a situation to invoke the jurisdiction of the Circuit Court of the United States. He went to Tennessee without any present intention to remain there permanently or for an indefinite time, but with a present intention to return to Alabama as soon as he could do so without defeating the jurisdiction of the Federal court to determine his new suit. He was, therefore, a mere sojourner in the former State when this suit was brought. He returned to Alabama almost immediately after giving his deposition. The case comes within the principle announced in *Butler* v. *Farnsworth*, 4 Wash. C. C. 101, 103, where Mr. Justice Washington said: 'If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the Federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a *bona fide* intention of changing his domicil, however frequent and public his declarations to the contrary may have been.' "

In the present case, although the Nevada corporation appeared, upon the face of the record, to be the owner of the rights which the California corporation had asserted in the state court, it was, when this suit was brought, only the representative of the California corporation and its stockholders. The latter corporation holding all the stock and having the same directors and officers as the Nevada corporation, could control the suit brought by the Nevada corporation, and, in the event of a favorable decree, could have compelled it to surrender or abandon all its claims to the California corporation, which was still in existence when this suit was brought.

As the Nevada corporation was formed by the direction of the California corporation, its stockholders and officers, for

the purpose only of having the matters in dispute between the California corporation and the East Side Canal & Irrigation Company determined in the Federal court rather than in the state court where they were pending and undetermined; as the Nevada corporation assumed to be the owner of the property rights which the California corporation had asserted against the Canal & Irrigation Company only that it might have a standing in the Federal court as a litigant in respect of those rights; and as the California corporation could have controlled the conduct of the suit brought by the Nevada corporation at any time after it was brought, and up to the date of the decree below, and could have required the Nevada corporation, in the event of a decree in its favor, to transfer the benefit of such decree to the California corporation, without any new or valuable consideration, we hold that the suit was properly dismissed under the fifth section of the act of 1875 as one in which the Nevada corporation was organized and collusively made plaintiff in the suit in the Federal court simply for the purpose of creating a case cognizable by that court.

Decree affirmed.

NORTH AMERICAN COLD STORAGE COMPANY, APPELLANT, *v.* CITY OF CHICAGO *et al.*

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

No. 28. Argued November 13, 1908.—Decided December 7, 1908.

A municipal ordinance properly adopted under a power granted by the state legislature is to be regarded as an act of the State within the Fourteenth Amendment.

Where the Circuit Court has sustained the demurrer to the complaint because the case does not involve the construction or application of the Constitution of the United States and has given a certificate to

that effect, and complainant has also appealed directly to this court under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 826, if this court finds that jurisdiction exists, the appeal can be heard without resort to the certificate and decided on the merits. *Giles* v. *Harris*, 189 U. S. 475.

Under its police power the State has the right to seize and destroy food which is unwholesome and unfit to use, and, in exercising such a power, due process of law, within the meaning of the Fourteenth Amendment, does not require previous notice and opportunity to be heard; the party whose property is destroyed has a right of action after the act which is not affected by the *ex parte* condemnation of the state officers.

Where, under the police power of the State, the legislature may enact laws for the destruction of articles prejudicial to public health, it is, to a great extent, within its discretion as to whether any notice and hearing shall be given; and the fact that the articles might be kept for a period does not give the owners a right to notice and hearing.

The right of the State under the police power to destroy food that is unfit for human consumption is not taken away because some value may remain in it for other purposes, when it is kept to be sold at some time as food. *Reduction Company* v. *Sanitary Works*, 199 U. S. 306; *Gardner* v. *Michigan*, 199 U. S. 325.

The provisions in the cold storage ordinances of Chicago for destruction of unsafe and unwholesome food, are not unconstitutional as depriving persons of property without due process of law because they do not provide for notice and opportunity to be heard before such destruction, or because the food destroyed might have some value for other purposes than food.

THE bill of complaint in this case was dismissed by the Circuit Court for want of jurisdiction, and a certificate of the Circuit Judge was given that the jurisdiction of the court was in issue, and the question of jurisdiction alone was certified to this court, under paragraph 2 of § 5 of the act of March 3, 1891 (26 Stat. 826, chap. 517). The appellant also appealed, and now asserts its right of appeal under paragraph five of the same section of the above act, on the ground that the case involves the construction or application of the Constitution of the United States, and hence may be brought directly to this court from the decision of the Circuit Court.

The bill was filed against the city of Chicago and the various individual defendants in their official capacities—Commissioner of Health of the city of Chicago, Secretary of the Department of Health, Chief Food Inspector of the Department of Health and inspectors of that department, and policemen of the city—for the purpose of obtaining an injunction under the circumstances set forth in the bill. It was therein alleged that the complainant was a cold storage company, having a cold storage plant in the city of Chicago; and that it received, for the purpose of keeping in cold storage, food products and goods as bailee for hire; that on an average it received $20,000 worth of goods per day, and returned a like amount to its customers, daily, and that it had on an average in storage about two million dollars' worth of goods; that it received some forty-seven barrels of poultry on or about October 2, 1906, from a wholesale dealer in due course of business, to be kept by it and returned to such dealer on demand; that the poultry was, when received, in good condition and wholesome for human food, and had been so maintained by it in cold storage from that time, and it would remain so, if undisturbed, for three months; that on October 2, 1906, the individual defendants appeared at complainant's place of business and demanded of it that it forthwith deliver the forty-seven barrels of poultry for the purpose of being by them destroyed, the defendants alleging that the poultry had become putrid, decayed, poisonous or infected in such a manner as to render it unsafe or unwholesome for human food. The demand was made under § 1161 of the Revised Municipal Code of the city of Chicago for 1905, which reads as follows:

"Every person being the owner, lessee or occupant of any room, stall, freight house, cold storage house or other place, other than a private dwelling, where any meat, fish, poultry, game, vegetables, fruit, or other perishable article adapted or designed to be used for human food, shall be stored or kept, whether temporarily or otherwise, and every person having charge of, or being interested or engaged, whether as principal

or agent, in the care of or in respect to the custody or sale of any such article of food supply, shall put, preserve and keep such article of food supply in a clean and wholesome condition, and shall not allow the same, nor any part thereof, to become putrid, decayed, poisoned, infected, or in any other manner rendered or made unsafe or unwholesome for human food; and it shall be the duty of the meat and food inspectors and other duly authorized employés of the health department of the city to enter any and all such premises above specified at any time of any day, and to forthwith *seize*, condemn and destroy any such putrid, decayed, poisoned and infected food, which any such inspector may find in and upon said premises."

The complainant refused to deliver up the poultry, on the ground that the section above quoted of the Municipal Code of Chicago, in so far as it allows the city or its agents to seize, condemn or destroy food or other food products, was in conflict with that portion of the Fourteenth Amendment which 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.

After the refusal of the complainant to deliver the poultry the defendants stated that they would not permit the complainant's business to be further conducted until it complied with the demand of the defendants and delivered up the poultry, nor would they permit any more goods to be received into the warehouse or taken from the same, and that they would arrest and imprison any person who attempted to do so, until complainant complied with their demand and delivered up the poultry. Since that time the complainant's business has been stopped and the complainant has been unable to deliver any goods from its plant or receive the same.

The bill averred that the attempt to seize, condemn and destroy the poultry, without a judicial determination of the fact that the same was putrid, decayed, poisonous or infected, was illegal, and it asked that the defendants, and each of them, might be enjoined from taking or removing the poultry from

the warehouse, or from destroying the same, and that they also be enjoined from preventing complainant delivering its goods and receiving from its customers in due course of business the goods committed to its care for storage.

In an amendment to the bill the complainant further stated that the defendants are now threatening to summarily destroy, from time to time, pursuant to the provisions of the above-mentioned section, any and all food products which may be deemed by them, or either of them, as being putrid, decayed, poisonous or infected in such manner as to be unfit for human food, without any judicial determination of the fact that such food products are in such condition.

The defendants demurred to the bill on the ground, among others, that the court had no jurisdiction of the action. The injunction was not issued, but upon argument of the case upon the demurrer the bill was dismissed by the Circuit Court for want of jurisdiction, as already stated.

Mr. L. A. Stebbins, with whom *Mr. W. H. Sears* was on the brief, for appellant:

If the trial court misconstrued the true definition of the word jurisdiction and therefore erred in dismissing the case for want of jurisdiction, then the case is still appealable direct to this court under par. 6 of § 5 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826. In this event the certificate of the trial court becomes surplusage, and this court will consider the case upon its merits. *Giles* v. *Harris*, 189 U. S. 475.

That notice, and an opportunity to be heard, shall precede the taking of life, liberty or property is a principle absolutely fundamental in every system of constitutional government. *Rex* v. *Cambridge Univ.*, 1 Stra. 558, 565; *Bradstreet* v. *Neptune Ins. Co.*, 3 Sumn. (U. S.) 600.

The police power of the several States is subject to constitutional limitations. *Mugler* v. *Kansas*, 123 U. S. 623; *Booth* v. *People*, 186 Illinois, 43; McGeehee on Due Process,

305; *Central of Ga. R. R. Co.* v. *Murphy*, 196 U. S. 194; *Reid* v. *Colorado*, 187 U. S. 137; *Lake Shore & Michigan Southern Ry. Co.* v. *Smith*, 173 U. S. 684; *Dobbins* v. *Los Angeles*, 195 U. S. 223.

Section 1161 of the Revised Municipal Code of the city of Chicago denies due process of law, in that it authorizes the destruction of property without any provision whatever for notice to the owner thereof, or to the bailee holding the same in cold storage, and without any opportunity whatsoever for any hearing, of any kind or character, before any person or official upon the question whether the said property is, in fact, dangerous to the public health. *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Pennoyer* v. *Neff*, 95 U. S. 714; McGeehee on Due Process of Law, 58, 73; *Galpin* v. *Page*, 18 Wall. 350; *King* v. *Hayes*, 80 Maine, 206; *Edson* v. *Crangle*, 62 Ohio St. 49; *Varden* v. *Mount*, 78 Kentucky, 86; *Jeck* v. *Anderson*, 57 California, 251; *Lowry* v. *Rainwater*, 70 Missouri, 152; *Weil* v. *Ricord*, 24 N. J. Eq. 169; *Hutton* v. *Camden*, 39 N. J. L. 122, 132.

There was no emergency calling for the immediate destruction of the property here in question, because the property could have remained in the cold storage warehouse in an unchanged condition until a hearing could have been had, after due notice. The court should take judicial notice of the nature and purpose of cold storage warehouses, as bearing on the alleged necessity for the destruction of the poultry involved in this proceeding.

The remedy suggested in the case of *Lawton* v. *Steele*, 152 U. S. 133, could not be applied in a case like the present, because by the destruction of the property all possible evidence of its character would be destroyed with it, and it would be impossible for the aggrieved owners to prove the wholesome character of their goods, and a suit against the offending officers would therefore be without success.

As decayed food products are still valuable for certain purposes, other than as food, there can be no justification for their

destruction; they are entitled to the same protection under the Constitution as other property.

Mr. Emil C. Wetten, with whom *Mr. George W. Miller* and *Mr. Edward J. Brundage* were on the brief, for appellees:

It is impossible to frame any definition of police power by absolutely indicating definite limits to its exercise, but each case which arises must be decided in accordance with the merits of the particular case. For the general principles governing the question see 22 Am. & Eng. Ency. of Law, 2d ed., 915; *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33; *Leisy* v. *Hardin*, 135 U. S. 100, 128; Parker & Worthington's Public Health & Safety, 2; Brannon on Fourteenth Amendment, 167, 175; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Mugler* v. *Kansas*, 123 U. S. 623, 664, 665; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 667; *In re Rahrer*, 140 U. S. 545, 554; *Powell* v. *Pennsylvania*, 127 U. S. 678, 683; *Patterson* v. *Kentucky*, 97 U. S. 501, 504.

The ordinance is a valid and proper exercise of police power. *Mugler* v. *Kansas*, 123 U. S. 623, 661, 669; *Lawton* v. *Steele*, 152 U. S. 133, 136; Parker & Worthington, 6; *Powell* v. *Pennsylvania*, 127 U. S. 678, 684; *In re Jacobs*, 98 N. Y. 98, 115; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 27, 30; *Gardner* v. *Michigan*, 199 U. S. 325, 332; *City of Chicago* v. *Netcher*, 183 Illinois, 104, 111.

Under the police power the summary destruction of unwholesome food products is a proper exercise of official discretion. Freund, Police Power, §§ 520, 521; *Powell* v. *Pennsylvania*, 127 U. S. 678, 685; *People* v. *Durston*, 119 N. Y. 569, 578; *Compagnie Francaise &c.* v. *Board of Health*, 186 U. S. 380, 392.

A notice and hearing before the summary abatement of a nuisance is not necessary. McGeehee on Due Process, 372; *People* v. *Board of Health*, 140 N. Y. 1; *S. C.*, 23 L. R. A. 481; Parker & Worthington, § 175; *Salem* v. *Eastern R. R. Co.*, 98 Massachusetts. 431, 443; *Miller* v. *Horton et al.*, 152 Massachusetts,

540, 543; *Stone* v. *Heath*, 179 Massachusetts, 385, 386; *Health Department* v. *Rector*, 145 N. Y. 32; *Lowe* v. *Conroy*, 120 Wisconsin, 151, 155, 156; *Daniels* v. *Homer*, 139 N. C. 219; *Blue* v. *Beach*, 80 Am. St. Rep. 212, 218; *Egan* v. *Health Department*, 20 Misc. 38; *S. C.*, 45 N. Y. Supp. 325; *Pearson et al.* v. *Zehr*, 138 Illinois, 40, 51; *State* v. *Main*, 69 Connecticut, 123, 136, 138; *Gaines* v. *Waters*, 64 Arkansas, 609, 612; *Booth* v. *People*, 186 Illinois, 43, 48.

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

In this case the ordinance in question is to be regarded as in effect a statute of the State, adopted under a power granted it by the state legislature, and hence it is an act of the State within the Fourteenth Amendment. *New Orleans* v. *Sugar Co.*, 125 U. S. 18, 31.

The Circuit Court held that the defendants being sued in their official capacities could not be held for acts or threats which they had no power or authority under the ordinance to make or perform; that, although it was alleged that the defendants acted under the provisions of the section of the code already quoted, yet that under no possible construction of that ordinance could the defendants claim the right to the entire stoppage of the business of the complainant in storing admittedly wholesome articles of food, so that it would seem that these acts were mere trespasses, and plainly without the sanction of the ordinance; as to these acts, therefore, the remedy was to be pursued in the state courts, there being no constitutional question involved necessary to give the court jurisdiction.

The court further held that the allegation that the intention to seize and destroy the poultry without any judicial determination as to the fact of its being unfit for food was in violation of the Fourteenth Amendment, could not be sustained; that such Amendment did not impair the police power of the

State, and that the ordinance was valid and not in violation of that Amendment. The demurrer was therefore sustained and the bill dismissed, as stated by the court, for want of jurisdiction.

We think there was jurisdiction and that it was error for the court to dismiss the bill on that ground. The court seems to have proceeded upon the theory that, as the complainant's assertion of jurisdiction was based upon an alleged Federal question which was not well founded, there was no jurisdiction. In this we think that the court erred. The bill contained a plain averment that the ordinance in question violated the Fourteenth Amendment, because it provided for no notice to the complainant or opportunity for a hearing before the seizure and destruction of the food. A constitutional question was thus presented to the court, over which it had jurisdiction, and it was bound to decide the same on its merits. If a question of jurisdiction alone were involved, the decree of dismissal would have to be reversed. The complainant, however, has, in addition to procuring the certificate of the court as to the reason for its action, also appealed from the decree of dismissal directly to this court under the fifth paragraph of § 5 of the act of 1891. Such appeal can be heard without resort to the certificate and may be decided on its merits. *Giles* v. *Harris*, 189 U. S. 475, 486. A constitutional question being involved, an appeal may be taken directly to this court from the Circuit Court.

Holding there was jurisdiction in the court below, we come to the merits of the case. The action of the defendants, which is admitted by the demurrer, in refusing to permit the complainant to carry on its ordinary business until it delivered the poultry, would seem to have been arbitrary and wholly indefensible. Counsel for the complainant, however, for the purpose of obtaining a decision in regard to the constitutional question as to the right to seize and destroy property without a prior hearing, states that he will lay no stress here upon that portion of the bill which alleges the unlawful and forcible

taking possession of complainant's business by the defendants. He states in his brief as follows:

"There is but one question in this case, and that question is, Is section 1161 of the Revised Municipal Code of Chicago in conflict with the due process of law provision of the Fourteenth Amendment, in this, that it does not provide for notice and an opportunity to be heard before the destruction of the food products therein referred to? If there is no such conflict the ordinance is valid for the purposes of Federal jurisdiction; the bill states no cause of action, and was properly dismissed, as there is no claim of any such diversity of citizenship as would confer jurisdiction upon the Federal court, and no such jurisdiction exists, except by reason of the claim, that such ordinance is in conflict with the Fourteenth Amendment."

The general power of the State to legislate upon the subject embraced in the above ordinance of the city of Chicago, counsel does not deny. See *Reduction Company* v. *Sanitary Works*, 199 U. S. 306, 318. Nor does he deny the right to seize and destroy unwholesome or putrid food, provided that notice and opportunity to be heard be given the owner or custodian of the property before it is destroyed. We are of opinion, however, that provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for use, is not necessary. The right to so seize is based upon the right and duty of the State to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption should be summarily seized and destroyed to prevent the danger which would arise from eating it. The right to so seize and destroy is, of course, based upon the fact that the food is not fit to be eaten. Food that is in such a condition, if kept for sale or in danger of being sold, is in itself a nuisance, and a nuisance of the most dangerous kind, involving, as it does, the health, if not the lives, of persons who may eat it. A determination on the part of the seizing officers that food is in an unfit condition to be eaten is not a decision which con-

cludes the owner. The *ex parte* finding of the health officers as to the fact is not in any way binding upon those who own or claim the right to sell the food. If a party cannot get his hearing in advance of the seizure and destruction he has the right to have it afterward, which right may be claimed upon the trial in an action brought for the destruction of his property, and in that action those who destroyed it can only successfully defend if the jury shall find the fact of unwholesomeness as claimed by them. The often cited case of *Lawton* v. *Steele*, 152 U. S. 133, substantially holds this. By the second section of an act of the legislature of the State of New York of 1880 it was provided that any "net . . . for capturing fish which was floated upon the water or found or maintained in any of the waters of the State," in violation of the statutes of the State for the protection of fish, was a public nuisance, and could be abated and summarily destroyed, and that no action for damages should lie or be maintained against any person for or on account of seizing or destroying such nets. Nets of the kind mentioned in that section were taken and destroyed by the defendant, and the owner commenced action against him to recover damages for such destruction. That portion of the section which provided that no action for damages should lie was applicable only to a case where the seizure or destruction had been of a nature amounting to a violation of the statute, and of course did not preclude an action against the person making a seizure if not made of a net which was illegally maintained. The seizure and destruction were justified by the defendant in the action, and such justification was allowed in the state courts (119 N. Y. 226) and in this court. Mr. Justice Brown, in delivering the opinion of this court, said:

"Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the

defendant to prove a justification under the statute. As was said by the Supreme Court of New Jersey, in a similar case (*Am. Print Works* v. *Lawrence,* 21 N. J. Law, 248, 259): 'The party is not, in point of fact, deprived of a trial by jury. . . .' Indeed it is scarcely possible that any actual injustice could be done in the practical administration of the act."

The statute in the above case had not provided for any hearing of the question of violation of its provisions and this court held that the owner of the nets would not be bound by the determination of the officers who destroyed them, but might question the fact by an action in a judicial proceeding in a court of justice. The statute was held valid, although it did not provide for notice or hearing. And so in *People &c.* v. *Board of Health,* 140 N. Y. 1, the question arose in a proceeding by certiorari, affirming the proceedings of the board of health of the city of Yonkers, by which certain dams upon the Nepperhan River were determined to be nuisances and ordered to be removed. The court held that the acts under which the dams were removed did not give a hearing in express terms nor could the right to a hearing be implied from any language used in them, but that they were valid without such provision, because they did not make the determination of the board of health final and conclusive on the owners of the premises wherein the nuisances were allowed to exist; that before such a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties and criminal punishments, the parties proceeded against must have a hearing, not as a matter of favor, but as a matter of right, and the right to a hearing must be found in the acts; that if the decisions of these boards were final and conclusive, even after a hearing, the citizen would in many cases hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated and generally unfitted to discharge grave judicial functions. It was said that boards of health under the acts referred to could not, as to any existing state of facts, by their

determination make that a nuisance which was not in fact a nuisance; that they had no jurisdiction to make any order or ordinance abating an alleged nuisance unless there were in fact a nuisance; that it was the actual existence of a nuisance which gave them jurisdiction to act. There being no provision for a hearing the acts were not void nevertheless, but the owner had the right to bring his action at common law against all the persons engaged in the abatement of the nuisance to recover his damages, and thus he would have due process of law; and if he could show that the alleged nuisance did not in fact exist he will recover judgment, notwithstanding the ordinance of the board of health under which the destruction took place.

The same principle has been decided by the Supreme Judicial Court of Massachusetts. The case of *The City of Salem* v. *Eastern R. Co.*, 98 Massachusetts, 431, was an action brought to recover moneys spent by the city to drain certain dams and ponds declared by the board of health to be a nuisance. The court held that in a suit to recover such expenses incurred in removing a nuisance, when prosecuted against a party on the ground that he caused the same, but who was not heard, and had no opportunity to be heard upon the questions before the board of health, such party is not concluded in the findings or adjudications of that board, and may contest all the facts upon which his liability is sought to be established.

Miller v. *Horton*, 152 Massachusetts, 540, is in principle like the case before us. It was an action brought for killing the plaintiff's horse. The defendants admitted the killing but justified the act under an order of the board of health, which declared that the horse had the glanders, and directed it to be killed. The court held that the decision of the board of health was not conclusive as to whether or not the horse was diseased, and said that: "Of course there cannot be a trial by jury before killing an animal supposed to have a contagious disease, and we assume that the legislature may authorize its destruction in such emergencies without a hearing beforehand.

But it does not follow that it can throw the loss upon the owner without a hearing. If he cannot be heard beforehand he may be heard afterward. The statute may provide for paying him in case it should appear that his property was not what the legislature had declared to be a nuisance and may give him his hearing in that way. If it does not do so, the statute may leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them."

And in *Stone* v. *Heath*, 179 Massachusetts, 385, the court held that under the statute it had no power to restrain the board of health from abating nuisances and from instituting proceedings against plaintiff on account of his failure to abate them, as provided for in the statute, because the board of health had adjudged that a nuisance existed and had ordered it to be abated by the plaintiff, yet still the question, "whether there was a nuisance, or whether, if there was, it was maintained by the one charged therewith might be litigated by such parties in proceedings instituted against them to recover the expenses of the abatement, or may be litigated by the parties whose property has been injured or destroyed in proceedings instituted by them to recover for such loss or damage, and may also be litigated by parties charged with causing or maintaining a nuisance in proceedings instituted against them for neglect or refusal to comply with the orders of the board of health directing them to abate the same." In that way they had a hearing and could recover or defend in case there was no nuisance.

See also *Lowe* v. *Conroy*, 120 Wisconsin, 151; *Pearson* v. *Zehr*, 138 Illinois, 48; *State* v. *Main*, 69 Connecticut, 123; *Gaines* v. *Waters*, 64 Arkansas, 609, 612, where the same principle is announced.

Complainant, however, contends that there was no emergency requiring speedy action for the destruction of the poultry in order to protect the public health from danger resulting from consumption of such poultry. It is said that the food was in cold storage, and that it would continue in the same con-

dition it then was for three months, if properly stored, and that therefore the defendants had ample time in which to give notice to complainant or the owner and have a hearing of the question as to the condition of the poultry, and as the ordinance provided for no hearing, it was void. But we think this is not required. The power of the legislature to enact laws in relation to the public health being conceded, as it must be, it is to a great extent within legislative discretion as to whether any hearing need be given before the destruction of unwholesome food which is unfit for human consumption. If a hearing were to be always necessary, even under the circumstances of this case, the question at once arises as to what is to be done with the food in the meantime. Is it to remain with the cold storage company, and if so under what security that it will not be removed? To be sure that it will not be removed during the time necessary for the hearing, which might frequently be indefinitely prolonged, some guard would probably have to be placed over the subject-matter of investigation, which would involve expense, and might not even then prove effectual. What is the emergency which would render a hearing unnecessary? We think when the question is one regarding the destruction of food which is not fit for human use the emergency must be one which would fairly appeal to the reasonable discretion of the legislature as to the necessity for a prior hearing, and in that case its decision would not be a subject for review by the courts. As the owner of the food or its custodian is amply protected against the party seizing the food, who must in a subsequent action against him show as a fact that it was within the statute, we think that due process of law is not denied the owner or custodian by the destruction of the food alleged to be unwholesome and unfit for human food without a preliminary hearing. The cases cited by the complainant do not run counter to those we have above referred to.

Even if it be a fact that some value may remain for certain purposes in food that is unfit for human consumption, the right to destroy it is not on that account taken away. The

small value that might remain in said food is a mere incident, and furnishes no defense to its destruction when it is plainly kept to be sold at some time as food. *Reduction Company* v. *Sanitary Works*, 199 U. S. 306–322; *Gardner* v. *Michigan*, 199 U. S. 325, 331.

The decree of the court below is modified by striking out the ground for dismissal of the bill as being for want of jurisdiction, and, as modified, is

Affirmed.

MR. JUSTICE BREWER dissents.

FITCHIE *v.* BROWN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 47. Argued October 29, 30, 1908.—Decided December 7, 1908.

Executors, parties to the action but who have not appealed, cannot be heard against a decree construing the will and determining the validity of trusts on an appeal taken by other parties.

The common law having been made applicable by statute in Hawaii, and there being no other statute regulating the subject, trusts must be valid as at common law; and the utmost extent of a testamentary trust is limited by ascertained lives in being at the time of its creation, selected by the testator but not necessarily having an interest in the property, and for twenty-one years after the death of the last survivor which must be ascertainable by reasonable evidence.

The testator's intent is to be sought and carried out if not illegal; and although the persons whose lives are to limit a trust may not actually be so designated in the will it is sufficient if a class or number of lives are referred to so as to plainly indicate that they were selected for that purpose.

A testamentary trust to continue as long as possible "under the statute" is not void, because in Hawaii there is no statute and the common

law is applicable; the testator's intent being evident that the trust was to continue as long as legally possible.

The fact that the class limiting the duration of a common-law trust is large—in this case over forty—does not render it void if it is otherwise legal.

A trust created for as long a period under the statute as possible *held* legal at common law and to be limited by the lives of annuitants mentioned in the will and evidently intended, although not so specified, by the testator as being the lives selected for the duration of the trust and twenty-one years after the death of the last survivor.

Where there are a number of annuitants constituting a class selected to determine the duration of a common-law trust, the fact that there is a corporation among them will not render the trust illegal, as creating a perpetuity; the annuity to the corporation will cease on the expiration of the trust twenty-one years after the death of the last surviving individual annuitant.

In this case, surplus income, after paying specified annuities, should be accumulated until the termination of the trust and then distributed as part of the estate to those entitled thereto under the will.

Whether or not a trustee named in a will can act as such does not affect the validity of the will; in case he cannot act the court can appoint a trustee to carry out the provisions of the trust.

18 Hawaii, 52, affirmed.

THE parties to this proceeding agreed upon a case, without action, containing the facts upon which a controversy had arisen between them, and submitted the same to the Supreme Court of the Territory of Hawaii, conformably to the laws of that Territory.

The court heard the case and made a decree therein, from which those named above as plaintiffs in the submission have appealed to this court, but the defendant executors have not appealed.

From the agreed statement of facts contained in the submission it appears that one George Galbraith, who died at Honolulu on the fifth of November, 1904, while domiciled in the Territory of Hawaii, left a will, which has been duly admitted to probate in Hawaii, disposing of an estate of about $121,000 in personal property and $128,000 in real estate in Hawaii, and a small amount of real estate in Ireland.

The will gave some pecuniary legacies to a number of people, relatives and friends, and then provided that—

"The balance, residue or remainder of my estate is to be placed in trust for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the statute.

"I hereby nominate and appoint the Hawaiian Trust Company, Limited, of Honolulu, Territory of Hawaii, as trustee of the aforesaid balance, residue or remainder of my estate and they are to devote sufficient of the annual income derived from the same toward paying the following annuities, which are to be free and clear of all taxes, unto the following persons mentioned, namely," [here follow the names of the annuitants and the amounts which they are to receive yearly].

"All of the foregoing for life, and then to their heirs, save and excepted the last three persons, namely, Josie Fink, Emma Douglass and Matilda Bailey, who are to receive only their life annuities and at their death all their interests to cease.

"On the final ending and distribution of the trust, the trust fund to be divided equally amongst those persons entitled at that time to the aforementioned annuities."

On the same day the testator made a codicil, in which he made some changes of the annuities, substituting for the annuity given to the seven children of Hugh Galbraith, of $2,520 annually, an annuity to the same children of $2,100 yearly for life, and then to their heirs.

The testator also bequeathed by the codicil an annuity to the Kona Orphanage of Kona of $100 yearly, "under the same conditions as the other annuitants mentioned, save and excepted, Hugh Galbraith, Josie Fink, Emma Douglass, and Matilda Bailey."

Upon the above facts several questions arose and were submitted to the court below, among them one which relates to the validity of the trust and another to the disposition of the surplus income remaining after the payments to the annuitants mentioned in the will.

The Supreme Court of Hawaii ordered a decree to be entered, which declared that the will of George Galbraith established a valid trust, and that the Hawaiian Trust Company, Limited, a corporation, the trustee named in the will, was legally authorized to administer the trust; that under the trust it was the duty of the trustee to pay out of the income of the trust property the annuities payable by the provisions of the will to the four persons named therein for their respective lives and for the payment of the other annuities payable by the will to the other annuitants therein named for and during their respective lives, and thereafter to pay the same to their heirs respectively until the end of twenty-one years after the death of the last survivor of all the said annuitants, and during the same period of time to pay to the Kona Orphanage the annuity directed in the will, and at the end of said twenty-one years to divide the trust fund and its accumulated and unapplied income as required by the direction in that behalf contained in the will.

Mr. Aldis B. Browne, with whom *Mr. W. L. Stanley*, *Mr. Henry Holmes* and *Mr. Alexander Britton* were on the brief, for appellants:

The trust for final distribution—"on the final ending and distribution of the trust, the trust fund to be divided equally amongst those persons entitled at that time to the aforementioned annuities"—is invalid because there is no direction in the will as to when it is to take place, to which effect can be given.

The words in question would not have the effect of fixing the time for the termination of the annuities and the payment over of the *corpus* at the end of twenty-one years after lives in being.

As to what is the effect of inserting such words, and the absence of any general rule on the question, see *Shelley* v. *Shelley*, L. R. 6 Eq. 540; *In re Johnston*, L. R. 26 Ch. D. 538; *Sackville-West* v. *Viscount Homesdale*, L. R. 4 Eng. and I.

App. Cas. 543; *Harrington* v. *Harrington*, L. R. 5 Eng. and I. App. Cas. 87, 105–107; *Hill* v. *Hill*, L. R. (1902) 1 Ch. Div. 537, 807; *In re Moore*, L. R. (1901) 1 Ch. Div. 936; *In re Exmouth*, L. R. 23 Ch. Div. 158; *Lord Scarsdale* v. *Curzon* (1860), 1 J. and H. 40; *Davies* v. *Davies*, 36 Ch. Div. 359, 380, 387, 392; *Tollemache* v. *Earl of Coventry*, 2 Cl. and Fin. 611; *Pownall* v. *Graham*, 33 Beav. 242.

Galbraith's will does not dispose of heirlooms; it does not contain any such referential trust, nor does it contain any executory trust, because if anything is clear as to the effect of the words in question, it is that they do not in themselves make the trust executory. 1 Perry on Trusts (2d ed.), par. 359; *Harrington* v. *Harrington*, *supra; Hill* v. *Hill*, *supra*.

There is no ground for saying that the trust is executory, and therefore the court will mold the limitations; and it is only by ignoring the fact that the above are cases of referential trusts, executory trusts, or trusts in which the lives to be taken are pointed out by the testator, that they can be considered as having any bearing on the case before the court. All these cases are English. The policy of the law of Hawaii, where estates tail are illegal (12 Hawaii, 375), does not require this court actually to go beyond the cases decided in England where estates are entailed to support hereditary titles and rights.

But if the words in question could have the effect of fixing the time for the termination of the annuities and the payment over of the *corpus* at the end of twenty-one years after lives in being, still the testator cannot be taken to have selected the lives in question, or any lives. There is no necessary presumption either by force of the common law or by the terms of the will, as compared with other wills which have been the subject of judicial decision, that the lives of the named annuitants, or any lives, were selected by the testator. Hawkins on Wills, 1; *Scale* v. *Rawlins*, L. R. (1892) App. Cas. 342, 343; *Pownall* v. *Graham*, 33 Beav. 242, discussed and distinguished.

To hold that Galbraith's will directs that the lives of all of

the "forty odd" annuitants are to measure the lives in being, would still make the trust void for remoteness, because it will tend to a perpetuity, as the extinction of forty odd lives is more than can be made out by reasonable evidence or without difficulty. *Thellusson* v. *Woodford*, 4 Ves. 290; *S. C.*, 11 Ves. 136; Gray, Rule against Perpetuities, § 218.

Mr. John C. Gray, with whom *Mr. Roland Gray* was on the brief, for the Hawaiian Trust Company, an appellee.

There is nothing illegal in the grant of an annuity, and an annuity may be for years, for life or perpetual.

The invalidity of a gift over does not affect the validity of an annuity. The annuity will continue up to the time fixed for the bad gift over, or else it will continue forever. But this is not material, as in this case the gift over is valid.

The whole intention of the testator must be considered together. He was not establishing two or more entirely separate funds. The testator states his two purposes in establishing the trust fund: the payment of annuities and the distribution of the principal of the fund. The trust is to continue as long as it is legally possible, consistently with the accomplishment of these two purposes.

Further, the surplus income not being disposed of during the payment of the annuities, the final gift of the trust fund carries the accumulated surplus income. This is the intention which is presumed in the absence of indications to the contrary, and it is also actually in accord with all the indications in this will. On any other theory there would be an intestacy as to that part of the income. Such an accumulation is legally possible only when the gift of the accumulations becomes vested within the period allowed by the rule against perpetuities. *Southampton* v. *Hertford*, 2 V. & B. 54, 61; *Boughton* v. *James*, 1 Coll. 26, 45; Gray on Rule against Perpetuities, §§ 671, 674. The trust as an entirety, therefore, cannot continue beyond that period. But the testator cannot have intended that the payment of the annuities and the accumulation of the

surplus income should stop at different times. The gift over of the trust fund is a single gift to take effect at one time, and it must have been intended to include the whole capital and accumulated income in a single distribution.

The trust for distribution is valid. The devise is not bad for uncertainty. The testator has sufficiently indicated what lives should be taken, and those lives were the lives of the persons to whom annuities were given for life. On this branch of the case see *Pownall* v. *Graham*, 33 Beav. 242; *Shelley* v. *Shelley*, L. R. 6 Eq. 540; *Re Johnston*, 26 Ch. Div. 538, 546; Gray on Rule against Perpetuities, §§ 363–367; *Harrington* v. *Harrington*, L. R. 3 Ch. Div. 564; *S. C.*, L. R. 5 H. L. 87; *S. C.*, L. R. 3 Ch. 574; *S. C.*, L. R. 5 H. L. 87, 105, 107; *Hill* v. *Hill*, 1 Ch. Div. 807, 813.

If the trust for distribution is sustained, the surplus of income accruing before the time of distribution is to be accumulated. On this point see *Genery* v. *Fitzgerald*, Jac. 468; *Re Dumble*, 23 Ch. Div. 360, 365; *Hurford* v. *Haines*, 67 Maryland, 240; *McKee's Appeal*, 96 Pa. St. 277, 284; *Cochrane* v. *Schell*, 140 N. Y. 516, 537; *Abbot* v. *Essex Co.*, 18 How. 202, 216; *Given* v. *Hilton*, 95 U. S. 591, 594; *Kenaday* v. *Sinnott*, 179 U. S. 606, 616; *Minot* v. *Tappan*, 127 Massachusetts, 333, 337; *Re Travis*, 2 Ch. Div. 541, 548.

Mr. Clarence H. Olson, with whom *Mr. William O. Smith* and *Mr. A. Lewis, Junior*, were on the brief, for Cecil Brown and William O. Smith, Executors, appellees.[1]

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

In the view we take of the case there are but two questions necessary to be noticed, and they involve the validity of the trust and the disposition of the surplus income. The appel-

[1] See statement in opinion as to right of the executors' counsel to be heard, *post*, p. 328.

lants, who are the heirs of testator, insist, first, that the provision in the will for final distribution, ordering the trust fund to be divided equally among those persons entitled at that time to the annuities mentioned, is invalid, because there is no direction in the will as to when it is to take place, and therefore effect cannot be given to it; that the only direction in the will as to the duration of the trust is contained in the words "the residue . . . to be placed in trust for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the statute." Unless there is contained in those words a direction as to the duration of the trust, or, in other words, a direction as to the period at which that part of the trust which consists of the payment of annuities is to cease, and that part which consists of the distribution of the capital is to take place, then, it is contended, the duration of the trust has not been sufficiently declared by the testator, and the trust is one which the court cannot carry out; second, that if the above words do constitute a direction as to the duration of the trust, yet still the testator has not selected the lives in being which are to be taken as a limitation of the trust; third, that even if the testator had selected the lives consisting of all the annuitants mentioned, they are more than forty in number, and the trust is void, because it would then tend to a perpetuity, as the extinction of more than forty lives is more than can be made out by reasonable evidence or without difficulty, it being quite impracticable to ascertain when the last of more than forty lives would be extinguished.

The counsel for the executors of the testator, appellees herein, was permitted in this court to file a brief and was heard orally on the argument before us, although no appeal from the decree had been taken by the executors, this court stating, however, that it would thereafter decide whether counsel for executors had any right to be heard to contend against the decree of the court below.

Counsel, in fact, did argue against some parts of the decree,

contending that the trust was valid in so far as it provided for the payment of the annuities specified, but that the provision for final distribution was void, and that the annuities succeeding to and other than the life annuities were perpetual, and that there was an intestacy as to that not required to satisfy all the annuities.

We are of opinion that counsel for the executors had no right to appear and be heard against the decree, no appeal having been taken from it by his clients.

The trustee contends that the whole trust is valid, and that the surplus income over the amount necessary for the payment of the annuities mentioned must be accumulated up to the time of the general distribution under the trust, as provided for in the will, and that such surplus shall then be distributed as part of the trust fund to the persons then entitled to that fund.

Our first inquiry is, Was this trust valid as a whole? It is conceded by all that the common law is applicable, and that there is no statute in Hawaii governing the subject, except the statute making the common law applicable there, and that the utmost extent of a trust at common law is limited by lives in being at its creation and for twenty-one years thereafter; that the lives must be selected by the testator in his will; that they must be ascertained lives, *i. e.*, lives that can be distinguished, and the fact of the death of the last survivor must be capable of being made out by reasonable evidence [*Thellusson* v. *Woodford*, 4 Ves. 227; *S. C.*, 11 Ves. 134, 146; *In re Moore* (1901), 1 Ch. 936], and the selected lives need not be those having an interest in the property. *Moore's Case* is an example of a void limitation on the ground of uncertainty. The limitation was measured by twenty-one years from the death of the last survivor of all persons living at the death of the testatrix.

A perusal of the will shows that the testator did not in so many words name the persons whose lives the trustee contends he selected for the limitation of the trust.

However, if the scheme of the will, discoverable from its provisions, be such that a plain implication arises from those provisions that a certain class or number of lives mentioned, or referred to, in the will were selected by the testator for a limitation of the trust, such implied selection is sufficient. It is the intention of the testator that is to be sought, and such intention is not always found to have been directly, and in so many words, expressed in the will. An intention, which is implied from language actually used and from facts actually appearing in the will, is to be carried out, provided it does not violate the law. An intention so implied is as good as an intention more plainly and in direct terms expressed. The question is, therefore, whether the testator, by an implication arising from the language used in the will and the facts therein appearing, selected those lives by which the trust is to be limited.

Looking at the will, it is seen that a trust is created for three purposes: The first, to pay certain annuitants out of the income of the fund; the second, to hold the fund until the time for distribution arrives; and the third, to distribute it to those people who may then be entitled to it, as provided by the terms of the will.

The whole trust, the testator has provided, shall continue as long as is legally possible, and it is not to be confined to any particular subdivision of the trust. The direction to hold and distribute is as imperative as the direction to pay annuitants until distribution is made. When the testator created the trust in the language already quoted he must have intended it should be measured by some lives then in being, and for not more than twenty-one years thereafter, because that is the longest time a trust of that kind is legally possible, and he provided it should last as long as that. There are no other lives that can reasonably be said to have been within the intention of the testator when he was making this provision. It is said that being ignorant of the legal length of time a trust could last, he therefore provided that it should

last as long as legally possible, and thus he could not have had an intention to select any particular life or lives in limiting the length of the trust.

There is force in the argument, but we are disposed to think that the position taken by the trustee is the correct one, and, indeed, is the only one compatible with the intention of the testator, to be gathered from the will. That intention could not have been to create annuities to last forever, as is contended, because it is plain from the provisions of the will that the testator intended to have the gift over of the whole estate created by the will divided at some future time among those who would be entitled to it at the time of such distribution. A perpetual annuity would prevent some part of the gift over from taking effect. There is not only the provision for continuing the trust as long as is legally possible, but there is also a provision, as part of the trust, for holding the fund and distributing it according to the terms of the will. Distribution, therefore, is certainly part of the scheme of the will, and distribution of all of the fund created by the trust—not a part of it. This distribution could not take place if the payment of the annuities provided for in the will were to continue forever.

As he was making provision for the annuitants mentioned in the will and for the payment to the heirs of such of those annuitants as died, it seems plain that the trust for the payment of the annuities should continue no longer than up to the time provided in the will for the distribution of the whole estate, and that distribution we think the testator intended to be twenty-one years after the death of the last survivor of the annuitants named in the will, for that period was as long as the trust could last under the terms of the will.

Upon all these considerations the inference, we think, is very strong that the lives selected were the lives of the annuitants. A reading of the will fails to suggest any other set of lives that the testator could reasonably be supposed to have intended. The inference that he intended these lives is almost conclusive. That he intended to dispose of his whole estate,

and not to die intestate as to any part of it, is plain from the language of the will. Either these lives must be regarded as intended by the testator or there is an intestacy as to a considerable part of the estate. The testator certainly did not mean that, and there is in addition a strong presumption against it. Counsel for the heirs do not argue that testator did not intend to make testamentary disposition of his whole estate, but that the disposition which they contend he did make was invalid. The answer to the question of what disposition he did make is easier to be given when aided by the presumption that he intended a valid rather than invalid disposition, there being from the language of the will one construction of his intention that would make the will valid, although there might be another possible, and at the same time unlikely, construction that would render it invalid. This selection prevents the trust from being bad for uncertainty or remoteness.

The whole of the language of the will must be considered, and while it says the trust is to continue as long as it is legally possible, it must also be remembered that a distribution of the whole estate is to be made, and therefore the continuation of the trust must also be limited by the direction to distribute; or, in other words, the trust is to continue as long as is legally possible and as shall be consistent with making the distribution as directed by the will. This distribution must be made at a time which is not too remote, that is, a time within which the trust would be valid, for the testator provided that the trust should only last that long. Payments of the most of the annuities are to be continued to the heirs of the annuitants, but we think these payments are to stop with the death of the last survivor of the annuitants named in the list and twenty-one years thereafter. The distribution of the entire *corpus* of the fund remaining with the trustee is then to be made as provided for in the will.

The use of the words "under the statute" in the will, providing for the termination of the trust when the law requires

it under the statute, is not material. It must be assumed that the testator was not positive as to the time provided by law for the duration of a trust, or whether it was limited by any particular statute. It is enough to know that his desire was to have the trust continue as long as was legally possible, and consistent with distribution as directed, and that the estate was to be then distributed, and hence the trust to pay the annuities was to cease when it would no longer be consistent with the provision for distribution. As the testator has mentioned annuitants to whom payments are to be made, it is most reasonable to infer from that fact that their lives and the life of the survivor of them were the lives he had in view, and therefore they are to be regarded as selected by him. The fact that in the meantime, when an annuitant died, payment was to be made to his heirs, does not affect the limitation to the survivor of the annuitants. His death then terminates the class, and twenty-one years from that time distribution is to be made.

As the question whether a valid trust has been created depends upon the construction to be given to the language of this particular will, reported cases in regard to the language used in other wills (unless similar to this in their facts) are not of great benefit in the solution of the question as to the intention of the testator in the will before us. The case of *Pownall* v. *Graham*, 33 Beav. 242 (Gray on Rule against Perpetuities, § 219), seems, however, to be as nearly in point as any to be found. There the question was as to what lives were to be taken as measuring the limitation of the trust, as none had been directly selected in so many words by the testator, but it was thought, upon looking over the entire will, that the testator intended a certain class of lives mentioned in it as the limitation of the trust, and the court accordingly so decided. Counsel for the heirs have criticised the application of that case, but we think unsuccessfully.

Some light is also to be found in a certain class of English cases, known as the Heirloom Cases, where bequests of per-

sonal property were made to go as heirlooms along with certain real property, "as far as the rules of law and equity will permit." These cases are to be found in Gray on Rule against Perpetuities, notes to §§ 363–367. They are cited for the purpose of showing that a limitation in a gift, "as far as the rules of law and equity will permit," is not bad for uncertainty, and that the period of limitation to be taken is to be determined from a consideration of the whole will. They strengthen the proposition that it is not necessary to find in the will, in so many words, the selection of lives, but that such selection is good if from a consideration of the whole will that selection can be ascertained.

Counsel for the heirs contend that there is as much reason for including the Kona Orphanage among the lives of the annuitants as a limitation of the trust as there is to say that the limitation includes only the individual annuitants. The orphanage is a corporation or joint stock company, and could not be included in or constitute a life in being within the rule of which we are speaking. To include it would render the trust void, and the testator intended a valid trust.

We see no reason for holding that the number of annuitants, which it is said exceeds forty, is too large for a valid limitation of the trust. There are cases cited from the English reports showing that even a larger number than that has been held not to exceed a valid limitation, and in *Humberston* v. *Humberston*, 1 P. Wms. 332, which is cited in *Thellusson* v. *Woodford*, 11 Ves. 112, 135, it would seem there were about fifty life estates.

We therefore sustain the validity of the trust in this case, and the question remaining is as to the disposition of the surplus income arising during the payment of the annuities. The will shows that the testator supposed there would be such surplus. Should it be accumulated or paid to the heirs of testator? We think the surplus, after paying annuities, must accumulate as part of the trust estate until the time arrives for the distribution of that estate, and that such accumulation

must then be distributed as a part thereof to those who will then have the right to take the estate as provided for in the will. The accumulation is to be treated as a surplus arising from both real and personal estate, and the person or persons entitled to receive the main fund are to take the surplus as if it arose entirely from personalty. Some of the cases upon this subject are gathered in the brief of counsel for the trustee and it is not necessary to cite them here. Holding the trust to be valid, it is not now necessary to determine to whom the distribution is to be made when the time for distribution shall arrive.

The trust company is entitled to take the property and execute the trust. We do not understand that this is now controverted by counsel for any of the parties. In any event, it does not affect the validity of the trust. If the trustee named could not act the court would appoint a trustee to carry out the provisions of the trust. *Vidal* v. *Girard*, 2 How. 127, 191; *Matter of McGraw*, 111 N. Y. 66, 104.

The judgment of the Supreme Court of Hawaii is

Affirmed.

INGERSOLL *v.* CORAM.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 8. Argued March 11, 12, 1908.—Decided December 7, 1908.

In this case the Circuit Court had jurisdiction under the provision of the act of March 3, 1875, 18 Stat. 470, 472, to enforce a lien for professional services, on property within the district, although some of the defendants did not reside therein.

An objection to the jurisdiction of the Circuit Court based on the residence of defendant, although diverse citizenship exists, may be waived, and is waived if not seasonably made. *In re Moore*, 209 U. S. 490.

A decree in a suit in the Circuit Court between citizens of different States is not violative of § 720, Rev. Stat., because it determines liens on distributive shares in an estate under administration in a state probate court and enjoins transmission of that share to the original administrator until satisfaction of the lien.

Quære, whether it is within the power of a state court to order property on which there is an asserted lien to be sent out of the district, thereby defeating the jurisdiction of the Circuit Court to enforce the lien under the act of March 3, 1875, 18 Stat. 470, 472.

The fact that proceedings for the administration of an estate are pending in the probate court does not deprive the Circuit Court of the United States of jurisdiction to determine whether a lien exists in favor of citizens of another State on some of the distributive shares, the lien only to be enforced after the probate court shall have finished its functions.

Section 629, Rev. Stat., does not deprive the Circuit Court of jurisdiction of an action brought by a citizen of another State against an administrator to enforce a lien on the distributive share of an heir of defendant's intestate because that heir being of the same State as the defendant could not sue him in the Circuit Court.

An ancillary administrator in one jurisdiction is not in privity with an ancillary administrator in another jurisdiction, and a judgment against the one is not *res judicata* and a bar to a suit by the other. *Brown* v. *Fletcher's Estate*, 210 U. S. 82.

Where the case in which counsel is employed on a contingent fee is so settled that the clients receive as much as though the contingency on which the fee depends were realized, and the settlement is achieved after a trial and by the services of the counsel, his contract is performed and he is entitled to the agreed compensation.

An express executory agreement in writing whereby the contracting party sufficiently indicates an intent to make some identified property security for a debt or other obligation, creates an equitable lien on such property; and in this case an agreement by contestants to pay counsel a contingent fee if the propounding of a will is prevented, created a lien on the distributive shares in the estate to which those contestants became entitled on a settlement of the matter effected by the successful services of the counsel so employed.

148 Fed. Rep. 169, reversed; 136 Fed. Rep. 689, modified and affirmed.

THE petitioner, as administratrix of the estate of Robert G. Ingersoll, deceased, sued the respondents and certain other persons, in the Circuit Court of the United States for the Dis-

trict of Massachusetts, to subject certain interests in the estate of Andrew J. Davis to a lien which is alleged to have accrued to her intestate by the agreement which is set out in the opinion, and by the laws of Montana, in which State the services were rendered.

Andrew J. Davis, a man of great wealth, a citizen of Montana, died, leaving property in that State and in Massachusetts. By a will, which was offered for probate in Montana, all of his property was left to his brother, John A. Davis. Certain other of his next of kin, five in number (referred to in the bill as the "five heirs"), associated to contest the probate of the will. Henry A. Root, one of the respondents, and a nephew of Andrew J. Davis, agreed with the four other contestants to conduct the litigation and to procure evidence and counsel at his own expense, receiving therefor an assignment of a part of the prospective distributive shares of the others. Joseph A. Coram, another respondent, also acquired an interest in the prospective shares of some of the contestants. Robert G. Ingersoll, the petitioner's intestate, was engaged as counsel to conduct the litigation, and Root and Coram entered into the agreement with him, which will hereafter be set out.

Upon the trial of the contest the jury disagreed. Pending the preparation for the second trial an agreement of compromise was made, by which Ingersoll's clients received a larger portion of the estate than though Davis had died intestate. It is alleged that this was the result of Ingersoll's services as counsel. "By reason," it is alleged, "and in consideration of the prosecution of said contests, and the force, effect, and stress thereof, as against the proponent of such alleged will, in preventing the admission thereof to probate, and in consideration of the determination of said controversy and litigation, and for no other consideration or reason," was the compromise effected. It is hence further alleged that the "will was defeated in so far as it could affect the rights, shares, or interest in and to said estate of said five heirs mentioned in

said agreement and promise made and delivered by said Root and Coram to said Robert G. Ingersoll, for as much as they were entitled to only $\frac{350}{1100}$ of said estate as such heirs at law of Andrew J. Davis, deceased, and got absolute right and title to 515½ eleven-hundreths thereof, through the prosecution of said contests and decree determining the same." Two hundred and fifty eleven-hundredths, it is alleged, were allotted directly to said five heirs and 265½ eleven-hundredths, for their use and benefit, to Charles H. Palmer (a respondent here) and Andrew J. Davis, Jr., trustees. A copy of the decree was annexed to the bill and made part of it. And it is alleged that by reason of said agreement and the fulfillment thereof and the "provisions of the laws and statutes of Montana," which are set out, an attorney's lien accrued in favor of said Ingersoll and his legal representatives, "and is existing and is in force and effect upon the portions, parcels, and interests of, in and to the funds and other property of said Andrew J. Davis, deceased, so acquired for said five heirs." That Root and Coram have conveyed away the real estate vested in them by the decree determining the said will contests, and that the distributions under said decree "have practically exhausted the funds and property of said estate in the State of Montana, and that by reason of the employment of Ingersoll and the services rendered by him and by the promises of payment an equitable lien exists on the funds and effects acquired by said heirs, situate in Boston, Mass.," and that such funds and effects should not be distributed or carried away "in default of payment of said indebtedness owing by Root and Coram to the estate and legal representative of Robert G. Ingersoll, deceased, but that said funds and effects situate in Boston, Mass., should be and remain subject to said indebtedness, and to be resorted to for the payment thereof."

It is alleged that John H. Leyson is the duly appointed, qualified and acting administrator of the estate of Andrew J. Davis, deceased, situate in Massachusetts, and has custody of the funds and effects acquired by Root and his associates, and

upon which the said lien exists in favor of the estate and legal representatives of Ingersoll, and that if such funds and effects should be distributed the lien will be defeated.

The death of Ingersoll in the State of New York is alleged, and the appointment of Eva A. Ingersoll, administratrix, by the Surrogate's Court of the county of Westchester, of that State, and her qualification. And it is alleged that she was subsequently appointed administratrix of his estate by the Probate Court of the county of Suffolk, Commonwealth of Massachusetts, situate in that Commonwealth, and that she duly qualified as such. It is alleged that the estate of Andrew J. Davis, situate in Boston, and in the hands of said John H. Leyson as administrator, consists of money, convertible stocks and bonds of the value of $450,000, after paying expenses of administration, of which funds and effects Coram and other parties for whom Ingersoll prosecuted said will contest are entitled by virtue of the decree of the District Court of the State of Montana, directly and through Charles H. Palmer and Andrew J. Davis, Jr., to 515½ eleven-hundredths, "acquired as part of the fruits of the labors of said Robert G. Ingersoll in the prosecution of said will contests." That Root, Coram and their associates have petitioned the Probate Court of Suffolk County to order distribution of said shares of said funds and effects to them. That all of said 515½ eleven-hundredths, except the interest owned by Sarah Maria Cummings and the interest owned by Ellen S. Cornue, are subject to the lien of Ingersoll. It is alleged that the interests of Elizabeth S. Ladd and Mary L. Dunbar have been transferred to Root and Coram.

A conspiracy and purpose of Coram and Root to defeat the lien of Ingersoll are alleged, and that distribution of the estate in Massachusetts is sought as a means thereto; further, that if the funds and effects be removed from Massachusetts or distributed to Root and Coram before the representatives of said Ingersoll have an opportunity to enforce their lien, the same will be placed beyond their reach and the payment of

the indebtedness secured thereby defeated; that the funds and effects remaining in Montana will be required and used to pay indebtedness and expenses of administration there; and that Root and Coram have no tangible property other than their shares and interest in the estate of Davis.

It is further alleged that petitioner brought suit in the District Court of the State of Montana in her name, as administratrix of Robert G. Ingersoll, to enforce payment of said claim existing in favor of the estate and legal representatives of Ingersoll. That Root and the other defendants therein appeared and demurred to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action, but did not specify or raise the objection that she was not qualified to prosecute said suit, although she alleged her appointment as administratrix by the Surrogate's Court of New York. That upon her urging the pendency of said suit against the petition for distribution filed by Root and Coram and their associates, it was objected that said suit had not been brought by an administrator of Ingersoll appointed in Montana. The court sustained the objection. That thereupon John S. Harris was appointed administrator in Montana, and substituted in said suit for respondent. The cause coming on to be heard in the District Court of Montana, Root objected to the introduction of any evidence, on the ground that the complaint therein did not state facts sufficient to constitute a cause of action. The motion was sustained, and without further proceedings the court granted a nonsuit and dismissed the complaint on the alleged ground that it did not state facts sufficient to constitute a cause of action, in consequence no trial thereof has been had, nor has the claim and lien of Ingersoll ever been adjudicated, nor is it barred by any statute of limitation.

The bill prays an injunction against Leyson to restrain him from delivering, and against respondents to restrain them from receiving, said funds and effects and for the appointment of a receiver, discovery of Coram's interest, and judgment for

the same, and that it be declared a lien on such interest. Judgment is prayed against Root for $95,000, with interest, and that the sum be declared a lien on his shares and interests. What else is prayed need not be noticed.

There were demurrers to the bill that went to the parties, the jurisdiction of the court, to the merits, and that the judgment of the District Court of Montana constituted a bar. The grounds of demurrer to jurisdiction were expressed in the demurrer filed by Root and Coram and Herbert P. Cummings, executor of the last will and testament of Sarah Maria Cummings, one of the five heirs, as follows:

"2. These defendants also demur to the bill of complaint upon the further ground that this court has not jurisdiction of this action, because it appears from the said bill that this action is brought to secure from this court a writ of injunction staying proceedings now pending in the Probate Court, in and for the county of Suffolk and Commonwealth of Massachusetts, to distribute the funds and effects of the estate of Andrew J. Davis, deceased, situate in the State of Massachusetts, among the persons entitled thereto, or to otherwise dispose of said funds and effects, and this court is forbidden by section 720 of the United States Revised Statutes from granting a writ of injunction to stay proceedings in any court of a State."

The demurrer of Leyson was more general, stating that the court "had no jurisdiction to grant the relief prayed for in the bill of complaint or any part thereof." And Andrew J. Davis particularized this by the specification that to enjoin the disposition of property in the hands of Leyson as administrator "would be an interference with the proceedings of the Probate Court of Suffolk County having jurisdiction of the matter, and would be unauthorized and illegal."

The demurrers were overruled except as against certain parties, and except so far as the bill claimed a statutory lien. The court said: "No statutory lien can be maintained, and that portion of the bill must be regarded as ineffectual; and as it is specially demurred to, it must be stricken out." 127

Fed. Rep. 418. The bill was amended in compliance with the order of the court, making Charles H. Ladd, individually and as administrator of the estate of Elizabeth S. Ladd, a party. The bill, however, was subsequently ordered to be dismissed as to him, Mary Louise Dunbar (one of the five heirs), and Herbert P. Cummings, executor. 132 Fed. Rep. 168. They seem, however, to have been regarded as parties until the final disposition of the case, for they joined Coram, Root and Palmer in an answer. Leyson filed a separate answer. In the answers some of the allegations of the bill were denied and others admitted. The answers also pleaded in bar of the suit the proceedings and judgment in the action brought in the District Court of Silver Bow County, State of Montana. Proofs were taken, the allegations of the bill were found to be true and a decree entered for petitioner. 136 Fed. Rep. 689. Root, Coram and Palmer took an appeal to the Circuit Court of Appeals, the other respondents declining to join them, which court reversed the decision by a divided court. 148 Fed. Rep. 169. This certiorari was then granted.

Mr. E. N. Harwood and *Mr. Hannis Taylor*, with whom *Mr. Hollis R. Bailey* and *Mr. John H. Hazelton* were on the brief, for petitioner:

The commencement and non-suit or dismissal of an action in Montana, by such proceedings as were had in the *Harris case*, even if the plaintiff had title to and right of action upon, the claim which he attempted to prosecute, would not, under the rules of law governing the effect of such proceeding, create or constitute a bar to another action for the same cause. *Homer* v. *Brown*, 16 How. 354; *Manhattan Insurance Co.* v. *Broughton*, 109 U. S. 121; *Gardner* v. *Mich. Cent. R. Co.*, 150 U. S. 349; *McComb* v. *Frink*, 149 U. S. 629; *Hughes* v. *United States*, 4 Wall. 232; *Canal Co.* v. *Gordon*, 6 Wall. 561; *Keller* v. *Stolzenbach*, 20 Fed. Rep. 47; *Wilbur* v. *Gilmore*, 21 Pick. 252; *Bridge* v. *Sumner*, 1 Pick. 370; *Clapp* v. *Thomas*, 5 Allen (Mass.), 158; *Borden* v. *Thomas*, 99 Massachusetts, 200; *Hub-*

bard v. *Hooker*, 102 Massachusetts, 202; *Fleming* v. *Hawley*, 65 California, 492; *Gummer* v. *Trustees &c.*, 50 Wisconsin, 247; Note on Non-suit and cases, 49 Am. St. R. 831; Freeman on Judgments, § 261; Montana Code of Civil Procedure, §§ 1004, 1111, 1112, 1196, 3453; *Green* v. *Montana Brewing Co.*, 32 Montana, 110; *Gilman* v. *Rives*, 10 Pet. 301; *Kleindschmidt* v. *Binzel*, 14 Montana, 31; Montana Compiled Statutes of 1887, 118, 119.

A judgment that a declaration is bad in substance, which alone and not matter of form is the ground of a general demurrer, can never be pleaded as a bar to a good declaration for the same cause of action.

The judgment is in no sense a judgment on the merits. The rule of law is thus declared by this court and many others without the aid of statute and is so declared in Montana according to the general rule and pursuant to statutes. And see *Gilman* v. *Rives*, 10 Pet. 301; *Kleindschmidt* v. *Binzel*, 14 Montana, 31; *Glass* v. *Basin & Bay St. M. Co.*, 34 Montana, 88; *Kirsch* v. *Kirsch*, 113 California, 56; *Hardenburg* v. *Bacon*, 33 California, 356; *Los Angeles* v. *Mellus*, 59 California, 452; approved in *City &c.* v. *Clark*, 62 Fed. Rep. 697; approved in *Gilmer* v. *Morris*, 30 Fed. Rep. 481; *Lockett* v. *Lindsay*, 1 Idaho, 324; *Wilbur* v. *Gilmore*, 21 Pick. 253; *Garrish & Brewster* v. *Pratt & Bunker*, 6 Minnesota, 53; *Rodman* v. *Michigan Central R. Co.*, 59 Michigan, 395; *Carmony* v. *Hoober*, 5 Pa. St. 307; *Moore* v. *Dunn*, 41 Ohio St. 62; *Stevens* v. *Dunbar*, 1 Blackf. (Ind.) 56; *Estep* v. *Larsh*, 21 Indiana, 190; *Hassell* v. *Nutt*, 14 Texas, 265.

The administrator appointed in Montana had no title to the chose in action on which this suit is founded. That the law, by virtue of the facts shown, vested in Eva A. Ingersoll, as administratrix, title to said chose in action and that the debtors thereon, wheresoever residing, could safely pay said administratrix and her receipt would protect them everywhere, is settled, beyond dispute, by the authorities. *Wilkins* v. *Ellett*,

9 Wall. 740; *Harper* v. *Butler*, 2 Pet. 239; *Wyman* v. *United States*, 109 U. S. 654; *Thorn* v. *Watkins*, 2 Ves. Sen. 36; *Eells, Admr.*, v. *Holder*, 12 Fed. Rep. 668; *May* v. *County of &c.*, 30 Fed. Rep. 250; *Van Bokkelen* v. *Cook*, 5 Sawy. 591; *S. C.*, Fed. Cas. No. 16,831; *Rand, Admr.*, v. *Hubbard*, 4 Metc. 252; *Pinney, Admr.*, v. *McGregory*, 102 Massachusetts, 186; *Petersen* v. *Chemical Bank*, 32 N. Y. 21; *St. John* v. *Hodges*, 68 Tennessee (9 Baxt.), 334; *In re Cape May & D. B. N. Co.*, 51 N. J. L. 82; *Gove* v. *Gove*, 64 N. H. 503.

Administrators of an intestate appointed in different States have no privity with each other in law or in estate. See opinion below and *Aspden* v. *Nixon*, 4 How. 467, 497; *Stacy* v. *Thresher*, 6 How. 44, 59; *Johnson* v. *Powers*, 139 U. S. 156; *Carpenter* v. *Strange*, 141 U. S. 87.

The effect given to said judgment of non-suit, by the ruling of the Court of Appeals in the case at bar, deprives the legal representative of Ingersoll of property without due process of law. *Fayerweather* v. *Ritch*, 195 U. S. 276; *Chicago, B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 234; *Martin* v. *Texas*, 200 U. S. 316.

There is a lien existing in favor of complainant, by virtue of the Montana statute, and also by virtue of principles of equity independent of statute, to secure payment for Ingersoll's services. *Coombe* v. *Knox*, 28 Montana, 202; *Justice* v. *Justice*, 115 Indiana, 201; *Fillmore* v. *Wells*, 10 Colorado, 228; *S. C.*, 3 Am. St. Rep. 567; *Newbert* v. *Cunningham*, 50 Maine, 231; *S. C.*, 79 Am. Dec. 621; *Wylie* v. *Coxe*, 15 How. 415.

Rights can and do have extraterritorial effect, and it makes no difference whether they were created by statute law, or common law, or by contract, will, decree or other effectual means. *Dennick* v. *Cent. R. R. Co.*, 103 U. S. 11; *Smith* v. *Condry*, 1 How. 29; *Nor. Pac. Ry. Co.* v. *Babcock*, 154 U. S. 190.

Both Federal and state courts constantly enforce rights founded upon the laws of other States, "whether the right

of action be *ex contractu*, or *ex delicto*." *Texas* v. *White*, 10 Wall. 483; *Nor. Pac. Ry. Co.* v. *Babcock*, 154 U. S. 190; *Dennick* v. *Cent. R. R. Co.*, 103 U. S. 11; *Smith* v. *Condry*, 1 How. 29; *Huntingdon* v. *Attrill*, 146 U. S. 657.

The courts of the United States take judicial notice of and administer the laws of the States of the Union in cases to which they respectively apply, and enforce rights created thereby. *Owings* v. *Hull*, 9 Pet. 607; *Merchants' Exchange Bank* v. *McGraw*, 59 Fed. Rep. 972; *Bank* v. *Franklyn*, 120 U. S. 747; *Lamar* v. *Micou*, 114 U. S. 218; *Gormley* v. *Bunyan*, 138 U. S. 623.

There are many cases which directly sustain the attorney's equitable lien foreclosed in the case at bar, such as: *Meddaugh* v. *Wilson*, 151 U. S. 333; *Central R. R. Co.* v. *Pettus*, 113 U. S. 116; *Louisville & St. L. Ry. Co.* v. *Wilson*, 138 U. S. 501; *Cowdry* v. *Galveston Ry. Co.*, 93 U. S. 352; *Semmes* v. *Whitney*, 50 Fed. Rep. 666; *Mahone* v. *Southern Tel. Co.*, 33 Fed. Rep. 702, approved in 138 U. S. 507; *Frink* v. *McComb*, 60 Fed. Rep. 486; *Tuttle* v. *Claflin*, 31 C. C. A. 419; *Needles* v. *Smith*, 32 C. C. A. 226; *Foster* v. *Danforth*, 59 Fed. Rep. 750; *Weeks* v. *Wayne Cir. Judge*, 73 Michigan, 256; *Carpenter* v. *Meyers*, 90 Michigan, 209; *Justice* v. *Justice*, 115 Indiana, 201; *Stratton* v. *Hussey*, 62 Maine, 286.

To the questions propounded by the court [1] counsel answer: 1. The Circuit Court has jurisdiction to ascertain and declare a lien upon property in the possession of the administrator appointed by the Probate Court for the County of Suffolk and State of Massachusetts.

The case at bar has in view the establishment of a lien on certain shares of funds and effects, which, although now in the hands of an administrator of an estate already settled, with the exception of possibly a few minor details, as shown without dispute, will be distributed to the parties holden for the debt secured by that lien.

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[1] See *post*, p. 354.

The administrator is a necessary party for the purpose of the suit and to protect the lien on the shares in his hands subject thereto, which he will have for distribution to the parties holden for the debt secured by the lien. The lien can only be established and protected by a court of equity jurisdiction. *Hauselt* v. *Harrison*, 105 U. S. 401; *Fletcher* v. *Morey*, 2 Story, 555; *S. C.*, Fed. Cas. No. 4,864, per Story, J.; *Pinch* v. *Anthony*, 8 Allen (Mass.), 336; *Hovey* v. *Elliot*, 118 N. Y. 124.

No Probate Court, as such, could adjudicate the question of debt and the existence of the lien involved in the case at bar. *Perris* v. *Higley*, 20 Wall. 375.

No abridgment of the equity jurisdiction of state courts by state law would restrict or impair the chancery jurisdiction of the Federal court sitting in that State. *Payne* v. *Hook*, 7 Wall. 425; *Kendall, Admr.*, v. *Creighton*, 23 How. 90; *Holland* v. *Challen*, 110 U. S. 15; *Gormley* v. *Clark*, 134 U. S. 338; *Bardon* v. *Land Imp. Co.*, 157 U. S. 327; *Rich* v. *Braxton*, 158 U. S. 405; *Smyth* v. *Ames*, 169 U. S. 466, 516.

A controversy as to the existence of a debt and lien on property to secure it, or other equitable right in property in the hands of an administrator or executor, may be adjudicated and determined by a court of equity without seizing or taking actual possession of the property on which the lien rests. *Wylie* v. *Coxe*, 15 How. 415; *McComb* v. *Frink*, 149 U. S. 629; *Canfield* v. *Canfield*, 56 C. C. A. 169; *S. C.*, 118 Fed. Rep. 1; *Richardson* v. *Green*, 9 C. C. A. 565; *S. C.*, 61 Fed. Rep. 423; *Van Bokkelen* v. *Cook*, 5 Saw. 587; *S. C.*, Fed. Cas. No. 16,831; *Snyder's Admr.* v. *McComb's Exr.*, 39 Fed. Rep. 292.

As a Massachusetts court of equity would apply the remedies which have been applied in the case at bar, to protect and enforce complainant's equitable right in the funds in the hands of the administrator, although they be in probate administration, so may the Federal Circuit Court, sitting in Massachusetts, apply the same equitable remedies to a case cognizable in chancery, even though it be an enlarged remedy given

by statute. *Clark* v. *Smith*, 13 Pet. 194, 203, 204; *Gaines* v. *Fuentes*, 92 U. S. 10; *Gormley* v. *Clark*, 143 U. S. 338; *Holland* v. *Challen*, 110 U. S. 15; *Bardon* v. *Land & R. Imp. Co.*, 157 U. S. 327; *Rich* v. *Braxton*, 158 U. S. 405; *Smyth* v. *Ames*, 169 U. S. 466, 516; *Richardson* v. *Green*, 9 C. C. A. 565; *S. C.*, 61 Fed. Rep. 423.

2. The Circuit Court has jurisdiction to enforce by foreclosure a lien upon property so situated. See 3 Pomeroy's Eq. Juris. § 1339; *Hauselt* v. *Harrison*, 105 U. S. 401; *Milner* v. *Metz*, 16 Pet. 221; *Dulaney* v. *Scudder*, 36 C. C. A. 52; *S. C.*, 94 Fed. Rep. 6; *Phelps* v. *McDonald*, 99 U. S. 298, 308; *McKinney* v. *Curtiss*, 60 Michigan, 611; *Sherman* v. *Am. Stove Co.*, 85 Michigan, 169; *Smith Co.* v. *Skinner*, 91 Hun, 641; *Lewis* v. *Doge*, 17 How. Pr. 229; *Keller* v. *Payne*, 1 N. Y. Supp. 148; *Hendrix* v. *Morrill*, 6 N. Y. Supp. 254.

3. The Circuit Court has jurisdiction to determine the shares of Root and Coram in the property so situated. See *Hauselt* v. *Harrison*, 105 U. S. 401; *Phelps* v. *McDonald*, 99 U. S. 298, 308; *Byers* v. *McAuley*, 149 U. S. 608; *Mayer* v. *Foulkrod*, Fed. Cas. No. 9,341; *Gaines* v. *Fuentes*, 92 U. S. 10; *Payne* v. *Hook*, 7 Wall. 425; *Dodd* v. *Ghiselin*, 27 Fed. Rep. 405; *Sullivan* v. *Andoe*, 6 Fed. Rep. 641; *Dennick* v. *Central Ry. Co.*, 103 U. S. 11; *Wylie* v. *Coxe*, 15 How. 415.

4. The Circuit Court has jurisdiction, upon the pending bill, either in its present form or as it might be amended, to direct that Leyson, Root, Coram, or either of them, should hold any property coming into their hands by order of distribution of the Probate Court, upon the trust to satisfy the claim of the complainant. 3 Pomeroy's Equity Juris. § 1339; *Hauselt* v. *Harrison*, 105 U. S. 401; *Cole* v. *Cunningham*, 133 U. S. 107.

5. The Circuit Court will confine its action to the determination, protection and enforcement of the equitable rights of the citizen of a different State than that of the administrator. *Byers* v. *McAuley*, 149 U. S. 608; *Sherman* v. *American Cong. Assn.*, 51 C. C. A. 329; *S. C.*, 113 Fed. Rep. 609.

6. Whatever equity jurisdiction is vested in the Probate

Court of Massachusetts, must be exercised independently of their ordinary probate jurisdiction. *Sherman* v. *Am. Cong. Assn.*, 113 Fed. Rep. 609, and cases cited. The jurisdiction in equity given to the Probate Court of Massachusetts by Stat. 1891, c. 415, § 1, is a jurisdiction concurrent with that of other equity courts. *Bennett* v. *Kimball*, 175 Massachusetts, 199. The Probate Court's possession is for certain prescribed administrative purposes. It has no possession that excludes established chancery jurisdiction over equitable rights touching the property. The chancery jurisdiction is not different in Massachusetts. And if it were different there, by virtue of state law, the equity jurisdiction of the Federal court would not be thereby impaired.

Mr. Louis D. Brandeis, with whom *Mr. William H. Dunbar* was on the brief, for respondents:

The appellant (petitioner) has not established the existence of any lien on any interest of any of the defendants in the estate of Andrew J. Davis in Massachusetts.

No lien can be maintained unless an equitable lien was created by act of the parties. No statutory lien can be maintained. It is not now open to appellant to assert the existence of a statutory lien. *Landram* v. *Jordan*, 203 U. S. 56, and cases there cited. The Montana statute could not create a lien upon property in Massachusetts. The Montana statute does not create a lien in a will contest. Montana Code of Civil Procedure, § 430; *Smith* v. *Central Trust Co.*, 4 Dem. (N. Y. Surr.) 75; *In the Matter of Lexington Avenue*, 30 App. Div. (N. Y.) 602; *S. C.*, 157 N. Y. 678; Montana Code of Civil Procedure, §§ 3471, 3472; *Reed* v. *Reed*, 31 Fed. Rep. 49; *In re Cilley*, 58 Fed. Rep. 977; *Wahl* v. *Franz*, 100 Fed. Rep. 680.

There is no attorney's lien apart from the statute. *Welsh* v. *Hole*, 1 Douglas, 238; *Barker* v. *St. Quinton*, 12 Mees. & W. 451; *Mercer* v. *Graves*, L. R. 7 Q. B. 499, 503; *Fillmore* v. *Wells*, 10 Colorado, 228, 231; *McCullough* v. *Flournoy*, 69 Alabama,

189; *Cozzens* v. *Whitney*, 3 R. I. 79; *Smalley* v. *Clark*, 22 Vermont, 598; *Forsythe* v. *Beveridge*, 52 Illinois, 268; *Braden* v. *Ward*, 42 N. J. L. 518; *Goodrich* v. *McDonald*, 112 N. Y. 157; *McDonald* v. *Napier*, 14 Georgia, 89, 110; *Frissell* v. *Haile*, 18 Missouri, 18; *Ward* v. *Sherbondz*, 96 Iowa, 477; *Wells* v. *Hatch*, 43 N. H. 246; *Baker* v. *Cook*, 11 Massachusetts, 236; *Gregory* v. *Pike*, 67 Fed. Rep. 837.

There is no equitable lien created by contract. In the present case there was not even a promise to pay from a particular fund. An equitable lien is not created by a promise to pay from a specified fund unaccompanied by some sort of assignment. This rule has long been the settled law of this court. *Wright* v. *Ellison*, 1 Wall. 16; *Christmas* v. *Russell*, 14 Wall. 69; *Trist* v. *Child*, 21 Wall. 441; *Dillon* v. *Barnard*, 21 Wall. 430; *Removal Cases*, 100 U. S. 457. The rule laid down by this court in the foregoing cases has been followed as the established law of the Federal courts. *Ex parte Tremont Nail Co.*, 24 Fed. Cas. 183; *In re Butler's Estate*, 105 Fed. Rep. 549; *Strang* v. *Richmond P. & C. Ry. Co.*, 101 Fed. Rep. 511; *Columbus, S. & H. R. Co. Appeals*, 109 Fed. Rep. 177, 197; *Cushing* v. *Chapman*, 115 Fed. Rep. 237; *Boyle* v. *Boyle*, 116 Fed. Rep. 764. The law is the same in other jurisdictions. *Bradley's Case*, Ridgeway's Reports, 194; *Newell* v. *West*, 149 Massachusetts, 520; *Rogers* v. *Hosack's Executors*, 18 Wend. 319; *Williams* v. *Ingersoll*, 89 N. Y. 508; *Cameron* v. *Boeger*, 200 Illinois, 84. None of the acts set out in the bill of complaint done after Ingersoll's death created a lien. *Christmas* v. *Russell*, 14 Wall. 69; *In re Butler's Estate*, 105 Fed. Rep. 549. The cases cited by the appellant (petitioner) do not support the contention that an equitable lien exists.

The appellant (petitioner) has failed to show that there is any property in Massachusetts that can be subjected to a lien for the alleged debt. There is no property of the defendants in Massachusetts.

Any property in Massachusetts not distributed under the will can be disposed of only by transmission to Montana, to

be distributed as the court there shall determine. In no case is there any property in Massachusetts that can be subjected to a lien in favor of the creditors of these defendants or upon which these defendants could create a lien. *Boston* v. *Boylston*, 2 Massachusetts, 384; *Clark* v. *Blackington*, 110 Massachusetts, 369; *Cowden* v. *Jacobson*, 165 Massachusetts, 240, 243; *Holcomb* v. *Phelps*, 16 Connecticut, 127; *Walton* v. *Hall*, 66 Vermont, 455; *Elder* v. *Adams*, 180 Massachusetts, 303, 306; *Lawrence* v. *Wright*, 23 Pick. 128, 129; *Clapp* v. *Inhabitants of Stoughton*, 10 Pick. 462; *Pritchard* v. *Norwood*, 155 Massachusetts, 539; *Flynn* v. *Flynn*, 183 Massachusetts, 365. See *Duchesse d'Auxy* v. *Soutter*, 35 Fed. Rep. 809; *Gardner* v. *Gantt*, 19 Alabama, 666; *Dugger* v. *Tayloe*, 60 Alabama, 504; *Costephens* v. *Dean*, 69 Alabama, 385; *Hickox* v. *Frank*, 102 Illinois, 660; *Alexander* v. *Stewart*, 8 Gill & J. 226; *Downing* v. *Porter*, 9 Massachusetts, 386; *Stills* v. *Harmon*, 7 Cush. 406; *Taylor* v. *Brooks*, 3 Dev. & Bat. 139; *Bradford* v. *Felder*, 2 McCord, Ch. 168; *Kaminer* v. *Hope*, 9 S. Car. 253; *Strickland* v. *Bridges*, 21 S. Car. 21. It is immaterial what contractual rights not amounting to a title the defendants may have in respect to the estate in Massachusetts. *Eyre* v. *Potter*, 15 How. 42; *Grosholz* v. *Newman*, 21 Wall. 481; *Andrews* v. *Farnham*, 2 Stockton, 91; *Stucky* v. *Stucky*, 30 N. J. Eq. 546, 554.

The judgment in the suit brought in Montana is a bar to the maintenance of this suit. Harris as ancillary administrator in Montana had power to bring the suit. The suit was brought by Harris as ancillary administrator, with full knowledge, consent and authority of the principal administratrix. The suit was maintainable by an ancillary administrator without any assignment from the domiciliary administratrix. The doctrine that personal property has a *situs* only at the domicil of the owner is a rule of convenience that never applied to the question of *situs* for purposes of administration, and that for all purposes is limited in its scope. Upon the death of the creditor the *situs* of the debt for purposes of dealing with it as property is recognized as the domicil of the debtor precisely

as if the debt were a chattel. *Blackstone* v. *Miller*, 188 U. S. 189; *Wyman* v. *Halstead*, 109 U. S. 654, 656; *Cunnius* v. *Reading School Dist.*, 198 U. S. 458; *New England Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138. By virtue of his appointment an ancillary administrator acquires power to deal with the assets within his jurisdiction. *Wilkins* v. *Ellett*, 108 U. S. 256; *New Eng. Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138. An ancillary administrator may bring suit against persons within his jurisdiction to collect simple contract debts due the deceased without requiring or receiving any assignment or authority from the principal administrator. *New Eng. Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138; *Equitable Life Ass. Society* v. *Brown*, 187 U. S. 308; *Noonan* v. *Bradley*, 9 Wall. 394; *Pinney* v. *McGregory*, 102 Massachusetts, 186; *Sulz* v. *Mut. Res. Fund*, 145 N. Y. 563; *Fox* v. *Carr*, 16 Hun, 434; *Traflet* v. *Empire Life Ins. Co.*, 64 N. J. L. 387. So far as property in a foreign jurisdiction is concerned, the domiciliary administrator has no right nor title that can conflict with the title of the ancillary administrator. *Gove* v. *Gove*, 64 N. H. 503; *Bowdoin* v. *Holland*, 10 Cush. 18, 21. The presence in New York of the letter of August 17, 1891, is immaterial. *Blackstone* v. *Miller*, 188 U. S. 189, 206; *Buck* v. *Beach*, 206 U. S. 392, 403.

The suit in Montana was upon the same cause of action and upon the same facts set up in the present suit.

The judgment in Montana was valid.

The judgment in the Montana suit was a conclusive judgment on the merits. A judgment rendered on an issue of law is conclusive as to the questions involved. *Gould* v. *Evansville & C. R. R. Co.*, 91 U. S. 526; *Bissell* v. *Spring Valley Township*, 124 U. S. 225. It appears in compliance with the Montana law that the judgment against Harris was a final judgment upon the merits. The judgment was not (as appellant contends) a mere non-suit constituting no adjudication. *Herbert* v. *King*, 1 Montana, 475. A judgment on the merits against an ancillary administrator in a suit

brought by him is conclusive as to that cause of action against the domiciliary or any other ancillary administrator.

Appellant did not establish the existence of any debt due from the defendants or any of them. The will was not "defeated" either in form or in substance. The defendants did not "get their shares" within the meaning of the contract before the suit was brought. The conditions not having been fulfilled, the appellant cannot recover.

To the questions propounded by the court, counsel answer:

1. The court has no jurisdiction to ascertain and declare a lien upon property in the possession of the administrator appointed by the Probate Court for the County of Suffolk and State of Massachusetts; it cannot entertain such a suit unless there is a *res* of which it can take jurisdiction. *Robertson* v. *Carson*, 19 Wall. 94; *Goodman* v. *Niblack*, 102 U. S. 556; *Ins. Co.* v. *Bangs*, 103 U. S. 435; *Mellen* v. *Moline Iron Works*, 131 U. S. 352; *Arndt* v. *Griggs*, 134 U. S. 316; *Greeley* v. *Lowe*, 155 U. S. 58; *Dick* v. *Foraker*, 155 U. S. 404; *Compton* v. *Jesup*, 167 U. S. 1; *Roller* v. *Holly*, 176 U. S. 398; *McDaniel* v. *Traylor*, 196 U. S. 415.

There was no *res* within the jurisdiction upon which the decree of the court could be enforced. *Byers* v. *McAuley*, 149 U. S. 608; *Hess* v. *Reynolds*, 113 U. S. 73, and other cases.

Even in a suit *inter partes* founded on personal jurisdiction the Circuit Court would not have jurisdiction to ascertain and declare a lien upon the property in possession of the ancillary administrator appointed in Massachusetts. *Blackstone* v. *Miller*, 188 U. S. 189; *Mager* v. *Grime*, 8 How. 490, 493; *Security Trust Co.* v. *Black River Nat. Bank*, 187 U. S. 211, 227; *Farrell* v. *O'Brien*, 199 U. S. 89; *Tilt* v. *Kelsey*, 207 U. S. 43, 56; *Byers* v. *McAuley*, 149 U. S. 608.

2. The Circuit Court had no jurisdiction to foreclose a lien, if one existed, on property in the Probate Court for administration.

3. The Circuit Court had not jurisdiction to determine the shares of Root and Coram in the property in the possession of

the Probate Court. *Payne* v. *Hook*, 7 Wall. 425; *Hook* v. *Payne*, 14 Wall. 252; *Byers* v. *McAuley*, 149 U. S. 608.

4. Neither on the present bill nor any amendment can an order be entered requiring Leyson, Root or Coram to retain property hereafter coming into their hands to satisfy the complainant's claim. *Cates* v. *Allen*, 149 U. S. 451; *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371.

5. The Circuit Court is excluded from any exercise of jurisdiction which disturbs the possession of the property by the Probate Court or the free exercise by the Probate Court of its jurisdiction over the property, and this limitation excludes jurisdiction of the case at bar.

Controversies in which a title is asserted adverse to the title of the deceased do not involve any question as to this limitation of jurisdiction. *Erwin* v. *Lowry*, 7 How. 172; *Williams* v. *Benedict*, 8 How. 107; *Wiswall* v. *Sampson*, 14 How. 52; *Peale* v. *Phipps*, 14 How. 368, 376.

The limitation prevents any exercise of jurisdiction by other courts inconsistent with the possession of property by the Probate Court or with its exercise of exclusive jurisdiction in matters of probate administration. *Suydam* v. *Broadnax*, 14 Pet. 67; *Williams* v. *Benedict*, 8 How. 107; *Union Bank* v. *Jolly*, 18 How. 503; *Green's Admx.* v. *Creighton*, 23 How. 90; *Yonley* v. *Lavender*, 21 Wall. 276; *Case of Broderick's Will*, 21 Wall. 503; *Gaines* v. *Fuentes*, 92 U. S. 10; *Kittredge* v. *Race*, 92 U. S. 116; *Borer* v. *Chapman*, 119 U. S. 587; *Ellis* v. *Davis*, 109 U. S. 485.

Whether the remedy in a given case is by a proceeding *inter partes* or by a probate proceeding depends upon the law of the State. *Ellis* v. *Davis*, 109 U. S. 485; *Farrell* v. *O'Brien*, 199 U. S. 89; *Payne* v. *Hook*, 7 Wall. 425.

Under the law of Massachusetts there can be no proceeding *inter partes* to recover a distributive share until the Probate Court has ordered distribution. *Haskins* v. *Hawkes*, 108 Massachusetts, 379; *Pritchard* v. *Norwood*, 155 Massachusetts, 539; *Cathaway* v. *Bowles*, 136 Massachusetts, 54;

Fletcher v. *Fletcher*, 191 Massachusetts, 211. In the case at bar the limitation on the jurisdiction of the Probate Court was absolute.

6. The Probate Court of Suffolk County has not, as ancillary to its possession of the property, final jurisdiction to declare, enforce and foreclose a lien on a share in the fund. *Bennett* v. *Kimball*, 175 Massachusetts, 199; *Green* v. *Gaskill*, 175 Massachusetts, 265; *Lenz* v. *Prescott*, 144 Massachusetts, 505.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

A question of jurisdiction occurs. It was discussed somewhat in the original briefs of counsel, but questions were submitted to them as appropriate to elicit further discussion.[1] We find it, however, more convenient and more conducive to brevity, in passing on the question of jurisdiction, to be somewhat

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[1] 1. Has the Circuit Court jurisdiction to ascertain and declare a lien upon property in the possession of the administrator appointed by the Probate Court for the county of Suffolk and State of Massachusetts?

2. Has the Circuit Court jurisdiction to enforce by foreclosure a lien upon property so situated?

3. Has the Circuit Court jurisdiction to determine the shares of Root and Coram in the property so situated?

4. Has the Circuit Court jurisdiction, upon the pending bill either in its present form or as it might be amended, to direct that Leyson, Root, Coram, or either of them, should hold any property, coming into their hands by order of distribution of the Probate Court, upon the trust to satisfy the claim of the complainant?

5. To what extent, if any, is the jurisdiction of the Circuit Court limited or affected by the fact that the property from which payment is sought is in the hands of an administrator appointed by the Probate Court of Suffolk County?

6. Has the Probate Court of Suffolk County, as ancillary to its possession of the property, jurisdiction in equity to ascertain, declare, enforce, and foreclose a lien upon it?

general. The petitioner (and her intestate) were citizens of New York. The defendants in the suit below, nine in number, were citizens of Massachusetts. Coram was a citizen of Massachusetts. Root and Andrew J. Davis, trustee, were citizens of Montana. Leyson was also a citizen of Montana. It is hence contended that, while there was diversity of citizenship when the suit was brought, there was no jurisdiction against Root and Andrew J. Davis, they not being inhabitants of the district. The suit against them, it is further contended, was without jurisdiction also, because it was not brought either in the district of the residence of the plaintiff or the defendant. And this, it was said, was recognized by the bill, which prayed an order for the absent defendants to appear and plead in accordance with § 738, Rev. Stat., now act of March 3, 1875, 18 Stat. 470, 472. That act provides, § 8, for notice to absent defendants in any suit "to enforce any legal or equitable lien or cloud upon the title to real or personal property within the district." And it is urged that the Circuit Judge said that the proceeding could only be sustained under that act.

The objection that Massachusetts was not the district of the residence of either Root or Davis was not made to the bill. The objection to the jurisdiction made by the demurrers was to the jurisdiction of the Circuit Court to interfere with or stay proceedings in a Probate Court of the Commonwealth of Massachusetts. It makes no difference how the parties were served or brought in. Being in, all objections to the bill should have been made. The bill prayed a personal judgment against Root as well as a lien upon his share, and those represented by Coram, in the hands of Leyson as administrator of Davis, deceased, and that Leyson be restrained from paying them and Root and Coram from receiving or carrying them away. And general relief was also prayed. In other words, the whole case arising from Ingersoll's service and the remedies for that service was presented. And to this case the defendants were summoned to answer. They did answer as to the jurisdiction of the court as to subject-matter, as to the relation of the

courts of the United States to the courts of Massachusetts. They did not answer as to the jurisdiction of the court as to parties, as to the rights of the parties to be sued in the district of their residence. The latter objection may be waived, and is waived by not being made. *In re Moore*, 209 U. S. 490.

To decide what jurisdiction the Circuit Court exercised we must consider the decree. It found all of the allegations of the bill to be true, and that there was due and owing to the plaintiff (petitioner here), on the contract executed by Coram and Root the sum of $95,000, with interest, amounting in all to the sum of $138,810.83. It adjudged Root to be personally indebted and liable for that sum and awarded execution against him, and for any balance that should be due if the property upon which the lien was declared, as presently mentioned, should not satisfy such indebtedness; that Coram was personally obligated and liable for the payment of said indebtedness upon the full amount which he had received, or should receive, from the shares of the estate of Andrew J. Davis, deceased, acquired for the five heirs mentioned in said agreement, or either of them, under or pursuant to the decree of the District Court of the State of Montana. It was also found and decreed that there was in the State of Massachusetts, in the hands of John H. Leyson, as administrator of Andrew J. Davis, deceased, $337,862, and 137 bonds of the United States, and 170 bonds of the Butte and Boston Consolidated Mining Company, of which money and bonds and the increase thereof, the said five heirs of Andrew J. Davis, deceased, and their legal representatives and successors in interest, were entitled to receive 515½ eleven-hundredths under and pursuant to the decree of the District Court of the State of Montana; and of which money and bonds and the increase thereof Coram and Root were entitled to have and receive 415½ eleven-hundredths parts on distribution of such money and bonds by the proper court having jurisdiction thereof in the administration and distribution of the estate of Andrew J. Davis, deceased. Upon such 415½ eleven-hun-

dredths parts petitioner was decreed to have a lien "subject to all proper and lawful administration," as a part of the estate of Andrew J. Davis, deceased, "pursuant to the orders and decrees or judgments of the Probate Court of Suffolk County, Massachusetts, now having probate jurisdiction thereof, or any court which may hereafter have probate jurisdiction . . . to administer the same as part of the estate of said Andrew J. Davis, deceased, in the due and lawful course of administration thereof." A lien is decreed upon said money and bonds and foreclosed subject to the terms of the decree wheresoever said money and bonds may be taken or removed, whether within or without the State of Massachusetts, and in the custody of whomsoever the same may come, "subject only to the proper and lawful probate administration . . . pursuant to the orders, judgments or decrees of the Probate Court of Suffolk County, in the State of Massachusetts, now having probate jurisdiction thereof . . . to administer the same as a part of the estate of Andrew J. Davis, deceased, in the due and lawful course of administration thereof." And it was decreed that as soon as the probate administration is finished and distribution is ordered by the Probate Court having jurisdiction, that Leyson, as administrator, or his successor in custody thereof, should set apart and bring into court the said 415½ eleven-hundredths of said money and bonds, to be applied to the satisfaction of the lien of complainant. It was decreed that each and all of the injunctive and restraining terms and commands of the interlocutory injunction order be made perpetual, and Leyson was enjoined and restrained, as administrator, from removing out of Massachusetts 415½ eleven-hundredths parts of the money and bonds in his possession, "unless and until the proper court within the State of Massachusetts, having probate jurisdiction of said money and bonds, by its final order, judgment or decree, directs said John H. Leyson, as such administrator, to remove said 415½ eleven-hundredths of said money and bonds out of the State of Massachusetts."

We have made this epitome of the main provisions of the decree to show how careful the court was to require the observance of its direction expressed in its opinion that the decree should declare that nothing in it was intended to contravene, or should contravene, "any action of any probate tribunal in Massachusetts with reference to distribution, or to any order or judgment remitting to the courts of the domicil."

The decree therefore deals exclusively with the parties. It adjudges what contract they made, the extent of their obligation and how that contract was secured. The remedies awarded are executed through the parties, and through Leyson only as he holds property to be delivered to the parties. No action of the Probate Court of Suffolk County is attempted to be restrained or limited or trenched upon, nor the property in its possession disturbed. And yet it is urged that the suit that sought this purpose and a decree that executes this purpose transcend the jurisdiction of a Circuit Court of the United States.

The proposition has been discussed at length by counsel, many cases cited and arguments advanced based upon the respective functions of courts of equity and probate.

The respondents especially rely upon the pendency of proceedings in the Probate Court of Suffolk County, and as a corollary that the property was in the possession of the Probate Court and under its jurisdiction, and, therefore, not within the jurisdiction of the Circuit Court. Respondents express and illustrate the latter conclusion in various ways. Their fundamental postulate, however, is that the Circuit Court has not power to disturb the possession of the property by the Probate Court or do any act which may interfere with the free exercise of jurisdiction by the Probate Court. This postulate is argued at length and many cases are cited. Besides, a statute of Massachusetts is relied upon which provides that upon the settlement of an estate, and after the payment of all debts for which the same is liable in that Commonwealth, the residue of the personal estate may be distributed and dis-

posed of in the manner provided by the will of a deceased, if he left any, or according to the laws of the State or country of which he was an inhabitant, "*or, in the discretion of the court, it may be transmitted to the executor or administrator, if any, in the State or country where the deceased had his domicil, to be there disposed of according to the laws thereof.*" (Italics ours.)

We think, however, a lengthy discussion is not necessary. The controversy presented by the bill was one between citizens of different States, and there was that ground of jurisdiction in the Circuit Court, being a court of the United States. One object of the bill, among others, was to declare and foreclose a lien upon property within the district, and there was that ground of jurisdiction, and we do not think that jurisdiction thus established and supported was taken away by the mere fact that the settlement of the estate of Davis was pending in the Probate Court of Suffolk County. No interference with that court was sought or decreed, as we have seen. Rights between the parties arising from their transactions and contracts were only adjudged and only decreed to be redressed when the Probate Court should have finished its functions. Indeed it may even be that the Circuit Court was too restrictive in the exercise of its power, for it may be disputed whether it is within the power of a state court to order property upon which there is a lien, sent out of a district and thereby defeat the jurisdiction of a court of the United States to enforce such lien in cases where they have jurisdiction under the act of March 3, 1875. This question, however, does not arise, nor any question depending upon it, and the line of cases of which *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, is an example does not apply, nor do the cases cited by respondent, but the case falls within the principles announced in *Payne* v. *Hook*, 7 Wall. 425, and *Byers* v. *McAuley*, 149 U. S. 608, and cases there cited.

The power of the court of equity to subject the share of a person under a lien, "and yet in the hands of an executor,"

to the payment of his debts has been decided in Massachusetts. *Ricketson* v. *Merrill*, 148 Massachusetts, 76. The same in principle is *Davis et al.* v. *Newton*, 6 Met. 537, where it was held that the distributive share of an insolvent debtor in the hands of an administrator passed to his assignee, and that the administrator could not withhold it from the assignee.

In *Lenz* v. *Prescott*, 144 Massachusetts, 505, it was decided that the Probate Court does not take cognizance of assignments of their interests, made by legatees or distributees, but deals only with those primarily entitled to the legacies or distributive shares; and many cases were cited. The court therefore sustained a bill in equity to ascertain the validity and construction of an assignment of an interest in an estate. See also *Green* v. *Gaskill*, 175 Massachusetts, 265, where the probate jurisdiction of the Probate Court and its equity jurisdiction in relation to other courts is explained, and it is decided that administrators and executors have a right to have their accounts adjusted and the amounts due to or from them determined in the Probate Court, on its probate side, and in the usual probate proceedings, but when the amount for which they are liable is so determined, may, by a bill in equity, be compelled to pay to those entitled their share of the property of the deceased. And this being the power of the courts of equity of the State, a like power certainly may be exercised by the Federal courts.

It is further objected that there is no property of the respondents in Massachusetts. The argument which is urged to support the objection is difficult to state. It seems to draw a distinction, under the laws of Massachusetts, between the will of Andrew J. Davis and the decree of the Montana court admitting the will to probate. "The Probate Court," respondents say, "might and did accept the decree of the Montana court as proof that the will ought to be allowed. It could not and did not accept the decree as establishing that the property in Massachusetts should be disposed of otherwise than as the will provided." And from a consideration of the laws

of Massachusetts, respondents conclude that (we quote the language of counsel), "No part of the property in Massachusetts can therefore in any sense be said to belong to the defendants in the suit. All of it must by law either be paid over according to the will, or be transmitted to Montana, to be distributed as the court may direct." We cannot refrain from saying that it is hard to believe that respondents would like to be taken at the full sense of their words, and we are quite sure that the Probate Court of Suffolk County will regard not the will as propounded for probate, but the will as qualified by the decree, as determining the rights of the parties. At any rate, it is only upon the shares which that court will distribute that the decree of the Circuit Court will operate.

Again, it is charged that the right of the petitioner's intestate was derived from Root, and as he, it is further contended, could not have sued to establish his right to a share in the funds of the administrator, the latter and he being citizens of Montana, that the petitioner was equally disqualified to establish and recover Root's share of the property. The argument is that she is seeking to enforce a right of Root against the administrator arising on an equitable assignment by Root to her intestate, and she is therefore, it is said, suing to recover as assignee of a chose in action upon which the assignor could not sue, because his citizenship is the same as that of the administrator in Massachusetts. Sec. 629, Rev. Stat. There are several answers to the contention. It is certainly very disputable if an interest in a distributive share of an estate is within the statute. Again, she is suing primarily on the obligation of Root to her intestate to secure which a lien was given on Root's distributive share; and besides, again, she sues as administratrix, and she is a citizen of a different State from Leyson. *Sere* v. *Pitot*, 6 Cranch, 333; *Chappedelaine* v. *Dechenaux*, 4 Cranch, 308; *Bushnell* v. *Kennedy*, 9 Wall. 387; *Coal Company* v. *Blatchford*, 11 Wall. 172; *Rice* v. *Houston*, 13 Wall. 66.

Respondents assert the identity of the action in Montana

with the present suit, and upon that identity they urge that such action constitutes *res judicata*. Petitioner denies the identity of the actions, and urges besides that there is no such privity between the parties as to make the Montana action *res judicata* of the pending case. In support of the latter contention petitioner urges that an ancillary administrator in one jurisdiction is not in privity with an ancillary administrator in another jurisdiction, and that therefore a judgment against one is not a bar to a suit by the other. And this was the ruling of the Circuit Court. The Circuit Court of Appeals took the contrary view, and rested its judgment upon the conclusive effect of the Montana action.

We shall assume that there is identity of subject-matter between the Montana action and that at bar, but the question remains, Was there identity of parties? An extended discussion of the question is made unnecessary by the case of *Brown* v. *Fletcher's Estate*, 210 U. S. 82. In that case a suit in equity against Fletcher, brought in his lifetime, was revived after his death, and a decree obtained. Fletcher resided in Michigan, where he died leaving a will, which was duly probated in the Probate Court of Wayne County in that State, in which the decree of the Massachusetts courts was filed as evidence of a claim against the estate. Its effect as such was denied, and the case was brought here by writ of error. Replying to the contention of plaintiff in error, that the Michigan executor and the administrator with the will annexed of Fletcher's estate in Massachusetts were in such privity that the decree was conclusive evidence of it in the proceedings in Michigan, this court held that the decree was not binding upon the Michigan executor or the estate in his possession, citing *Vaughan* v. *Northrup*, 15 Pet. 1; *Aspden* v. *Nixon*, 4 How. 467; *Stacy, Admr.*, v. *Thrasher*, 6 How. 44. The latter case was quoted from as follows: " 'Where administrations are granted to different persons in different States, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the

other, to affect assets received by the latter in virtue of his own administration; for in contemplation of law, there is no privity between him and the other administrator. See Story, Confl. of Laws, § 522; *Brodie* v. *Bickley*, 2 Rawle, 431.' " *McLean* v. *Meek*, 18 How. 16; *Johnson* v. *Powers*, 139 U. S. 156, were also cited, and it was said that the "doctrine was enforced in Massachusetts. *Low* v. *Bartlett*, 8 Allen, 259."

Respondents insist that this doctrine has no application to the Montana judgment, and urge that the latter was a bar of the pending suit (1) because it was a judgment on the merits, and (2) because such a judgment "against an ancillary administrator in the suit brought by him is conclusive as to that cause of action against the domiciliary or any other ancillary administrator." And this is said to follow from the proposition which appellant advances, that "the authorized act of an ancillary administrator as to property of the intestate within his jurisdiction is binding everywhere," and it is hence concluded that a suit brought by an ancillary administrator is subject to the same principle as an act done touching tangible property. That the argument by which this conclusion is supported has strength is established by the fact that the Circuit Court of Appeals yielded to it, and it is said to be sanctioned by *Biddle* v. *Wilkins*, 1 Pet. 686; *Wilkens* v. *Ellett*, 108 U. S. 256; *Talmage* v. *Chapel*, 16 Massachusetts, 71. But as these cases preceded *Brown* v. *Fletcher's Estate*, they must be regarded as consistent with it. Besides, in that case, *Johnson* v. *Powers*, 139 U. S. 156, was cited as establishing, on the authority of *Aspden* v. *Nixon*, *Stacy* v. *Thrasher*, *Low* v. *Bartlett*, 8 Allen, 259, the doctrine that a judgment recovered against the administrator of a deceased person in one State is no evidence of debt, in a subsequent suit by the same plaintiff in another State, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased. That there is a certain amount of artificiality in the doctrine was pointed out in *Stacy* v. *Thrasher*, and that it leads to the inconvenience

and burdensome result of retrying controversies and repeating litigations. The doctrine, however, was vindicated as a necessary consequence of the different sources from which the different administrators received their powers, and the absence of privity between them, and that the imputations against it were not greater than could be made against other "logical conclusions upon admitted legal principles." It is not necessary, therefore, to review in detail the argument of respondents. Its fundamental concept is that the authorized act of an administrator as to property of the intestate within his jurisdiction is binding everywhere, and it is said that a suit brought by an administrator is subject to the same principle. The generality of the conclusion, however, counsel immediately limit by the concession that it does not include a suit brought against an administrator, whether he successfully or unsuccessfully defends it. In other words, the principle is true only of an action brought by an ancillary administrator to enforce a claim in behalf of the estate and judgment goes against him. But counsel even limit this again, and says it would not be binding "in the sense of creating a personal liability for costs, if costs be awarded, or otherwise, but it is binding in the sense that the cause of action has been effectively disposed of." That is, as counsel explains, merged in the judgment. We do not think that the doctrine announced in *Brown* v. *Fletcher's Estate*, *supra*, admits of these distinctions, and surely the estoppel of a judgment must be mutual. The argument of appellees contends for the contrary; it makes a judgment against an ancillary administrator binding against other administrators, but not binding for them. We think, therefore, that the Montana judgment is not a bar to the pending suit.

On the merits there are two propositions: (1) Did the complainant establish the existence of a debt due from Coram and Root to Ingersoll? (2) Did she establish the existence of a lien? On neither of these propositions did the Court of Appeals pass; the Circuit Court decided them in favor of complainant.

We need not recite the evidence. The Circuit Court found, and, we think, rightly found, that the agreement sued on was performed. In other words, that the will of Davis was defeated, and that the contestants got their shares through the services of Ingersoll. The form in which the defeat was expressed is unimportant. The will as propounded was defeated. As propounded it cut them off from inheritance. As qualified in probate, by compromise more property was received than would have come to them by inheritance. And the evidence leaves no doubt that it was brought about, to quote the bill, "by the force, effect and stress" of the contest and by the services, which it is admitted Ingersoll rendered, and from the belief that the will as propounded would not receive probate and would only receive probate when so qualified as to recognize the rights of the contestants as heirs of the estate. That it did not do so was its defect and to make it do so was the purpose for which they employed Ingersoll and which his services achieved. There was performance, therefore, of his contract.

The next question is, Does the evidence establish the existence of the lien? An affirmative answer must be given. It is manifest that payment to Ingersoll was dependent upon success, but it is equally manifest that he relied upon more than the personal responsibility of the parties. The so-called five heirs, Elizabeth S. Ladd, Sarah M. Cumming, M. Louise Dunbar, Ellen Cornue, and Henry A. Root entered into an agreement in which it was recited that controversies had arisen in regard to the will, and that Root had rendered services and expended money in behalf thereof, and had undertaken "to procure evidence, counsel and such other needs" as were necessary for opposing the will and obtaining for the others their "respective rights and shares" of the estate, and in consideration thereof there was assigned to Root and one Gideon Wells one-third part of each of their interersts to reimburse Root for the moneys he had expended or should expend or the liabilities which he might incur on account thereof. And it was agreed

that the assignment was to be in full for past or future liabilities. Root, on his part, agreed to employ counsel and to do all things necessary to secure the interests of the other parties.

It is alleged in the complaint and admitted by the answer that Coram acquired the remaining interests of Elizabeth Ladd and Mary L. Dunbar and that the interests so acquired were dependent upon the prosecution of the objections to and contests of the validity of the will until the shares of the five heirs should be secured to them by a grant from the proponent of the will or by the decree of the District Court of Montana. This being the situation, Ingersoll wrote to Root as follows:

"May 1st, 1891.

"My dear Root. Do not know whether I can get the money, but feel sure I can raise $25,000—have already secured $13,000—

"Now, there is another thing: I suppose it is best for you and I to have a specific and definite understanding in regard to my fee. Of course, if you should lose the case you could not pay. We can raise money enough to pay expenses and of course I shall want expenses—but the real question is as to what I am to have in case of success and how that is to be secured—*i. e.* what papers are necessary, etc.

"Let me hear from you.

"Yours,

"R. G. INGERSOLL."

To which Coram and Root replied as follows:

"Butte City, Mont., August 17, 1891.

"R. G. Ingersoll, Esq., Butte City, Montana.

"Sir: We agree that for your services in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will of A. J. Davis, deceased, rendered and to be rendered, that your fee, in case the will is defeated and our clients get their shares, shall be one hundred (100,000) thousand dollars, and that your expenses and disbursements shall be paid in any event.

"There is to be no personal obligation against J. A. Coram, in the event that the interests represented by Henry A. Root are unsuccessful, and in no event is the said J. A. Coram obligated except to pay such fee out of the funds secured from the estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar and Mrs. Ellen S. Cornue and Henry A. Root.

"HENRY A. ROOT,
"J. A. CORAM."

It is evident, therefore, that Ingersoll asked for security in a definite and written form. We do not think it can be said that he sought only a promise to pay. That followed from his employment, and besides Coram stipulated against personal liability, but did obligate himself to pay "out of the funds secured from the estate." And this is the test of the agreement. It is the exception that establishes that as to Root there was a personal and property obligation; as to Coram, a property obligation. It is confirmed by excerpts from the letters of Root set out in the complaint and introduced in evidence. In those letters he expresses a desire "That Mrs. Ingersoll should realize out of the Davis estate as much as possible," and would "bend every effort" to that end. And, explaining the agreement, he said that Ingersoll "was to receive $100,000 from moneys collected from the Davis estate for his services," and assured Mrs. Ingersoll that he would do everything in his power to see that she received "as much from that fund," (referring to the estate in Boston).

The sufficiency of the agreement of August 17, 1891, to create a lien seems not to have been seriously questioned in the Circuit Court upon the argument of the demurrer. However the court said that "Upon all settled rules with reference to the construction of such instruments we cannot doubt that this one of August 17, 1891, created a lien on the funds therein referred to in behalf of Mr. Ingersoll." On the final hearing the effect of the instrument was contested, and the court adhered to its ruling, saying, "Whether or not the particular

agreement creates a lien is a matter of construction. In this case the fact that there was no primary personal responsibility on J. A. Coram specially serves to stamp the agreement in issue as declaring a purpose to create a lien. Therefore, on the whole, we hold that, on this final hearing on bill, answer and proofs, the bill must be sustained." The conclusion of the court is sustained by authority. In *Wylie* v. *Coxe*, 15 How. 415, a contract was made with an attorney for the prosecution of a claim against Mexico to pay him a contingent fee of five per cent out of the fund awarded. It was held that the agreement constituted a lien upon the fund. In *In re Paschal*, 10 Wall. 483, in the letter retaining Paschal it was said that his compensation would depend upon the action of a future legislature, "unless a recovery is had in the suit, in which event I shall feel authorized to let you retain it out of the amount received." It was held that in accordance with the prevailing rule in this country Paschal had a lien on the fund in his hands for disbursement and professional fees. The case was cited in *McPherson* v. *Cox*, 96 U. S. 404, 417, and the doctrine repeated. See also *Central Railroad* v. *Pettus*, 113 U. S. 116; *Louisville &c. Railroad Company* v. *Wilson*, 138 U. S. 501, 507. In *Walker* v. *Brown*, 165 U. S. 654, it was held that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligations, creates an equitable lien on the property so indicated. This was an application of the doctrine of *Fourth Street Bank* v. *Yardley*, 165 U. S. 634, and *Ketchum* v. *St. Louis*, 101 U. S. 306. These cases are not opposed by *Trist* v. *Child*, 21 Wall. 441, and *Wright* v. *Ellison*, 1 Wall. 16. In the latter case it is said that it is indispensable to the lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the debtor should be paid out of it. These conditions are satisfied in the case at bar.

The other contentions of respondents assert a defect of par-

ties and error in the decree as to the amount of interest adjudged to Root and Coram in the property. In the first contention we do not concur.

The second contention is justified. We do not think, however, that it is necessary to enter into all of its details, with some of which, we may say, we do not agree. We think that the Circuit Court rightly, as we have already pointed out, adjudged that the five heirs were entitled, by virtue of the final decree in Montana, to $515\frac{1}{2}$ eleven-hundredths of the estate in Massachusetts, and in adopting, as we think it did, in making division among them according to intestacy, that is, in proportion to the shares they would have taken in case Davis had died intestate. Those shares the bill alleged and the answers admitted would have been as follows: Sarah M. Cummings and Elizabeth S. Ladd, one-eleventh each; Henry A. Root, Ellen S. Cornue and Mary Louise Dunbar, one twenty-second each—in all, 350 eleven-hundredths of the estate. But there was error in adjudging that the interest remaining in Sarah Maria Cummings and Ellen S. Cornue, after the assignment of one-third of their interest to Root, to be respectively sixty-two and two-thirds eleven-hundredths and thirty-three and one-third eleven-hundredths. The bill shows that they were entitled respectively to one hundred eleven-hundredths and fifty eleven-hundredths of the amount they as two of the five heirs would have been entitled to if Davis had died intestate, that is, those shares of three hundred and fifty eleven-hundredths. But the amount was increased by the decree in Montana to $515\frac{1}{2}$ eleven-hundredths and their shares thereof necessarily increased. In other words, as they were entitled respectively to $\frac{2}{7}$ and $\frac{1}{7}$ of the first amount, they are entitled respectively to $\frac{2}{7}$ and $\frac{1}{7}$ of the second amount, to wit, $147\frac{4}{14}$ eleven-hundredths and $73\frac{9}{14}$ eleven-hundredths, one-third of which amounts was assigned to Root. There were left in them respectively, therefore, $98\frac{4}{21}$ eleven-hundredths and $49\frac{2}{21}$ eleven-hundredths. To Root, as we have seen, they assigned $\frac{1}{3}$ of their shares, and there was also assigned to him $\frac{1}{3}$ of the shares

of Elizabeth S. Ladd and Mary Louise Dunbar, making with the $\frac{1}{7}$ to which he is entitled in his own right $220\frac{13}{14}$ eleven-hundreths. Coram is entitled as assignee to the other two-thirds of the shares of Ladd and Dunbar, to wit, $147\frac{4}{14}$ eleven-hundredths, making the total in him and Root of $368\frac{3}{14}$ eleven-hundredths instead of $415\frac{1}{2}$ eleven-hundredths, as stated in the decree. The decree must be modified accordingly.

The decree of the Circuit Court of Appeals is reversed and that of the Circuit Court is modified as above indicated, and, as modified,

Affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE MOODY dissent.

UNITED STATES *v.* KEITEL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 286. Argued October 22, 23, 26, 1908.—Decided December 14, 1908.

Where an indictment is quashed because the facts charged are not within the statute the Government has an appeal under the act of March 2, 1907, c. 2564, 34 Stat. 1246.

While abstractly there may be a difference between "interpretation" and "construction," in common usage the words have the same significance; and "construction" as employed in the act of March 2, 1907, c. 2564, 34 Stat. 1246, includes interpretation.

Under §§ 2347–2350, Rev. Stat., a person who is qualified to enter coal lands in his own behalf is prohibited from making an entry ostensibly for himself but in fact as agent for another who is disqualified; and an agreement to obtain land for a disqualified person through entries made by qualified persons constitutes the offense of conspiracy against the United States under § 5440, Rev. Stat.

The provisions of the Revised Statutes in regard to coal lands limit the amount of land to be taken by each person entering; and while there may be no statutory limitation on the right of the entryman to

sell after acquisition, the statute, according to its plain meaning, will be enforced as not permitting a person to acquire land as agent for a disqualified person and so defeat the purpose of the statute.

A person cannot enter land through an agent, even though the agency be undisclosed, if he is disqualified to enter the land himself.

The authoritative construction of a statute in a civil case may be applied in a criminal case subsequently arising; although *United States* v. *Trinidad Coal Co.*, 137 U. S. 160, was a suit to annul patents to coal lands the decision in that case that qualified persons cannot enter coal lands under §§ 2347–2350, Rev. Stat., as agents, or on behalf of, disqualified persons, will be followed as to the construction of those statutes in sustaining indictments under § 5440 for conspiracy to defraud the United States by obtaining coal lands by entries in violation of the statutes as so construed.

A charge of conspiracy to defraud the United States under § 5440, Rev. Stat., can be predicated on acts made criminal after the enactment of the statute. *Hyde* v. *Shine*, 199 U. S. 62.

Even though a word may have a common-law significance which should control if the word stood alone, in the construction of a statute the word must be given the broader meaning resulting from the words with which it is accompanied; and so *held* that the word "defraud," in § 5440, Rev. Stat., when construed in connection with the accompanying words "in any manner or for any purpose" includes obtaining public lands in violation of the statutes as to quantities to be taken by, and qualifications of, entrymen, notwithstanding the United States be paid the price of the lands. *Hyde* v. *Shine*, 199 U. S. 62.

An amendment to a statute will be construed to relate to the present subject thereof and not to be new legislation in regard to other subjects; and the act of July 7, 1898, c. 578, 30 Stat. 718, amending § 4746, Rev. Stat., related solely to the subject of pensions and bounty land claims, and simply extended the statute to the use of fraudulent papers in regard to such claims, and a violation of its provisions as amended cannot arise from acts in connection with entries other than those on pensions and bounty claims.

Under the act of March 2, 1907, c. 2564, 34 Stat. 1246, this court on direct writ of error only has jurisdiction to review the particular questions decided by the court below for which the statute provides, and the whole case is not open to review.

157 Fed. Rep. 396, reversed.

THE facts are stated in the opinion.

The Attorney General and *The Solicitor General*, with whom *Mr. Edwin W. Lawrence*, Special Assistant to the Attorney General, was on the brief, for the United States:

The charge against defendants of conspiracy to defraud the United States is specifically made a crime by § 5440, Rev. Stat. Arguments that, because the coal land laws do not expressly make it a crime for an individual to obtain lands in excess of the designated quantity, it is not criminal to do so, are fallacious. Those laws furnish an occasion for conspiracy to defraud under § 5440, just as other laws and departmental regulations furnish the occasion for crimes under statutes which otherwise have no connection with them. See *Caha* v. *United States*, 152 U. S. 211; *Curley* v. *United States*, 130 Fed. Rep. 1.

The right of acquisition, not of alienation, is involved here. The statute expressly limits the right to acquire and it is with this limitation that we are concerned. The right of an entryman to alienate does not accrue, at least until an application is made, and the conspiracy is charged to have been formed before that time. *Williamson* v. *United States*, 207 U. S. 425; *Adams* v. *Church*, 193 U. S. 511, and *United States* v. *Budd*, 144 U. S. 154, distinguished. The question is, Has an individual the right to acquire from the United States more than the specified quantity of coal lands?

Any lands obtained as a result of the execution of these conspiracies can be recovered by the Government on the ground that they were obtained by fraud. *United States* v. *Trinidad Coal Co.*, 137 U. S. 160. See also *United States* v. *Lonabaugh*, 158 Fed. Rep. 314. The scheme necessarily involved intentional concealment of facts in order to deceive and mislead the land officers and obtain from the United States the possession of coal lands which defendants knew they could not obtain without such concealment.

The history of § 5440, and the decisions construing and applying the section conclusively show that Congress did not intend to confine "conspiracies to defraud" to the offenses known

as such to the common law, but that it was intended that the section should be applied so as to include frauds upon the United States of every kind and character. Congress aimed to protect the Government against those in whom avarice and cupidity are stronger than the desire for good government and honest execution of the laws. *United States* v. *Stone*, 135 Fed. Rep. 392; *Hyde* v. *Shine*, 199 U. S. 62; *Dealy* v. *United States*, 152 U. S. 539; *United States* v. *Lonabaugh*, 158 Fed. Rep. 314; *United States* v. *Robbins*, 157 Fed. Rep. 999; *Stearns* v. *United States*, 152 Fed. Rep. 900; *Bradford* v. *United States*, 152 Fed. Rep. 617; *United States* v. *Owen*, 32 Fed. Rep. 534; *United States* v. *Gordon*, 22 Fed. Rep. 250; *United States* v. *Hirsch*, 100 Fed. Rep. 33; *Curley* v. *United States*, 195 Fed. Rep. 628; *United States* v. *Morse*, 161 U. S. 429; *United States* v. *Haas*, not yet reported; *United States* v. *Stone*, 135 Fed. Rep. 392; *McGregor* v. *United States*, 134 U. S. 187.

Entry under the coal land laws is a matter within the jurisdiction of the Secretary of the Interior under § 4746, Rev. Stat. In two unreported cases (*United States* v. *Dodson*, *United States* v. *Fout*, Eighth Circuit) it has been held that the words "pertaining to any other matter within the jurisdiction of the Secretary of the Interior" must be interpreted according to their plain and literal meaning, and therefore include matters pertaining to coal land entries. The purpose of the amendment of 1898 was to extend the operation of the statute, and in conformity with this purpose the language of the statute should be construed broadly.

The regulation of the Interior Department requiring an entryman to state in writing that he is making the entry solely for his own benefit and not directly or indirectly in behalf of another merely requires a positive statement of what it would be in violation of the statute and a fraud to conceal. The law in limiting the amount of land one person or association may acquire necessarily contemplates that entry shall be made solely for the benefit of the entryman. Otherwise the limitation would be wholly ineffectual. The defendants are not

charged with a violation of or a conspiracy to violate the regulation. They made or were to make the statement which the regulation required, but in making such statement falsely and fraudulently and filing it they committed or would commit crimes defined and punished by §§ 5440 and 4746. The regulation merely furnishes the opportunity for the commission of a statutory crime.

The Interior Department has always held that an entry could not be made by one person for the benefit of another. *Adolph Peterson et al.*, 6 L. D. 371; *North Pacific Coal Co.*, 7 L. D. 422. These decisions deal with cash entries. The same ruling is applied to cash entries under preference right in *Union Coal Co.*, 17 L. D. 351.

The practice of the Land Office and the regulations of the Interior Department recognize the right of a person to make an entry through an agent when the name of the principal is disclosed. In such a case the principal takes the benefit of the act and cannot make another entry thereunder. To permit entries to be made for undisclosed principals would nullify the statutory provision that one person or association of persons can make only one entry, for it would throw wide open the door for fraud.

The *Trinidad case* is on all fours with these cases, aside from the single point that there the corporation itself was at the inception of the scheme disqualified to make an entry under the coal land laws, while in the present cases the corporation to which the lands were to be conveyed was not at first disqualified to make an entry in its own name. There is no difference between a case where the corporation is disqualified before any act is done in performance of the conspiracy, and one where the corporation is necessarily to become disqualified during the execution of the conspiracy.

The cases of *Williamson* v. *United States*, *Adams* v. *Church*, and *United States* v. *Budd*, *supra*, construing the timber and stone act, cannot apply to coal land entries; the provisions of the coal land laws are very different from those of the timber

and stone act. Coal land entries are known as cash entries or cash entries under a preference right. In the former an application is made, the money paid and receipt taken therefor at the same time and all as one transaction. The entry is then complete. The entryman may present his receipt and obtain a patent, but title passes when the receipt is taken. It is apparent that there can be no such thing as an assignment of any right in a cash entry. Until application is made there is no right existing, and at the time application is made, other steps are taken which complete the entry. In the case of cash entries under a preference right a declaratory statement is filed, and within one year after, application for entry must be made. At the time the application is made the money is paid, receipt taken and title passes the same as in the case of a cash entry. For the same reasons as exist there, it is apparent that there can be no such thing as an assignment of any right in a cash entry under a preference right.

The general mineral act of 1872 has never been held by the courts or the Interior Department as being applicable to coal lands. No coal land entry was ever made under it. The fact that under the general mineral act one person may make any number of entries cannot be held to overrule the manifest purpose of Congress to limit the right to enter coal lands.

Mr. Edwin H. Park and *Mr. Frederick N. Judson*, with whom *Mr. Tyson S. Dines* and *John F. Green* were on the brief, for defendants in error:

There are no common-law offenses against the United States. Any offense which may be the subject of criminal procedure in a court of the United States, must be an act committed or omitted in violation of a public law of the United States either prohibiting it or commanding it. *United States* v. *Hudson*, 7 Cranch, 32; *United States* v. *Cooledge*, 1 Wheat. 415; *United States* v. *Wiltenberger*, 5 Wheat. 76; *Manchester* v. *Massachusetts*, 139 U. S. 240; *United States* v. *Eaton*, 144 U. S. 678; *United States* v. *Britton*, 108 U. S. 199; *United States* v. *Clayton*,

2 Dill. 219; *United States* v. *Manion*, 44 Fed. Rep. 800; *Todd* v. *United States*, 158 U. S. 278.

A requirement in a rule or regulation of a department cannot make any act or neglect to act a criminal offense in the absence of a statute making such act or neglect a criminal offense. *United States* v. *Eaton*, 144 U. S. 677; *Caha* v. *United States*, 152 U. S. 211; *Williamson* v. *United States*, 207 U. S. 425.

Perjury cannot be assigned upon an affidavit before a notary public by preëmptor of coal land under §§ 2348, 2349, Rev. Stat. *United States* v. *Manion*, 44 Fed. Rep. 800.

Congress, in the public land laws, wherever considerations of public policy prohibited pre-contracts of alienation, has specifically enacted the prohibition in statutes declaring the form of affidavit and assigning perjury for a violation thereof.

In the coal land statute there is no prohibition of alienation by pre-contract or otherwise, and such prohibition cannot be inferred from any supposed public policy not enacted in a statute. *St. Louis Co.* v. *Montana Co.*, 171 U. S. 650.

On the contrary, Congress intended the free exercise of right of alienation by entrymen by pre-contract and otherwise.

The conspiracy statute, § 5440, has been construed in accordance with these fundamental principles, and as there are no common-law offenses in the United States, criminal conspiracies are punishable only as such when they are distinctly declared in the statute. There must be a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. It is thus sharply distinguished from conspiracy at common law which has been substantially modified both by judicial decisions and statute in England and in the courts of the several States. *Britton* v. *United States*, 108 U. S. 192; *Pettibone* v. *United States*, 148 U. S. 197; 2 Stephens' Hist. of Crim. Law in Eng., 121-127; 2 Wharton's Crim. Law (10th ed.), § 1356, *a*, *b* and note; Wright's Hist. of Crim. Conspiracies (Am. ed.), 6, 68.

The word "defraud" in the second clause must be construed

in the sense of committing a fraud made so by Federal statute. 2 Wharton, *ubi supra.*

The indictment does not state a case of "defraud" at common law. Bouvier's Law Dict., "defraud;" 7 Cyc. 123, "cheats;" 19 Cyc. 387, "false pretenses;" *United States* v. *Wilson,* 44 Fed. Rep. 751; 2 Stephens, *ubi supra.*

The statutory requirement of overt acts in conspiracies against the Government is analogous to and taken from the constitutional requirement in indictments for treason, and this latter has sprung from the dread of constructive treason, and is controlled by considerations of public policy, which prohibit the extension by judicial construction of statutory crimes which are dangerous to liberty. Const. Art. III, § 3; 4 Blackstone, chap. VI; *United States* v. *Hirsch,* 100 U. S. 33; The Federalist, No. XLIII; 2 Curtis' Hist. of Const. 384; Arguments of Erskine in *Gordon, Hardy* and *Horne Tooke cases;* Coke 3, Inst. 23; *Commonwealth* v. *Hunt,* 4 Met. 111; Wright's Hist. of Crim. Conspiracy, 68; 2 Wharton, *supra.*

The conspiracy must therefore be sufficiently charged irrespective of any averment of overt acts, which are merely to afford a *locus penitentiæ. United States* v. *Britton,* 108 U. S. 192; *Pettibone* v. *United States,* 148 U. S. 197; *United States* v. *Taffe,* 86 Fed. Rep. 113.

The United States cannot be defrauded by a citizen's sale of his right of entry and purchase of coal lands when it has not been prohibited by statute.

Constructive fraud, such as is cognizable only in a court of equity, cannot be the basis of a criminal prosecution for conspiracy as no man could tell whether he had committed a crime until the chancellor had passed judgment thereon.

"Fraud" as used in the bankruptcy act involves moral turpitude and does not imply fraud or fraud in law, which may exist without the imputation of bad faith or immorality. *Neal* v. *Clark,* 95 U. S. 704. See also *Hennequin* v. *Clews,* 111 U. S. 676.

"With intent to defraud," as used in the Federal statute,

means a guilty intent. See Nat'l Banking Act, § 5209, Rev. Stat.; Forgery Statute, §§ 5421, 5423, Rev. Stat. It is impossible to define the equitable conception of fraud. 2 Pomeroy Eq. Jurisp. 873; Stephens' Hist. of Crim. Law, 121.

The right of contract for the conveyance of a property right acquired or to be acquired thereafter, is inherent in the citizen, and cannot be made a crime, or in anywise illegal in the absence of any statutory enactment.

The United States, therefore, cannot be defrauded by the exercise by a citizen of the right of alienation by contract, where, for a consideration, deemed satisfactory to himself, he extinguishes his own right. *Trinidad Coal & Coke Co.* v. *United States*, 137 U. S. 161, is not in point, as this is a criminal action, and see *Adams* v. *Church*, 193 U. S. 510; *Hafemann* v. *Gross*, 199 U. S. 342; *Hartman* v. *Butterfield Lbr. Co.*, 199 U. S. 335; *United States* v. *Budd*, 144 U. S. 154; *Myers* v. *Croft*, 13 Wall. 291.

Had Congress intended to prevent the exercise of this right, it would have said so. *France* v. *United States*, 164 U. S. 676.

The *Curley Case*, 130 Fed. Rep. 1, and the *Stone Case*, 135 Fed. Rep. 393, are not in point. In those cases the conspiracies relate directly to the exercise of governmental functions in public service, and in the protection of lives upon the high seas, and involved the invasion, if not violation, of specific statutes and were acts in themselves *mala in se* and not *mala prohibita*.

The second count of the indictment is specifically based upon the statute § 4746, which is distinctly a pension statute and not applicable to the case at bar.

The court may refer to the proceedings in Congress in order to determine the evil sought to be remedied by the enactment of the statute. *Hepburn* v. *Griswold*, 8 Wall. 603; *American Net &c. Co.* v. *Worthington*, 141 U. S. 468, 473; *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Northern Pac. Ry. Co.* v. *United States*, 36 Fed. Rep. 282, 285; *United States* v. *Union Pac. Ry. Co.*, 37 Fed. Rep. 551; *Untermeyer* v. *Freund*, 50 Fed.

Rep. 77, 80; *United States* v. *Pattison*, 55 Fed. Rep. 605, 641; *United States* v. *Wilson*, 58 Fed. Rep. 768; *United States* v. *Hansey*, 79 Fed. Rep. 303. This statute was construed as a pension statute in *Pooler* v. *United States*, 127 Fed. Rep. 509. See also *Edgington* v. *United States*, 164 U. S. 361, construing the statute before its amendment.

The case should be dismissed for want of jurisdiction; the opinion below shows that the decision of the court as to the first count was not based upon a construction of the statute, and that the decision of the court as to the second count was based upon other grounds decided adversely to the United States, which grounds are sufficient to sustain the decision and to quash the indictment.

The Congress, in enacting the law of March 2, 1907, used the word "construction" in its ordinary meaning. When Congress said "construction" it did not mean "interpretation." The courts have long distinguished between interpretation and construction. *Bloomer* v. *Todd*, 3 Wash. Ter. 612; *S. C.*, 19 Pac. Rep. 135, 138; *Proprietors of Morris Aqueduct* v. *Jones*, 36 N. J. Law, 206; *State ex rel. Hastings* v. *Smith*, 35 Nebraska, 13, 22; *People ex rel. Twenty-third Street R. R.* v. *Commissioner of Taxes*, 95 N. Y. 554, 559; *Deane* v. *State*, 159 Indiana, 313; *Terre Haute &c. R. R. Co.* v. *Erdee*, 158 Indiana, 334, 347; *United States* v. *Wiltberger*, 5 Wheat. 76, 96. All that the court below decided was that the case at bar was not within the intention of the statute, because the language of the statute did not authorize the court to say so.

Mr. Justice White delivered the opinion of the court.

The United States prosecutes this writ of error upon the assumption that the decision of the District Court was based upon an erroneous construction of the statutes upon which the indictment was founded, and therefore, by virtue of the act of March 2, 1907, c. 2564 (34 Stat. 1246 [1]), the right ob-

[1] This act is reproduced in full in note to p. 398, *post.*

tained to review the decision by writ of error direct from this court.

The indictment contained two counts. Without quoting them fully, it suffices to say, for the purposes of the questions which we are called upon to decide, if we have authority to decide them, that the first count charged that the eleven defendants illegally conspired, in violation of § 5440, Rev. Stat., with certain named persons and others unknown, to illegally obtain the title of certain coal lands belonging to the United States. The conspiracy was to be effected by procuring various persons as agents to enter coal lands in their own name, ostensibly for their own benefit but in reality for the use and benefit of the accused and a named organization; the purchases being made by the agents as above stated, not with their own money, but with money of the accused or the corporation, and under agreements to convey the title, when acquired, to the accused or to the corporation, thus enabling the accused and the corporation to obtain coal lands belonging to the United States in excess of the quantity which they were allowed by law to enter. Copious averments were made in the count as to the use of alleged false, fictitious and fraudulent papers in making the entries in question, which papers, as filed and entries made, had for their object and purpose to deceive the land officers of the United States, so as thereby to cause them to allow the entries in the name of the agents on the supposition that the entries were for the benefit of the entrymen, and which entries they would not have had the power to allow under the law, and would not have allowed had the truth been disclosed. The second count charged an illegal conspiracy to do acts made criminal by § 4746, Rev. Stat., in making and presenting, and causing to be made and presented, in connection with the entries of coal land, certain false, forged, fictitious, etc., affidavits and papers.

To clear the approach to the issues to be decided we bring into view the statutes which must be passed on. Section 5440, relating to conspiracies, was amended May 17, 1879, by chang-

ing the penalties imposed by the section as primarily enacted. As amended this section is as follows, c. 8, 21 Stat. 4:

"SEC. 5440. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

The text of §§ 2347, 2348, 2349 and 2350, which provide for the sale of coal lands belonging to the United States, is as follows:

"SEC. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register or the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

"SEC. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and im-

proving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

"SEC. 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvement shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

"SEC. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof, and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant."

Section 2351 provides for conflicting claims in designated cases, and thus concludes;

"The Commissioner of the General Land Office is authorized

to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections."

Section 4746 of the Revised Statutes, embraced in the title "Pensions," was amended by the act of July 7, 1898, 30 Stat. 718, c. 578. The section, as amended, is as follows, the amendments which the law of 1898 enacted being printed in italics:

"That every person who knowingly or willfully *makes or aids, or assists in the making* or in any wise procures the making or presentation of any false or fraudulent affidavit, *declaration, certificate, voucher, or papers, or writing purporting to be such,* concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions *or of the Secretary of the Interior,* or who knowingly or willfully *makes or causes to be made, or aids or assists in the making,* or presents or causes to be presented at any pension agency any power of attorney or other paper required as a voucher in drawing a pension, which paper bears a date subsequent to that upon which it was actually signed or *acknowledged by the pensioner, and every person before whom any declaration, affidavit, voucher, or other paper or writing to be used in aid of the prosecution of any claim for pension or bounty land or payment thereof purports to have been executed who shall knowingly certify that the declarant, affiant, or witness named in such declaration, affidavit, voucher, or other paper or writing personally appeared before him and was sworn thereto or acknowledged the execution thereof, when, in fact, such declarant, affiant, or witness did not personally appear before him or was not sworn thereto or did not acknowledge the execution thereof,* shall be punished by a fine not exceeding five hundred dollars or by imprisonment for a term of not more than five years."

On behalf of the various defendants motions to quash the indictment were filed, which the court granted. The grounds of demurrer were substantially the same, many being addressed to technical attacks upon the sufficiency of the indictment, but in each of the motions the validity of the indict-

ment was assailed upon the ground that neither count stated an offense within the statutes when properly understood.

The court in the reasons given by it for granting the motions to quash substantially held as follows:

1st. That the first count related exclusively to cash entries of coal lands under § 2347, Rev. Stat. That under this section no affidavits or papers were required other than the application to purchase, and therefore that all the allegations of the count respecting false and fictitious affidavits, papers, etc., related to documents required solely by the rules and regulations of the Land Department, which, not being expressly authorized by the statute, could not form the basis of a criminal conspiracy. The papers were therefore put out of view.

2d. That the coal land statutes did not prohibit one who was qualified to enter coal lands from making a cash entry of such lands in his own name, ostensibly for himself but really for the benefit of another, who was disqualified to directly make the entry, even although the ostensible entryman in making the purchase in his own name was really acting as the agent of the disqualified person, paid the price of the land with the money of such disqualified person, and made the entry under an obligation, on the completion of the purchase from the United States, to transfer the land to such disqualified person.

3d. From the import of the coal land statutes thus announced it was decided that a conspiracy to acquire coal lands from the United States by the means stated was not a violation of § 5440, as the acts alleged did not constitute a defrauding of the United States within the meaning of the word defraud as used in the second clause of the section, because that word must be interpreted in a restricted sense, and be given only its assumed common-law significance, and could not be used so as to embrace acts not expressly forbidden by law, upon the theory that their performance was contrary to a public policy which it might be assumed caused the enactment of the statutes.

4th. It was directly held that the conclusions just stated were not in conflict with a previous adjudication of this court construing the coal land laws, as the decision had been rendered in a civil controversy and could not be extended and carried over so as to control the construction of the statute in a criminal prosecution, thus "spelling out" a crime where none was expressly declared in the statute.

5th. As to the second count, it was decided that § 4746 embraced only affidavits, etc., relating to pension and bounty land claims, and the charge of a conspiracy to commit a crime in violation of the section in question could not be based upon allegations of the use of false and fictitious papers, etc., in connection with entries of coal lands.

At the threshold our jurisdiction is questioned because it is asserted the case does not come within the act of March 2, 1907.[1] The grounds of this contention are as follows:

First. That the court below merely held that the facts charged in the indictment were not within the statute, and therefore the indictment and not the statute was interpreted or construed.

Second. Because in any event the court below did not construe, but merely interpreted, the statutes.

As to the first ground, we dispose of it simply by saying that the analysis which we have hitherto made of the decision of the court below demonstrates that the contention is devoid of all merit.

In support of the second ground, it is insisted that the construction of a statute is one thing and its interpretation another and different thing. That abstractly there may be a difference between the two terms is not denied in argument by the United States, and finds support in works of respectable authority.

But, conceding the abstract distinction, and granting for the sake of the argument only that the conclusion of the

[1] The act is reproduced in full in note to p. 398, *post*.

court below might properly be classed, abstractly speaking, as an interpretation and not a construction of the statute, we think the contention without merit. It may not be doubted that in common usage interpretation and construction are usually understood as having the same significance. This was aptly pointed out in Cooley's Constitutional Limitations, 6th edition, where, after stating the theoretical difference, it is observed (p. 51): "In common use, however, the word construction is generally employed in the law in a sense embracing all that is properly covered by both, when each is used in a sense strictly and technically correct." We think, when the context of the act of March 2, 1907, is taken into view, and the remedial character of the act is given due weight, it becomes apparent that the word "construction" is employed in the statute in its common signification, and hence includes both construction and interpretation, although there may be an abstract difference between them. This being so, it follows that we have jurisdiction to review the action of the court in quashing the indictment.

Putting aside for the moment technical objections to the sufficiency of the indictment, it is conceded by both sides that if the statutes which the court below construed be given the meaning which the United States by the assignments of error assert is the correct one, an offense against the United States was stated in both counts of the indictment. The construction of the statutes, therefore, is the real question for decision. We propose to examine the statutes applicable to each count separately, and in doing so to weigh the conflicting contentions urged in argument bearing on the question of the true construction. We reserve, however, for final consideration various contentions relating merely to the construction of the indictment as a pleading, by which the United States contends that the court below was wrong, even, if for the sake of argument, it be assumed that its construction of the statutes was right and by which the defendants in error contend that the order quashing the indictment was right, even if the court was

wrong in its view of the law, because of defects in the indictment.

1. *The first count.*

This count requires us to consider only the conspiracy provision, § 5440, and the coal land provisions, §§ 2347, 2348, 2349 and 2350. As the applicability of § 5440 to the facts charged largely depends upon whether those acts were forbidden by the sections last mentioned, we proceed first to their consideration. Under these sections the question is, Do they prohibit a person who is disqualified from acquiring additional coal lands from the United States, because he has already purchased the full quantity permitted by law, from employing one, who would be qualified if he made any entry of coal land, in his own behalf, to make such entry ostensibly for himself but really as agent for the disqualified principal to pay for the land with money of such principal under the obligation, when the title has been obtained by purchasing from the United States, to turn over the land purchased to the concealed and disqualified principal? That the statute does expressly prohibit such a transaction we think is foreclosed by a previous decision of this court. Before coming to so demonstrate, however, in view of the contrary conclusion reached by the court below and the earnestness with which the correctness of that conclusion has been pressed at bar, we shall briefly consider the subject upon the hypothesis that it is open and not foreclosed. Beyond question, by § 2347, Rev. Stat., everyone possessing the qualifications of age and citizenship therein stipulated is entitled, upon application and on payment of the price fixed by law, to purchase in his own behalf one hundred and sixty acres of coal land, and every association of persons possessing the qualifications therein mentioned is entitled to purchase three hundred and twenty acres of such land. This right, however, to thus purchase is not uncontrolled, since it is limited by the § 2350, saying:

"The three preceding sections shall be held to authorize only one entry by the same person or association of persons;

and no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions. . . ."

The express command that the preceding sections shall be held to authorize only one entry by the same person or association of persons causes the grant to purchase not to embrace more than one entry by the same person, and as the right to purchase the coal land did not exist except by the authority conferred by the statute, it follows that the express provision excluding the right to do a particular act is both, in form and substance, a prohibition against the doing of such act. To hold that this prohibition does not exclude the existence in a disqualified person of a power to employ an agent to make a second entry, to furnish him with the money to pay for the land, under an obligation when he has bought from the United States to transfer the land to the disqualified person, would require us to say that the power was given to do that which the statute, in express terms, declares shall not be done. In other words, it would compel us to decide that an act done for a disqualified person by an agent acting for him and for his exclusive benefit was not the act of the disqualified principal. But this would be to nullify the prohibition upon the inconceivable hypothesis that the act of a duly authorized agent was not the act of his principal. To escape this impossible result it is insisted in argument that where a person qualified to purchase buys in his own name, without disclosing that he is a mere agent for a disqualified person, as he, the agent, thereby exhausts his individual right, the purchase must be treated as his and not that of the undisclosed principal. This, however, does not change the situation, but simply seeks to avoid it by the statement of a distinction without a difference, since it again but reads the prohibition out of the statute by

causing it to be inoperative if the disqualified person elects to do by another, his agent, that which the statute forbids him to do. True, the statute imposes no limitation on the right of a purchaser who has acquired coal land from the United States to sell the same after he has become the owner of the land. The absence, however, of a limitation on the power to sell after acquisition affords no ground for saying that the express prohibition of the statute against more than one entry by the same person should not be enforced according to its plain meaning. This clearly follows, since the right to sell that which one has lawfully acquired neither directly nor indirectly implies the authority to unlawfully acquire in violation of an express prohibition.

It is elaborately argued that the laws as to the sale of coal lands were originally embraced in the general statutes regulating the disposition of mineral lands, in which there were no limitations whatever as to the number of entries that a single entryman might make. With this genesis in mind it is urged that the sole purpose of the prohibition forbidding more than one entry by the same person, inserted in the coal land laws when that subject came to be separately dealt with, was to secure to every citizen the right if he chose to make one entry; in other words, to prevent the monopolization by one person by means of many entries of the whole or a vast part of the coal fields belonging to the United States. From this it is insisted the prohibition forbidding more than one entry by the same person should not be held to embrace an entry made by a qualified person for the benefit and as the agent of a disqualified one when the qualified person did not disclose the fact that he was acting as an agent. Conceding for the sake of argument the premise, we do not perceive its relevancy. That is to say, we do not comprehend how such concession lends support to the proposition that the prohibition against more than one entry by the same person should be disregarded by allowing more than one entry by the same person, if only that person chose, after making one entry in his own name,

to cause other and subsequent entries *ad libitum* to be made for his benefit by his agent with his money and for his exclusive account.

But if the mind could bring itself upon grounds of the supposed public policy of the statute to disregard the prohibition which it expressly contains, the argument here advanced, instead of conducing to that result, leads directly to the contrary. The purpose of the prohibition being, as the argument insists, to keep open the opportunity to every citizen to make one entry for himself, thus discouraging monopoly, it is obvious that that public purpose would be frustrated by allowing a person to make one entry in his own name and thereafter as many as he chose through his agents and for his exclusive benefit. It is a misconception to assume that there is any real identity between a purchase made by a qualified person in his own name and for himself with a purchase made by such person ostensibly for himself but really as the agent of a disqualified person. In the one case the person securing coal land from the United States for himself is free to dispose of the land after acquisition as he may deem best for his interest and for the development of the property acquired. In the other case the ostensible purchaser acquires with no dominion or control over the property, with no power to deal with it free from the control of the disqualified person for whose benefit the purchase was made.

And the legislation of Congress subsequent to the coal land laws indicates that Congress contemplated, in enacting the prohibition against more than one entry, the distinction between an entry made by one for himself, with the full power of disposition after entry, and an entry made by one ostensibly for himself but in reality for another. Thus, under the timber culture act of June 14, 1878, c. 190, 20 Stat. 113, which conferred authority upon citizens of the United States, or persons who had declared their intention to become such, to make one entry of not exceeding one quarter-section of land for the cultivation of timber, the statute was sedulous to require

that the person desiring to hold and cultivate the land should, at the time of making his entry, swear in his application that his filing and entry was made for his own exclusive use and benefit.

And the public policy lying at the foundation of the prohibition against an entry of land for the conceded benefit of another, whilst leaving full power of disposition in one who acquired the land in compliance with the statute, was pointed out in *United States* v. *Budd*, 144 U. S. 154, where, in considering the timber and stone act of June 3, 1878, c. 151, 20 Stat. 89, it was said (p. 163):

"The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the Government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If when the title passed from the Government no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied."

We shall not further pursue the analysis, as we think it is patent that the whole argument rests upon a plain disregard of the prohibition which the statute contains or seeks to render that prohibition nugatory by contradictory assumptions; that is to say, by assuming that things which are one and the same are wholly different, and on the other hand by asserting that things which are different are one and the same. This is said because such is the result of the contention that a purchase made by one through his agent is in legal effect a different thing from a purchase made by the principal, and on the other hand by the proposition that a purchase made by one for his own account is not different from a purchase made by the same person, not for his own account but for another.

But, as we have hitherto observed, the review of the contentions as an original question was not essential, because their want of merit affirmatively appears from a prior adjudication of this court. The case referred to is *United States* v. *Trinidad Coal Company*, 137 U. S. 160. The United States sued to

annul certain patents to coal lands on the ground that the land had been purchased by officers and employés of a corporation when the corporation itself was disqualified, because it had already made one entry. The court below had sustained a demurrer to the bill. Its decree was reversed and it was expressly decided that the entries made both by the officers of the corporation and its employés were void. The contention was urged that the employés, having each a right to make an entry for his own account, it was not unlawful to do so for the benefit of the corporation. This was expressly negatived, the court saying (p. 167):

"It is true, in the present case, that some of the persons who made the entries in question were not, strictly speaking, members of the corporation but only its employés. But as they were parties to the alleged scheme, and were, in fact, agents of the defendant in obtaining from the Government coal lands that could not rightfully have been entered in its own name, that circumstance is not controlling. . . . There is, consequently, in view of all the allegations of the bill, no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained, because, if the facts admitted by the demurrer had been set out in the papers filed in the Land Office, the patents sought to be cancelled could not have been issued without violating the statute. The defendant would not have been permitted to do indirectly that which it could not do directly."

Because the statute was thus construed in a civil cause affords no reason for saying that the authoritative construction of the statute is not to be applied in a criminal case. It is true that in the reasoning of the opinion the public policy upon which the prohibition of the statute was founded was pointed out, but this does not justify the contention that the decision was rested, not upon the prohibition, but upon public policy alone.

The contention that the rules and regulations of the General Land Office or decisions made thereunder have recognized

the right of a qualified person to enter coal lands in his own name, ostensibly for himself but really for a disqualified person, under the obligation to transfer the land after purchase to such person, we think finds no semblance of support either in the rules and regulations or in the decisions of the Department.

The meaning of the coal land statutes being thus fixed, the consideration of the conspiracy statute, § 5440, Rev. Stat., is free from difficulty. It will be observed that the section embraces two classes of conspiracies, the first "to commit any offense against the United States" and the other "to defraud the United States in any manner or for any purpose." The count we are now considering, it is not disputed, was framed upon the second clause. The proposition urged in argument that a charge of the commission of crime cannot constitutionally be predicated upon the averment of a conspiracy to defraud under the second clause, unless the acts charged were antecedently made criminal, is without merit and is foreclosed by *Hyde* v. *Shine*, 199 U. S. 62, wherein it was expressly held that a prosecution would lie upon the charge of a conspiracy to obtain by fraudulent practices public lands of the United States. And indeed the ruling in that case was but the reiteration of the prior rulings in *United States* v. *Hirsch*, 100 U. S. 33, and *Dealy* v. *United States*, 152 U. S. 539.

The contention that the word "defraud" must be confined to its common-law significance, and hence cannot embrace the acts here charged, is without merit, even if we concede for the sake of argument that the word has a common-law meaning, and that that meaning would be impelled if the word stood alone in the statute. This follows because the argument rests upon the assumption that the word "defraud" stands alone in the statute, and ignores the broader meaning which must result from the words "in any manner or for any purpose," by which the word "defraud" is accompanied in the statute. Besides, the contention is foreclosed by *United States* v. *Trinidad Coal Company*, where transactions of the very

nature of those here charged were declared to be a fraudulent obtaining of the lands of the United States, and indeed transactions generally of a like character formed the subject-matter of the ruling in *Hyde* v. *Shine*.

The unsoundness of the argument that as when the prohibited entries were made the price of the lands was paid to the United States, therefore the United States could not have been defrauded, is refuted by its mere statement. If it were true, then in every case, however flagrant, where the lands of the United States were procured in violation of express prohibitions of law, the element of fraud would cease to exist by the mere payment of the price; that is to say, the successful operation of the fraud would deprive the transaction of its fraudulent character. But the inherent weakness of the contention need not be further pointed out, because its want of merit is conclusively established by the ruling in *Hyde* v. *Shine*, where a like contention was decided to be without foundation.

The attempt to distinguish this case from *Hyde* v. *Shine*, upon the theory that there the parties obtaining the land were disqualified whilst in this they were not, rests upon the misconstruction of the coal land statutes which we have already pointed out, a misconstruction which we have seen led the court, in its ultimate conclusion, erroneously to say that the entrymen who acted as the agents of the disqualified persons or corporation were not forbidden by the statute to act as they did, because they might have made an entry for themselves.

Nor do we deem it necessary to do more than briefly refer to the elaborate statements at bar concerning constructive crimes and the fear which also found expression in the opinion below, that if the words to defraud in any manner or for any purpose receive a broad significance charges of crime may be hereafter predicated upon acts not prohibited and innocuous in and of themselves, and which, when they were committed, might have been deemed by no one to afford the basis of a criminal prosecution. It will be time enough to

consider such forebodings when a case arises indicating that the dread is real and not imaginary. That they are mere phantoms when applied to the case here presented results from the obvious consideration that the conspiracy charged had for its purpose the doing of acts which were in clear violation of the direct prohibition of the coal land laws, a prohibition whose meaning and effect had been unmistakably announced and applied by a decision of this court rendered many years before the formation of the conspiracy here charged. The cogency of these considerations becomes more pointedly manifest when it is borne in mind that the purpose and necessary effect of the conspiracy complained of was to obtain the lands of the United States by the suppression of facts which, had they been disclosed, would have rendered the acquisition impossible.

2. *The second count.*

The court below considered that the second count was framed solely upon the first clause of § 5440; that is, it held that the count charged the formation of a conspiracy to commit an offense against the United States through a violation of § 4746, and because of the construction given to that section it was decided that the count stated no offense. In testing the count in this aspect we must primarily fix the meaning of § 4746, as violations of that section were charged to have been the subject of the alleged conspiracy.

It was conceded by the United States in argument, and indeed it could not have been in reason denied, that the section in question, as originally embodied under the head of pensions in the Revised Statutes, related exclusively to pension or bounty land claims. No crime, therefore, could have been predicated under the original section upon the affidavits or other papers used in making the coal land entries as alleged in the indictment. The contention, therefore, as now made by the United States, to sustain the second count, rests upon the proposition that the amendment to § 4746 by the act of July 7, 1898, had the effect of bringing within that section sub-

jects to which, prior to the amendment, the section in no manner related. Turning to the text, which we have previously quoted, with the provisions incorporated by the amending act, printed therein in italics, it will be observed that every enumeration or description of new acts or papers in addition to those embraced in the section prior to the amendment, alone concern pension or bounty land claims. The argument as to the broad scope of the statute in its present form rests therefore alone upon the proposition that because the amendatory statute in repeating the original words, viz., "concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions," adds to them the following, viz., "or of the Secretary of the Interior," therefore the statute now embraces not only acts done in connection with pension or bounty land claims, but all acts of the prohibited character as to any matter coming before the Secretary of the Interior, or subject to so come, entirely without reference to whether they were in pension or bounty land claims or proceedings. But to adopt this latitudinarian construction would cause the statute to create a multitude of new and substantive crimes, wholly disconnected with claims for pensions or bounty land, with which latter it was alone evidently the purpose of the original as well as the amendatory statute to deal. We think to state the proposition is in effect to answer it. When the original text and the amendments which were made are taken into view, the conclusion inevitably follows that the purpose of the amendment was but to more specifically define the pension or bounty land papers, etc., with which the statute was concerned, and to enlarge the operation of the statute in respect to such papers so as to cause it to be criminal to use the pension or bounty land papers, etc., to which the statute refers, as well before the Secretary of the Interior as before the Commissioner of Pensions. In other words, that the only purpose of the amendment was to more fully deal with the subjects with which the provision which was amended

dealt, and not by way of the amendment to legislate concerning every conceivable subject coming within the jurisdiction of the Secretary of the Interior. To otherwise hold would not only violate the most elementary rules of construction, but would require the treating as superfluous the new words of enumeration concerning pension matters which the amendatory act expressed. This follows, because if the adding by way of amendment of the words "or of the Secretary of the Interior" contemplated bringing within the criminal inhibitions of the statute every act of a like nature to those forbidden done in connection with every subject within the jurisdiction of the Secretary of the Interior, then the new enumerations made in the amendment were wholly unnecessary, because without enumeration they would have been embraced in the statute as amended. Indeed, if the purpose intended to be accomplished by the amendment had been to embrace all acts of the prohibited nature as to every subject within the jurisdiction of the Secretary of the Interior, no reason can be suggested why the new legislation should have taken the form of a mere amendment to the section of the statutes which was alone concerned with pension and bounty land claims. Construing the statute as relating only to the subject of pension and bounty land claims coming within the authority of the Commissioner of Pensions or the Secretary of the Interior, it follows that a violation of its provisions could not arise from the acts charged in the indictment concerning the coal land entries.

Finally we come to the two contentions of the Government which we have hitherto temporarily put aside, and to the various contentions on the part of the defendants in error, insisting either that the court below misconstrued the indictment, or that there were such defects in the indictment that it was rightly quashed, irrespective of the construction of the statutes which led the court below to do so. But we do not think we have jurisdiction on this writ of error to consider these questions. The right of the United States to come di-

rectly to this court because of the construction of the statutes by the court below, as we have previously said in considering the question of jurisdiction, is solely derived from the act of 1907, the text of which is printed in the margin.[1] That act, we think, plainly shows that in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case.

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[1] CHAP. 2564.—An Act Providing for writs of error in certain instances in criminal cases.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That a writ of error may be taken by and on behalf of the United States from the District or Circuit Courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

"The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

"Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.

"Approved, March 2, 1907." (34 Stat. 1246.)

We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same. It follows from what we have said that the court erred in its construction of the statutes by which it quashed the first count of the indictment, and that from a rightful construction of the statutes no error was committed in quashing the second count. The order, therefore, quashing the first count is reversed and that quashing the second count is affirmed, and the case is

Reversed and remanded for further proceedings in conformity to this opinion.

UNITED STATES *v.* FORRESTER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 287. Argued October 22, 23, 26, 1908.—Decided December 14, 1908.

United States v. *Keitel*, *ante*, p. 370, followed; the rule therein stated as to fraudulent entries of coal lands under §§ 2347–2350, Rev. Stat., by qualified persons for the benefit, and as agents of, disqualified persons, applies not only to cash entries, but also to entries under preferential rights by persons opening and developing mines on the lands entered.

The preferential right under §§ 2348, 2349, Rev. Stat., is not in and of itself the equivalent of an entry uncontrolled by the prohibitions expressed in the statutes relating to entries of coal lands, but is simply

a privilege to make the statutory entry of a particular tract in preference to others.

157 Fed. Rep. 396, reversed.

THE facts are stated in the opinion.

The Attorney General and *The Solicitor General*, with whom *Mr. Edwin W. Lawrence*, Special Assistant to the Attorney General, was on the brief, for the United States.[1]

Mr. John M. Waldron, with whom *Mr. G. Q. Richmond* was on the brief, for defendants in error.

MR. JUSTICE WHITE delivered the opinion of the court.

A demurrer having been sustained to an indictment found against the present defendants in error, this writ of error was prosecuted on behalf of the United States under the authority of the act of March 2, 1907 (34 Stat. 1246).

The five persons named as defendants were accused of having at Durango, Colorado, entered into an unlawful conspiracy to defraud the United States of more than thirty-five hundred acres of coal lands, eighteen tracts of which land were particularly described. The purpose and object of the conspiracy was averred to have been the obtaining of the title to the lands for a Colorado corporation, styled the Calumet Fuel Company, in a quantity far greater than the corporation could lawfully acquire. The lands were averred to be "all then and there lands of the United States, chiefly valuable for the deposit of coal therein, situated within said land district, and open to entry and purchase as coal lands at the said land office, under the laws of the United States relating to the entry and sale of coal lands, and the rules and regulations then in force, which had theretofore been made under authority of said laws by the Commissioner of the General Land Office with the approval of the Secretary of the Interior." The means by which

[1] For abstract of argument see *United States* v. *Keitel*, *ante*, p. 372.

the lands were to be fraudulently acquired were substantially as follows: Persons qualified to enter coal lands were to be procured, who would be furnished by the conspirators or the corporation with the means to purchase such lands upon antecedent agreements that the lands when acquired should be conveyed as directed by the conspirators, each entryman to make the application to purchase and the final entry, and in so doing to make affidavit, in which among other things it would be falsely stated that the entryman was making the entry for his own use and benefit, and not directly or indirectly for the use or benefit of any other person, whereby the local land officers would be deceived, etc. Forty-nine separate overt acts were charged to have been done in furtherance of the conspiracy. In six of the paragraphs relating to the commission of overt acts the making of affidavits at purchase concerning six of the eighteen tracts enumerated in the body of the indictment was alleged, and the affidavits were set forth verbatim. In each affidavit, besides asserting citizenship, no previous exercise of a right to purchase, and stating the character of the lands, the applicant declared that he had expended a small sum (in one instance fifty dollars, in the others fifteen or twenty dollars) in developing a mine on the particular tract, that the applicant was in actual possession of the mine, and that the entry was made for his own use and benefit and not indirectly for the use or benefit of any other party. The remaining overt acts concerned the borrowing of the money to make the purchases, the furnishing of the money to the entrymen to make the payments, the execution of deeds by the entrymen, the surveying of certain of the lands, an affidavit as to the distance of some of the lands from a completed railroad, etc.

Among other grounds of demurrer to the indictment was one asserting that no offense was stated therein. The demurrer was sustained "for reasons given on consideration of the first count in case No. 2022, *United States of America* v. *F. W. Keitel et al.*" The decision thus made the basis of the

ruling was that reviewed in case No. 286, which we have just decided, *ante*, p. 370. As pointed out in the opinion in that case, the court below, in quashing the indictment there considered, treated it as relating solely to cash entries made under the provisions of § 2347, Rev. Stat. If the indictment in this case is also to be so treated, it clearly follows from the ruling which we have made in the previous case that the court erred in sustaining the demurrer. But it is insisted on behalf of the defendants in error that this case differs from the *Keitel case*, because the conspiracy here charged did not concern cash entries so called, but embraced only entries of coal lands made by persons who had secured by the opening and developing of mines and the filing of declaratory statements as provided in § 2349 preferential rights of entry. If it be certain that the court below had construed the indictment as solely relating to strictly cash entries, then, under the views expressed in the *Keitel case*, the contention now made as to the true significance of the indictment would not be open upon this record. It does not, however, follow that the court below interpreted the indictment here as relating solely to cash entries, because it referred to the reasons given for quashing the first count of the indictment in the *Keitel case* as affording the basis for its action in sustaining the demurrer to the indictment in this. We say this because it may well be that the court deemed that the construction which it gave to the statutes as applied in the *Keitel case* to cash entries was applicable, even although the indictment in the case was concerned with preferential entries. In any event, in applying the ruling which it made in the *Keitel case* to this, the court below must have construed the conspiracy charged in the indictment as relating to all or any of the following classes: 1, to the procuring of the making of original cash entries by qualified entrymen in their own names while secretly acting as agents for a disqualified person; 2, to the procuring of qualified persons to take possession and improve coal lands and to file declaratory statements, with the ultimate object and purpose of entering the lands for the

benefit of disqualified persons; and, 3, to cause persons in whose favor preference rights to enter coal lands had arisen to exercise such rights by purchasing the land ostensibly for themselves but in reality for the benefit of disqualified persons, and to pay for the same with money furnished by those persons under an obligation to convey the land to them.

The first two of these classes are so obviously controlled by the construction of the statute which we have just announced in the *Keitel case* as to demonstrate beyond contention that the court below erred in its ruling on the demurrer. The third class is, we think, also necessarily governed by the construction which we have given the statute in the *Keitel case.* It being settled in that case that the prohibition against more than one entry of coal lands by the same person prohibits a qualified person from entering such lands apparently for himself, but in fact as the agent of a disqualified person, it follows that the prohibition embraces an entry made by one through the procurement and for the benefit of another, although the entryman had previously initiated a preference right to enter the land for his own account. The mere preference right obtained as the result of taking the steps enumerated in §§ 2348, 2349, Rev. Stat., including the filing of the declaratory statement, is, as described in § 2348, simply "a preference right of entry, under the preceding section, of the mine so opened and improved." Turning to § 2347, the preceding section referred to, it will be seen that the entry therein provided for is the cash entry made by applying to purchase the land, and contemporaneously therewith making payment for the same, which entry, as we have decided in the *Keitel case,* excludes the right of a qualified person to make the entry in his own name with the money and for the benefit of a disqualified person. When it is considered that the preference which the statute allows is but a right within the time limited in the statute to make the entry authorized by § 2347, it cannot be held, without destroying that section, that the obtaining of such mere right of preference authorized the making, not only of an

entry which the statute permitted, but as well one which the statute forbade. All the argument which seeks to demonstrate that the provision which gives the right to be preferred in making an authorized entry, endows with the authority to make an illegal because prohibited entry, rests upon a mere misconception of the nature and character of the right of preference for which the statute provides. The argument assumes that the right of preference is in and of itself the equivalent of an entry, not controlled by the prohibition which the statute expresses, when in truth and in fact the right of preference is merely a privilege given to make the statutory entry of a particular tract of coal land in preference to others. And the misconceptions upon which the argument rests concerning the nature and character of the preference right for which the coal land statutes provide when duly appreciated at once demonstrates the irrelevancy of previous rulings of this court concerning the right of an entryman after entry or after the doing of acts made by the statute equivalent to an entry to dispose of the land embraced within the entry.

It follows from the construction which we have given the statutes in the opinion delivered in the *Keitel case*, No. 286, just decided, and for the reasons here stated, that the court below erred in sustaining the demurrer to the indictment.

Reversed and remanded for further proceedings in conformity to this opinion.

UNITED STATES *v.* HERR *et al.*

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 291. Argued October 22, 23, 26, 1908.—Decided December 14, 1908.

Decided on the authority of *United States* v. *Keitel*, *ante*, p. 370, and *United States* v. *Forrester*, *ante*, p. 399.

157 Fed. Rep. 396, reversed.

THE facts are stated in the opinion.

The Attorney General and *The Solicitor General*, with whom *Mr. Edwin W. Lawrence*, Special Assistant to the Attorney General, was on the brief, for the United States.[1]

Mr. B. W. Ritter and *Mr. N. C. Miller* for defendants in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The court below sustained a demurrer to the indictment in this case, for the reasons which caused it to quash the first count of the indictment in the case of *United States* v. *F. W. Keitel*, *ante*, p. 370.

The indictment alleged a conspiracy to defraud the United States of coal lands in violation of § 5440, Rev. Stat. The conspiracy charged was, speaking in a broad sense, of the same general nature as that set forth in the first count of the indictment in the *Keitel case*. In the argument at bar, however, counsel differ as to the correct construction of the indictment here under consideration, the United States contending that the conspiracy to which the indictment related concerned entries based upon preferential rights, while on the part of the defendants in error it is insisted that the conspiracy related to only cash entries. In view, however, of our ruling in the *Keitel case*, No. 286, and the reasoning by which the decision in that case was held to be controlling in *United States* v. *Forrester et al.*, No. 287, just decided, the contentions referred to are irrelevant on this writ of error.

As it results from the opinions in the cases just referred to that the court below erred in sustaining the demurrer to the indictment, its order so doing must be reversed.

Reversed and remanded for further proceedings in conformity to this opinion.

[1] For abstract of argument see *United States* v. *Keitel et al.*, *ante*, p. 372.

UNITED STATES *v.* HERR.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 292. Argued October 15, 1908.—Decided December 14, 1908.

Decided on the authority of *United States* v. *Keitel, ante,* p. 370. 157 Fed. Rep. 396, affirmed.

THE facts are stated in the opinion.

The Attorney General and *The Solicitor General,* with whom *Mr. Edwin W. Lawrence,* Special Assistant to the Attorney General, was on the brief, for the United States.[1]

Mr. B. W. Ritter and *Mr. N. C. Miller,* with whom *Mr. Edgar Buchanan* was on the brief, for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The indictment in this case contains two counts, each purporting to charge the commission of an offense in violation of Rev. Stat., § 4746, as amended.

The substantial charge in each count is that the defendant unlawfully procured a named person, in connection with a preferential entry of coal lands, to make and present to the Secretary of the Interior, by and through the register and receiver of the United States Land Office at Durango, Colorado, an affidavit at purchase, which was false and fraudulent in specified particulars. A demurrer to the indictment was filed and the validity of each count was assailed on many grounds. In disposing of the demurrer it was assumed by the District

[1] For abstract of argument see *United States* v. *Keitel et al., ante,* p. 372.

Judge, as conceded by the Government, that the affidavit was not, in fact, presented to the Secretary of the Interior, but was simply filed in the local land office.

The demurrer was sustained, "for reasons given on consideration of the second count in the indictment," in the case against *F. W. Keitel et al.* The case at bar comes within the principles applied by us in No. 287, just decided, where, in passing upon the rulings made below in the *Keitel case*, it was held that the second count of the indictment there considered, when the statute was correctly construed, stated no offense. The judgment below, which involved a similar ruling, is therefore

Affirmed.

HARRIMAN *v.* INTERSTATE COMMERCE COMMISSION.
KAHN *v.* INTERSTATE COMMERCE COMMISSION.
INTERSTATE COMMERCE COMMISSION *v.* HARRIMAN.

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

Nos. 315, 316, 317. Argued November 3, 4, 1908.—Decided December 14, 1908.

The primary purpose of the Interstate Commerce Act is to regulate interstate business of carriers, and the secondary purpose, that for which the commission was established, to enforce the regulations enacted by it, and the power to require testimony is limited, as is usual in English-speaking countries, to investigations concerning a specific breach of the existing law; this power is not extended to mere investigations by provisions in any of the amendatory acts in regard to annual reports of interstate carriers, or of the commission, or for the purpose of recommending legislation.

Quære whether Congress has unlimited power to compel testimony in regard to subjects which do not concern direct breaches of law, and whether, and to what extent, it can delegate such power.

THE facts are stated in the opinion.

Mr. John C. Spooner and *Mr. John G. Milburn*, with whom *Mr. Robert S. Lovett* was on the brief, for Edward H. Harriman:

Congress has conferred upon the Interstate Commerce Commission authority to investigate, and in connection therewith compel the testimony of witnesses, only in aid of its duty to execute and enforce the provisions of the act to regulate commerce.

The commission is a body of limited powers derived exclusively from the act to regulate commerce. It is a purely administrative body charged with specific administrative duties and invested with specific powers. *Kentucky Bridge Co.* v. *L. & N. R. R. Co.*, 37 Fed. Rep. 567. The restricted operation of the act limits the powers of the commission. Neither the province of the act or the commission is coextensive with interstate commerce or interstate transportation. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290.

An analysis of the act shows that the commission is merely an administrative agency for the enforcement of the provisions of the act to regulate commerce.[1]

The act is primarily an enumeration of particular duties imposed upon common carriers; of particular acts on their part which are prohibited; and of particular duties and powers relating thereto conferred upon the commission. The duties it imposes and the acts it prohibits are the only duties and acts of common carriers with which the act is concerned. It is an act of details and not of generalities. Every duty it imposes is definitely specified, and a carrier which observes them complies with the act in full. The primary function of the commission is to enforce the performance of those duties and prevent the doing of the prohibited acts, and to that end the necessary machinery of investigation, hearings on complaints,

[1] The brief contains an elaborate analysis of the act, section by section.

and judicial proceedings is provided. With respect to other duties or acts of carriers not regulated by the act, the commission has no function to perform and it is invested with none. Congress simply has not seen fit to regulate those acts and duties or to extend to them the functions of the commission. Having defined certain duties and prohibited certain acts the commission is created as an administrative body, not with a general supervisory power over common carriers subject to the act in all their operations, transactions and relations, but generally speaking, with a power of supervision limited to the specific requirements of the act, and with power to enforce those requirements and determine complaints made of violations of the act after notice, answer and hearing.

The business of a common carrier covered by the act is the business of transportation;—the movement of traffic; reasonable, equal and public rates; equal facilities; and the functions of the commission are limited to those aspects of its business. The language of the act is entirely inappropriate to the creation of a power of investigation with the aid of compulsory testimony coextensive with a visitatorial power over all the acts, transactions and relations of a corporation, although a corporation engaged in part in interstate transportation.

There is nothing in § 20 or § 21 enlarging the power of the commission to investigate or warranting the contention that Congress has conferred upon the commission all the "inquisitorial powers of Congress" with respect to interstate commerce.

The cases cited in support of the claim of an inquisitorial power beyond the enforcement of the provisions of the act do not sustain it. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25; *Interstate Commerce Commission* v. *C. N. O. & T. P. Ry. Co.*, 167 U. S. 479; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, discussed and said not to sustain the power contended for by counsel for the Interstate Commerce Commission.

Mr. Walker D. Hines, with whom *Mr. Paul D. Cravath* was on the brief, for appellant, Kahn:

The commission has no power to ask questions of persons not connected with carriers, except to ascertain whether or not the act has been obeyed. *Interstate Commerce Commission* v. *Reichmann*, 145 U. S. 237, 242.

The general power of the commission to inquire into the management of the business of common carriers does not authorize these questions.

The questions related to the private business of Kuhn, Loeb & Co., and not to the business of the Union Pacific.

The theory that under § 12 the commission has authority to go into the private side of transactions with a railroad company on the idea that both sides of the transaction—the railroad company's side and the opposite or private side—are both the railroad company's business, is opposed not only to the letter, but to the spirit, of the statute, and to the policy of our government. It is natural to permit an administrative board, created to supervise *quasi*-public corporations, to inquire in a purely administrative way into the affairs and papers of such corporations; but it is preposterous to permit such mere administrative inquiry to be extended into the affairs and papers of those private institutions with which the railroad company may do business.

The commission's authority to inquire into the management of the business of carriers is an authority to obtain information from carriers themselves, but not from private persons.

The commission's authority to require information from the carriers themselves does not extend to matters having no connection with the general subject-matter of the act to regulate commerce, and the questions asked Mr. Kahn have no such connection.

The commission has no power to make inquiries of private persons merely for the purpose of considering the propriety of recommending additional legislation when such questions have no relation to any inquiry as to violations of the act.

To create such a power in the commission is to give it, by unwarrantable implication, an inquisitorial power into private affairs over which it was never intended that the commission should have any supervision. The commission's investigating power is given "for the purposes" of the act. "The purposes" of the act are to be found alone in the requirements expressed in the act. Those requirements can be construed and understood and applied. To go beyond that is to go into a realm of endless speculation and uncertainty.

The commission's duty and authority are sufficiently broad and sufficiently difficult of effective and impartial discharge when confined to the things which Congress has required, and should not be extended to those things which Congress did not require, but which the commission may assume that Congress hoped to accomplish.

Mr. Frank B. Kellogg and *Mr. Cordenio A. Severance*, with whom *Mr. Henry L. Stimson* was on the brief, for Interstate Commerce Commission:

The Interstate Commerce Commission, in making this investigation, had all the power of a congressional committee of inquiry, so far as interstate carriers are concerned, and could inquire into the management of such interstate carriers and all the financial operations and business thereof, not only for the purpose of regulating rates, fares and charges as provided by the Interstate Commerce Act, but for the purpose of recommending additional legislation. See §§ 12, 20, 21 of the Interstate Commerce Act; *Interstate Com. Com.* v. *Brimson*, 154 U. S. 447, 474; *Interstate Com. Com.* v. *Railway Co.*, 167 U. S. 479, 506; *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 438.

The end which Congress is seeking to obtain by the Interstate Commerce Act, namely, the proper regulation of interstate commerce, being indisputably within its constitutional powers, and Congress, by the sections of the act hereinbefore quoted, having emphatically declared its opinion that an inquiry into

the financial operations of the carrier is a necessary and proper means toward achieving such an end, the courts will effectuate and not hinder the purpose of Congress.

The situation is even more serious than when a court is called upon to pass upon the constitutionality of a statute. In such a case the court will not set aside the statute unless the unconstitutionality exists beyond a reasonable doubt. *Legal Tender Cases*, 12 Wall. 531; *Trade-mark Cases*, 100 U. S. 96; *Nicol* v. *Ames*, 173 U. S. 514.

But the case now before the court goes even further. To uphold these appellants in their contumacy is to prejudge Congress and to hold that by no rational possibility could it legislate upon the subject-matter at issue; and this without permitting Congress, through the Interstate Commerce Commission, to obtain the facts upon which such legislation could properly be constitutionally based; and without permitting Congress itself after it shall have acquired such facts, within its constitutional powers of debate, to consider them. As to the power which entitles legislative committees to elicit information of the character here sought, see *In re Chapman*, 166 U. S. 668; *People* v. *Keeler*, 99 N. Y. 463; *People* v. *Sharp*, 107 N. Y. 427, and *Falvey & Kilbourn* v. *Massing*, 7 Wisconsin, 630, which lay down very clearly the rule.

This inquisitorial power of the Interstate Commerce Commission has been fruitfully used. An examination of the debates of Congress and decisions of the courts will show that it was upon information developed by the commission and reported to Congress, that the Elkins Law, the Safety Appliance Law, the Employers' Liability Act, and the Hepburn Act, were successively based; in other words, the inquisitorial work of the commission has been the basis of all congressional legislation affecting interstate carriers during the past twenty years.

The contention that the inquiry involved the private business of the appellants is no answer to the right of the commission to have the inquiry answered.

Of course, sales of property by directors to their railroad

company are not their private affairs; and any inquiry tending to show that the price of the property so sold was inadequate or fraudulent is not an inquiry into the private affairs of the directors. Nor is an inquiry into the reasons of the directors for withholding publication of a dividend, while they were engaged in private speculation in the stock on which the dividend was declared, an inquiry into the private affairs of those directors. Such transactions are no more private than the business of the railroad company is private.

But even if the transactions under inquiry had not concerned men who hold official positions in the company, but were transactions of purely private individuals, being, as they were, relevant to the subject-matter under inquiry by the commission, their privacy was no shield against the commission's probe. Wigmore on Evidence, § 2192; *Interstate Commerce Commission* v. *Baird,* 194 U. S. 46; *Burnham* v. *Morrissey,* 14 Gray, 226.

Within the sphere of inquiry entrusted to the Interstate Commerce Commission the power to investigate the truth has been deemed of such paramount importance to the public that even those privileges which usually maintain in a court of justice have been abolished by statute. No man can assert before the Interstate Commerce Commission or before a court, on an inquiry into matters within the purview of the Interstate Commerce Act, that his answer would tend to incriminate or degrade him; and his refusal to answer inquiries before that commission not only subjects him to proceedings for contempt, but is expressly made a crime (act of February 11, 1893; 27 Stat. L. 443).

Mr. Justice Holmes delivered the opinion of the court.

These are appeals; on the one side, from an order of the Circuit Court directing the appellants, Harriman and Kahn, to answer certain questions put during an investigation by the Interstate Commerce Commission, and, on the other, from

a denial of a like order as to two other questions, answers to which the commission had required.

In November, 1906, the Interstate Commerce Commission, of its own motion, and not upon complaint, made an order reciting the authority and requirements of the act to regulate commerce (Feb. 4, 1887, c. 104, 24 Stat. 379), and proceeding as follows: "And whereas it appears to the Commission that consolidations and combinations of carriers subject to the act, and the relations now and heretofore existing between such carriers, including community of interests therein, and the practises and methods of such carriers affecting the movement of interstate commerce, the rates received and facilities furnished therefor should be made the subject of investigation by the Commission to the end that it may be fully informed in respect thereof, and to the further end that it may be ascertained whether such consolidations, combinations, relations, community of interests, practises, or methods result in violations of said act or tend to defeat its purposes; It is ordered that a proceeding of investigation and inquiry into and concerning the matters above stated be, and the same is hereby instituted." A time and place was set for the first hearing, and the inquiry thus begun was continued for about two months, resulting in the report of July, 1907, entitled "Consolidations and Combinations of Carriers," etc. 12 I. C. C. R. 277.

In the course of the inquiry the appellant Harriman was called by the commission and testified as a witness. At the time of the transactions referred to he was a director and also the president and the chairman of the Executive Committee of the Union Pacific Railroad Company. The relations between the Union Pacific and other connecting roads, parallel or not, were under investigation and are set forth in the commission's report. It is enough to say that the Union Pacific Railroad Company is incorporated under the laws of Utah, and, as has been asserted and assumed, has power under the state laws to purchase the stock of other railroads, a power that it has

exercised on a large scale. Among other things, it bought 103,401 shares of the preferred stock of the Chicago and Alton Railway Company. These shares had been deposited with bankers, Kuhn, Loeb & Company, by their owners, under an agreement authorizing the bankers to sell them to any purchaser at such price and upon such terms as should be approved by Messrs. Stewart, Mitchell and the witness, Harriman. He was asked whether he owned any of the stock so deposited, and how much, if any. These questions, under the advice of counsel, he declined to answer.

Next he was asked with regard to stock of the Atchison, Topeka & Santa Fé Railroad Company, bought by the Oregon Short Line Railroad Company, another Utah corporation, the stock of which was owned by the Union Pacific, whether it was part of the stock that had been acquired previously by him and two others, and whether it or any part of it was owned by any of the three. After answering the first question, "I think not," he was stopped by his counsel and refused to answer further. Again, it appearing that the Union Pacific, in July, 1906, purchased 90,000 shares of Illinois Central Railroad stock from Messrs. Rogers, Stillman and the witness, he was asked whether that stock was acquired by a pool of the three, whether it was acquired with a view of selling it to the Union Pacific, and whether it or any part of it was bought at a much lower price than $175 a share with the intent just mentioned. These questions the witness declined to answer. It appearing further that Kuhn, Loeb & Company, who were the fiscal agents of the Union Pacific, had sold to it 105,000 shares of the Illinois Central stock on the same date, he was asked if he had any interest in these shares, and whether they were acquired by a pool for the purpose of selling them to the Union Pacific. These questions the witness declined to answer. Again, it appearing that the Union Pacific had purchased stock of the St. Joseph and Grand Island Railroad Company from the witness since the last-mentioned date, he was asked when he acquired the stock and what he paid for it, and again de-

clined to answer. Finally, after it had been shown that since July, 1906, the Union Pacific had bought a large amount of New York Central Railroad stock, the witness was asked whether any of the directors of the Union Pacific were interested directly or indirectly in this stock at the time when it was sold. An answer to this question also was declined. All these refusals to answer were persisted in after a direction to answer from the commission. The Circuit Court ordered them to be answered and Harriman appealed.

The petition of the Interstate Commerce Commission set forth two other questions which the witness refused to answer, and on which it asked the order of the Circuit Court. One was a general one, whether he was interested in any stocks bought between the nineteenth of July and the seventeenth of August that appreciated, and another, more specific, was whether he or any director bought any Union and [or] Southern Pacific in anticipation of a certain dividend, the suggestion being that announcement of the dividend was delayed for the directors to profit by their secret knowledge and that they did so. With regard to these the petition was denied, and the Interstate Commerce Commission appealed.

The appellant Kahn was a member of the firm of Kuhn, Loeb & Company. He also was asked whether any of the directors of the Union Pacific were the real owners of any of the shares of the Chicago and Alton Railroad deposited, as has been stated, with Kuhn, Loeb & Company, and sold to the Union Pacific. He was asked further in various forms whether the before mentioned 105,000 shares of Illinois Central stock, or any part of them, really belonged to or were held for any of the directors of the Union Pacific. And again, whether at the same time that he bought these shares he bought for Messrs. Harriman, Rogers and Stillman the stocks they sold at the same time that he sold his. Finally he was asked whether the 105,000 shares, and the 90,000 shares turned in by Stillman, Rogers and Harriman, were all bought through his instrumentality for a pool of which they and he were members, that

was operating in Illinois Central stocks for some months before July, 1906. All these questions he was directed by the commission to answer, but refused. The Circuit Court ordered him to answer, and he appealed.

Many broad questions were discussed in the argument before us, but we shall confine ourselves to comparatively narrow ground. The contention of the commission is that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the act of February 4, 1887, but to aid it in recommending any additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have a bearing upon any part of what it has in mind. The contention necessarily takes this extreme form, because this was a general inquiry started by the commission of its own motion, not an investigation upon complaint, or of some specific matter that might be made the object of a complaint. To answer this claim it will be sufficient to construe the act creating the commission, upon which its powers depend.

Before taking up the words of the statute the enormous scope of the power asserted for the commission should be emphasized and dwelt upon. The legislation that the commission may recommend embraces, according to the arguments before us, anything and everything that may be conceived to be within the power of Congress to regulate, if it relates to commerce with foreign nations or among the several States. And the result of the arguments is that whatever might influence the mind of the commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say only, legitimately influence the mind of the commission in the opinion of the court called in aid, still it will be seen

that the power, if it exists, is unparalleled in its vague extent. Its territorial sweep also should be noticed. By § 12 of the act of 1887, the commission has authority to require the attendance of witnesses "from any place in the United States, at any designated place of hearing." No such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court.

How far Congress could legislate on the subject-matter of the questions put to the witnesses was one of the subjects of discussion, but we pass it by. Whether Congress itself has the unlimited power claimed by the commission, we also leave on one side. It was intimated that there was a limit in *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 478, 479. Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt to make such a delegation anywhere in the act.

Whatever may be the power of Congress, it did not attempt, in the act of February 4, 1887, c. 104, 24 Stat. 379, to do more than to regulate the interstate business of common carriers, and the primary purpose for which the commission was established was to enforce the regulations which Congress had imposed. The earlier sections of the statute require that charges shall be reasonable, prohibit discrimination and pooling of freights, require the publication of rates, and so forth, in well-known provisions. Then, by § 11, the Interstate Commerce Commission is created, and by § 12, as amended by later acts, the commission has "authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is hereby authorized and required

to execute and enforce the provisions of this act." District attorneys to whom the commission may apply are to institute and prosecute all necessary proceedings for the enforcement of the act and for the punishment of violations of it; and "for the purposes of this act the commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation." Then comes the provision to which we already have called attention, by which a witness could be summoned from Maine to Texas, and then follow clauses for enforcing obedience to the subpœna by an order of court and for taking depositions, which do not need statement.

The commission it will be seen is given power to require the testimony of witnesses "for the purposes of this Act." The argument for the commission is that the purposes of the act embrace all the duties that the act imposes and the powers that it gives the commission; that one of the purposes is that the commission shall keep itself informed as to the manner and method in which the business of the carriers is conducted, as required by § 12; that another is that it shall recommend additional legislation under § 21, to which we shall refer again, and that for either of these general objects it may call on the courts to require any one whom it may point out to attend and testify if he would avoid the penalties for contempt.

We are of opinion on the contrary that the purposes of the act for which the commission may exact evidence embrace only complaints for violation of the act, and investigations by the commission upon matters that might have been made the object of complaint. As we already have implied the main purpose of the act was to regulate the interstate business of carriers, and the secondary purpose, that for which the commission was established, was to enforce the regulations enacted. These in our opinion are the purposes referred to; in other words the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice

of privacy is necessary—those where the investigations concern a specific breach of the law.

That this is the true view appears, we think, sufficiently from the original form of § 14. That section made it the duty of the commission, "whenever an investigation shall be made," to make a report in writing, which was to "include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and the findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found." As this applied, in terms, to all investigations, it is plain that at that time there was no thought of allowing witnesses to be summoned except in connection with a complaint for contraventions of the act, such as the commission was directed to "investigate" by § 13, or in connection with an inquiry instituted by the commission, authorized by the same section, "in the same manner and to the same effect as though complaint had been made." Obviously such an inquiry is limited to matters that might have been the object of a complaint.

The plain limit to the authority to institute an inquiry given by § 13, and the duty to make a report with findings of facts, etc., in the section next following, with hardly a word between, hang together, and show the purposes for which it was intended that witnesses should be summoned. They quite exclude the inference of broader power from the general words in § 12, as to inquiring into the management of the business of common carriers, subject to the provisions of the act, the commission keeping itself informed, etc. They equally exclude such an inference from § 21, the other section on which most reliance is placed. That, as it now stands, requires an annual report, containing "such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation

relating thereto as the Commission may deem necessary." Act of March 2, 1889, c. 382, § 8, 25 Stat. 855, 862.

It is true that in the latest amendment of § 14, findings of fact are required only in case damages are awarded. Act of June 29, 1906, c. 3591, § 3, 34 Stat. 584, 589. But there is no change sufficient to affect the meaning of the words in § 12, as already fixed. If by virtue of § 21 the power exists to summon witnesses for the purpose of recommending legislation, we hardly see why, under the same section, it should not extend to summoning them for the still vaguer reason that their testimony might furnish data considered by the commission of value in the determination of questions connected with the regulation of commerce. If we did not think, as we do, that the act clearly showed that the power to compel the attendance of witnesses was to be exercised only in connection with the *quasi*-judicial duties of the commission, we still should be unable to suppose that such an unprecedented grant was to be drawn from the counsels of perfection that have been quoted from §§ 12 and 21. We could not believe on the strength of other than explicit and unmistakable words that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that personal matters should be revealed.

In §§ 15 and 16 are further provisions for the enforcement of the act, not otherwise material than as showing the main purpose that Congress had in mind. The only other section that is thought to sustain the argument for the commission is § 20, amended by act of June 29, 1906, c. 3591, § 7, 34 Stat. 584, 593. This authorizes the commission to require annual reports from all the carriers concerned, with details of what is to be shown, to which the commission may add in certain particulars, and further "to require from such carriers specific answers to all questions upon which the Commission may need information." The commission may require certain other reports, and is to have access to all accounts, records and memoranda. The section now deals at length with this matter and how ac-

counts shall be kept and the like. It seems to us plain that it is directed solely to accounts and returns, and is imposing a duty on the common carrier only from whom the returns come.

All that we are considering is the power under the act to regulate commerce and its amendments to extort evidence from a witness by compulsion. What reports or investigations the commission may make without that aid but with the help of such returns or special reports as it may require from the carrier, we need not decide. Upon the point before us we should infer from the later action of Congress with regard to its resolution of March 7, 1906, 34 Stat. 823, directing the commission to investigate and report as to railroad discrimination and monopolies in coal and oil, that it took the same view that we do. For it thought it advisable to amend that resolution on March 21 by adding a section giving the commission the same power it then had to compel the attendance of witnesses in the investigation ordered. 34 Stat. 824. The mention of the power then possessed obviously is intended simply to define the nature and extent of the power by reference to § 12 of the original act. The passage of the amendment indicates that without it the power would be wanting. The case is not affected by the provision of § 9 of the act of June 29, 1906, c. 3591, § 9, 34 Stat. 595, extending the former acts relating to the attendance of witnesses and the compelling of testimony to "all proceedings and hearings under this Act." If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality but so as to avoid a succession of constitutional doubts, so far as candor permits. *Knights Templar & Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205.

Order in 315 *and* 316 *reversed.*
Order in 317 *affirmed.*
Petition denied.

MR. JUSTICE MOODY, not having been present at the argument, took no part in the decision.

MR. JUSTICE DAY, dissenting.

I am constrained to dissent from the opinion of the court in this case. It seems to me that too narrow a construction has been given to the act of Congress conferring power upon the Interstate Commerce Commission to conduct investigations into the affairs of corporations engaged in interstate commerce.

The court in the prevailing opinion has not placed its decision upon the want of power in Congress to legislate concerning the subject-matter of investigation in this case. The decision is based wholly upon the construction of the act of Congress, and as I am unable to concur in the view taken in the opinion, I will state the grounds upon which my dissent rests.

The reports of committees which accompanied the enactment of the Interstate Commerce Law, in its original form, show that importance was attached to the power conferred upon the commission to make investigations as well as to make orders relating to specific complaints as to practices affecting the conduct of interstate commerce and the instrumentalities by which the same is carried on. It was to have a power of investigation, such as had been conferred upon similar bodies in the States and in the English acts regulating the subject, with a view to eliciting information important to be had, in order to lay the basis for intelligent and efficient action in the legislative branch of the Government to which the Constitution has delegated power to regulate commerce among the States and with foreign nations.

In speaking of this power, Judge Cooley, the eminent chairman of the commission, in its first annual report, said:

"This is a very important provision and the commission will no doubt have frequent occasion to take action under it. It will not hesitate to do so in any case in which a mischief of public importance is thought to exist, and which is not likely to be brought to its attention on complaint of a private prosecutor."

In numerous instances investigations have been conducted by the commission having in view the exercise of its authority to afford information as to the manner and methods in which corporations engaged in interstate commerce are conducting their business. These investigations have been undertaken upon the initiative of the commission; witnesses have been subpœnaed; and testimony has been taken without objection from those interested that the power of the commission conferred by the acts of Congress had been exceeded. While these considerations are not determinative of the extent of the powers conferred in the act, they are suggestive of the practical construction which those interested have put upon it.

The act itself makes provision for two kinds of investigation, the one under § 12 upon the initiative of the commission without written complaint; the other under § 13, where investigation and orders are made upon complaint.

We are concerned in this case with an investigation undertaken upon the initiative of the commission under § 12 of the act. That section, so far as pertinent, provides:

"That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses

of the courts of the United States; and for the purposes of this act the commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the commission, or any party to a proceeding before the commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section."

The plain reading of this section is that for the purposes of the act the commission shall have power to require, by subpœna, the attendance and testimony of witnesses, and the production of books, papers, contracts, tariffs, agreements, and documents relating to any matter under investigation. Notwithstanding the broad language used by Congress, it is now held that the power of the commission to require testimony embraces only subjects stated in complaints for the violation of the act, or investigations by the commission upon matters which might have been the subject of complaint. I am unable to follow the reasoning which thus cuts down the expressed words of the act, which enables the commission to require testimony for all purposes of the act. The complaints under the act may relate to unreasonable rates, to discriminating practices, to the management of the affairs of the carrier as involved in or connected with the conduct of interstate commerce, to the relations of interstate carriers with each other, and the like matters, directly affecting corporations and individuals engaged in interstate commerce. These things are within the purposes of the act, but no more so, in my judgment, than the declared purpose of the act to endow the commission with investigating powers, having in view the ascertainment of the manner in which interstate commerce business is con-

ducted and managed, with a view to intelligent action upon these important subjects.

For the purposes of the act this power to require the attendance of witnesses and the production of books, papers, tariffs, contracts, etc., relating to any matter under investigation, is specifically conferred by Congress. To make the act read that the power shall be conferred only for the purposes of laying the ground for redress of specific complaints, or things which might be the subject-matter of complaints, narrows its provisions from the broad power conferred in the language used by Congress to powers limited to the execution of only a part of the act. It seems to me that the restricted construction given in the opinion has the effect to entirely reform the act of Congress, substituting for it, by judicial construction, a much narrower act than Congress intended to pass, and did, in fact, pass.

In § 12, which requires the district attorneys under the direction of the Attorney General to take all necessary proceedings for the enforcement of the act, and empowers the commission for the purposes of the act to issue subpœnas and require the production of books, papers, etc., there is in terms conferred, as the basis of this judicial action and this power to summon witnesses, authority to inquire into the management of the business of corporations subject to the provisions of the act, in order that the commission may keep itself informed as to the manner and methods in which the same is conducted, and to obtain from common carriers thus engaged full and complete information to enable the commission to prevent bad practices and to perform the duties and carry out the objects for which it was created.

Nor are the purposes of the act for which the power to subpœna witnesses, require the production of books, papers, etc., alone defined in § 12. In § 20 of the act, in order to enable the commission to make its reports, it is authorized to require from common carriers specific answers upon all questions upon which the commission may need information, such reports to

contain a showing of the amount of the capital stock, the amount paid therefor, the manner of payment for the same, etc., and § 21 of the act requires the commission to make an annual report which shall contain such information and data collected by the commission as may be considered of value in the determination of questions concerning the regulation of commerce, together with such recommendation as to additional legislation relating thereto as the commission may deem necessary. These things are "purposes of the act" no less than the hearing of complaints and making orders touching the same. For all these purposes § 12 conferred the power which was sought to be exercised in this case. That inquiries might take a wide range is shown in the acts of Congress giving immunity to persons required to testify, and providing that no person shall be excused from attendance and testifying, or from producing books, papers, etc., before the Interstate Commerce Commission for the reason that his answers or the production of such testimony may tend to criminate him, and granting immunity from prosecution because of such compulsory testimony.

The function of investigation which Congress has conferred upon the Interstate Commerce Commission is one of great importance, and while of course it can only be exercised within the constitutional limitations which protect the individual from unreasonable searches and seizures and unconstitutional invasions of liberty, the act should not be construed so narrowly as to defeat its purposes.

In the case of *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 474, this court had under consideration the provisions of § 12, authorizing the Interstate Commerce Commission to conduct an investigation upon its own motion, and in that case this court said:

"An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce, and with power to call witnesses before it, and to require the production of books, documents and

papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the States under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced otherwise than through the instrumentality of an administrative body representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules."

And in *Interstate Commerce Commission* v. *Railway*, 167 U. S. 506, this court said:

"It [the commission] is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business."

In the case of *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 438, this court said:

"The commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts, and their methods of dealing, and generally to enforce the provisions of the act."

In the case last cited it was held that a rate filed with the Interstate Commerce Commission could only be attacked for unreasonableness by a proceeding before the commission, with a direct view to a change in the rate. The power thus invested in the commission, no less than the power conferred in this case, affected shippers from Maine to Texas, and required a shipper making complaint against a common carrier for carriage in a remote part of the country to obtain redress for unreasonable rates only by a proceeding before the Interstate Commerce Commission, which ordinarily sits in the capital at

Washington. Legislative power vested in Congress over interstate commerce embraces the whole country, and while it may be extremely inconvenient to compel the attendance of witnesses and the production of the papers, etc., throughout a domain so large as ours, that consideration does not detract from the power of Congress over the subject-matter.

Assuming, for the purposes of this case and the construction of the statute, that the relations of directors in a corporation engaged in interstate commerce to the sales of stock to such corporation may be the subject of inquiry when Congress confers such power upon the commission, I think that in this act Congress has conferred such power. If such is the proper construction of the act, it follows that the commission had a right to propound the questions which the Circuit Court directed to be answered. In my view the judgment of the Circuit Court should be affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA concur in this dissent.

MR. JUSTICE HARLAN also dissents in No. 317.

HUTCHINS, TRUSTEE, *v.* WILLIAM W. BIERCE, LIMITED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 447. Argued November 29, 1908.—Decided December 14, 1908.

An appeal from a judgment of the Supreme Court of Hawaii dismissed because not final. *Cotton* v. *Hawaii*, *ante*, p. 162.

THE facts are stated in the opinion.

Mr. David L. Withington and *Mr. Aldis B. Browne*, with whom *Mr. W. R. Castle*, *Mr. Alexander Britton* and *Mr. J. W. Cathcart* were on the brief, for appellant.

Mr. Charles H. Aldrich, with whom *Mr. Henry S. McAuley* and *Mr. Henry W. Prouty* were on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case has been before this court once already. 205 U. S. 340. It was an action of replevin and was tried by a judge without a jury. The judge found that the allegations of the complaint were proved and that the plaintiff, William W. Bierce, Limited, was entitled to recover. He also made a series of findings in detail, establishing the plaintiff's case and excluding certain defenses. These findings were excepted to on various grounds, among others, that they were not warranted by the evidence, and the whole evidence was attached to the bill of exceptions. Two of the findings were that the plaintiff had not waived a condition precedent to the passing of title to the property replevied, and that it had not elected against its right to bring this action. The case went to the Supreme Court of Hawaii on the exceptions and there, of course, the question was whether it appeared as matter of law that the finding for the plaintiff and the judgment rendered upon it were unwarranted. The Supreme Court held that an election appeared as matter of law, sustained the exceptions, and made the usual order sending the case back for further proceedings in the lower court; but afterwards, on the plaintiff's motion, coupled with an affidavit that it would have no more evidence to offer at a second trial, it ordered judgment for the defendant. Thereupon the plaintiff brought the case here. It was held that the error relied on was not made out against the findings of the trial court, and the judgment of the Supreme Court of the Territory was reversed.

In the discussion here it was assumed that the Supreme

Court of the Territory had power under the local procedure to order judgment as it did, and so to lay a foundation for the appeal. But the difficulties incident to such a course in cases subject to appeal are made manifest by this case. If the Supreme Court had the power to order judgment, obviously the scope of its inquiry before rendering judgment was not enlarged by the subsequent appeal or by the liability to it. When it rendered judgment it was confined to the questions of law presented by the bill of exceptions and the record. Logically, on appeal in such a case this court would be confined in the same way. At the broadest, the only questions would be whether it appeared from the record, as matter of law, that the judgment for the defendant ordered by the Supreme Court, or the judgment for the plaintiff in the court of first instance, or both of them, were wrong. It would be anomalous if the Supreme Court could make the statement of facts which is contemplated by the statutes and which it was said in our former opinion should have been made, in such form as to open questions on which the Supreme Court itself had had no power to pass before entering judgment, and so to present to this court grounds for decision which the Supreme Court of Hawaii could not have taken into account. On the other hand a statement that should present the questions passed upon and no more would simply have presented the record, even if possibly somewhat abridged, or modified by concessions of which there was some trace in the opinion of the court. So not unnaturally, at the subsequent stage the Supreme Court found itself a little perplexed.

Whatever might have been open, in our former decision the only question actually dealt with was whether the judgment of the Supreme Court could be sustained. There were some subordinate exceptions to the admission of evidence and the allowance of an amendment that were not considered here. When the case went back these were taken up and overruled by the Supreme Court. It then made a statement of facts in deference to what was said in our decision, and the defendant

appealed to this court. But this time the Supreme Court did not order judgment, and it may be, that in its present opinion, the former judgment was unwarranted in point of procedure. *Meheula* v. *Pioneer Mill Co.*, 17 Hawaii, 91. It is unnecessary to consider whether our former decision left anything open, in view of the technical scope of the appeal on the one side and the limited inquiry to which our attention was directed on the other. The statement of facts cannot affect that question, nor can it affect the defendant's right to be here. It is enough that the Supreme Court of Hawaii has pursued the usual course upon exceptions, and has not entered or directed a judgment. Therefore, as was decided a few days ago, in *Cotton* v. *Hawaii*, *ante*, p. 162, an appeal does not lie.

Appeal dismissed.

McCORQUODALE *v.* STATE OF TEXAS.

ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

No. 38. Argued December 3, 1908.—Decided December 21, 1908.

It is too late to raise the Federal question for the first time in petition for rehearing in the state court of last resort, unless, and it must so appear, that court actually entertains the motion and passes upon the Federal question; where the order is merely a denial of the motion the writ of error will be dismissed.

Writ of error to review 98 S. W. Rep. 879, dismissed.

THE facts are stated in the opinion.

Mr. Sam Streetman, with whom *Mr. Thomas H. Ball* was on the brief, for plaintiff in error.

Mr. R. V. Davidson, Attorney General of the State of Texas, and *Mr. Felix J. McCord*, for defendant in error, submitted.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Plaintiff in error on March 10, 1905, was indicted by the grand jury of the District Court of Brazos County, Texas, for the murder of one Henry Spell. He was brought to trial and convicted of murder in the first degree, the jury fixing his punishment at imprisonment for life in the penitentiary.

The judgment, after stating the number and title of the case, the arraignment of the defendant (plaintiff in error), his plea, the impanelling of the jury, the trial of the case, the presence of the defendant throughout all of the proceedings, the retirement of the jury to consider of their verdict, recites that the jury "afterwards on April 1st were brought into open court by the proper officers, the defendant and his counsel being present, and in due form of law returned in open court the following verdict:

"'We the jury, find the defendant guilty of murder in the first degree and assess his punishment at confinement in the state penitentiary for life.

"'J. H. WHITE, *Foreman.*'"

The following is the sentence:

"April 15th, 1905.

"This day this cause being again called, the State appeared by her district attorney, and the defendant, William McCorquodale was brought into open court in person, in charge of the sheriff, his counsel also being present, for the purpose of having the sentence of the law pronounced against him in accordance with the verdict and judgment herein rendered and entered against him on a former day of this term; and thereupon the defendant, William McCorquodale, was asked by the court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof, whereupon the court proceeded, in the presence of the said defendant, William McCorquodale, to pronounce sentence against him, as follows:

"'It is the order of the court that the defendant, William

McCorquodale, who has been adjudged to be guilty of murder in the first degree, and whose punishment has been assessed by the verdict of the jury at confinement in the penitentiary for life, be delivered by the sheriff of Brazos County, Texas, immediately to the superintendent of the penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and the said William McCorquodale shall be confined in said penitentiaries for life, in accordance with the provisions of the law governing the penitentiaries of said State, and the said William McCorquodale is remanded to jail until said sheriff can obey the direction of this sentence.' "

The judgment was affirmed by the Court of Criminal Appeals. 98 S. W. Rep. 879. A motion for rehearing was made by plaintiff in error and denied. Subsequently a motion was made by the State as follows:

"Now comes the State, by the assistant attorney general, and would show the court that the judgment in this cause was affirmed at Tyler, and the appellant's motion for rehearing was overruled at the Dallas term;

"That since which time it has been discovered, and this court's attention is now called to the fact, that the transcript does not contain a complete judgment against appellant, though the sentence is contained in the transcript:

"Wherefore, the State prays that the court order the transcript and all papers transferred from Tyler to the Austin branch of the court, to the end that this court may determine its jurisdiction of this appeal, and whether or not the judgment should be reformed and affirmed, or whatever action this court deems necessary.

"Respectfully submitted."

The motion to transfer was granted. The defendant, by his counsel, excepted, and opposed the State's motion to reform and affirm the judgment, on the following grounds: (1) The motion was not disposed of at the term which it was filed; (2) It was not such a motion as is contemplated by law, is not

a motion for rehearing nor a motion for the court to correct its own judgment, but it is a motion to enter an original judgment, which the lower court alone has the power to do at the proper time, and that the Court of Criminal Appeals has no power to so do. The latter ground was repeated in many ways, and it was alleged, with much repetition, that the court had no jurisdiction to grant the motion of the State, and it was prayed that the motion be denied in so far as it sought to have a judgment entered, or supplied, or to supply the want of the proper judgment in the court below, and in so far as it sought to have the Court of Criminal Appeals make any other order than to issue its mandate in accordance with its opinion theretofore rendered.

The court granted the motion of the State, holding that the judgment was in the ordinary form and complete so far as it went, but that it did not comply with certain requirements of the Code of Criminal Procedure of the State, in that it did not declare, as provided in subdivisions 9 and 10 of Art. 831, that it was considered by the court that the defendant be adjudged guilty of the offense as found by the jury, and that the defendant be punished as determined by the jury. The court further held that it had the power to reform and correct the judgment so as to bring it into accordance with the provisions of the Code of Criminal Procedure. The court, after reciting the proceedings and reviewing prior cases, concluded its opinion as follows:

"'Reform' means to correct; to make anew; to rectify. Rapalje Law Dic. p. 1083. Here we have all of the foundation of the judgment, including the verdict of the jury, which is the basic rock on which the judgment is formulated. We have, following this, the final judgment of the court, which is the sentence. This itself adjudicates the guilt of appellant and sentences him, in accordance with the verdict and judgment. From this data certainly we can do that which the court *a quo*, in due order, should have done. We accordingly hold that the judgment of the court below should be reformed, and cor-

rected, so as to make it read, in connection with the judgment as entered, and following the verdict, as follows, to wit:

"'It is therefore considered, ordered and adjudged by the court that the defendant, William McCorquodale, is guilty of the offense of murder in the first degree, as found by the jury, and that he, the said William McCorquodale, be punished, as has been determined by the jury, by imprisonment for life in the penitentiary; and it is further ordered, adjudged and decreed by the court that the State of Texas do have and recover of and from the defendant, William McCorquodale, all costs of this prosecution, for which execution may issue; and that the said defendant is now remanded to jail to remain in custody to await the further order of the court.'

"The State's motion to reform is accordingly granted; the judgment is reformed and corrected, as above indicated, and, as reformed and corrected, the judgment is affirmed in accordance with the previous opinion of this court."

In answer to the motion of the State, the defendant did not set up that the action invoked by the State would, if granted, contravene the Fourteenth Amendment of the Constitution of the United States. He however presented a petition for, to quote from the petition, "a rehearing upon the State's motion to 'reform and affirm,'" and urged as one of the grounds thereof the following:

"This court's said opinion is further erroneous in that it, in effect, deprives appellant of that due process of law guaranteed him by the constitution of the State of Texas, and that of the United States, in this: that it is in effect the rendering of a judgment against him in his absence, and the authorization of sentence against him without a judgment."

The other grounds of the motion for rehearing were repetitions of the grounds urged in the answer to the State's motion and other grounds based on the local procedure, the basis of all being the want of jurisdiction in the court.

The order of the court on the motion for a rehearing was as follows:

"This cause came on to be heard on appellant's motion for a rehearing, and the same being considered by the court said motion is overruled."

This court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a State after that court has pronounced its final decision. *Loeber* v. *Schroeder*, 149 U. S. 580, 585; *Pim* v. *St. Louis*, 165 U. S. 273. It is true that we have also decided that if the court entertains the motion and passes on the Federal question, we will review its decision. But it must appear that the court has done so. *Mallett* v. *North Carolina*, 181 U. S. 589; *Leigh* v. *Green*, 193 U. S. 79; *Corkran Oil Co.* v. *Arnaudet*, 199 U. S. 182, 193; *Fullerton* v. *Texas*, 196 U. S. 192; *McMillen* v. *Ferrum*, 197 U. S. 343. It can hardly be said to so appear in the case at bar. The order of the court is nothing more than a denial of the motion. In other words, it expresses no more than would be implied from a simple denial of the motion.

Writ of error dismissed.

McCANDLESS v. PRATT, LAND COMMISSIONER OF HAWAII.[1]

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 109. Argued November 6, 9, 1908.—Decided December 21, 1908.

The jurisdiction of this court can only be invoked by a party having a personal interest in the litigation. *Smith* v. *Indiana*, 191 U. S. 138. A writ of error will not lie to review a judgment of the Supreme Court of Hawaii, dismissing the bill in a suit brought by a taxpayer to enjoin the land commissioner from an alleged unauthorized use of public lands where it does not appear that complainant would be personally injured by the threatened use.

[1] Original docket title, McCandless v. Carter, Governor of Hawaii.

Quære and not decided, whether any citizen and taxpayer has a right to maintain a suit in the courts of Hawaii to enjoin the land commissioner from acts involving unauthorized use of public lands, or whether if that right exists a personal loss to complainant must appear.

Quære and not decided, whether the land laws of Hawaii are Federal statutes within the meaning, and by virtue of § 83 of the organic act of April 30, 1900, 31 Stat. 141, c. 339, so that their construction involves a Federal question.

Writ of error to review 18 Hawaii, 221, dismissed.

THE facts are stated in the opinion.

Mr. Aldis B. Browne, with whom *Mr. A. G. M. Robertson* and *Mr. Alexander Britton* were on the brief, for plaintiff in error:

Under the practice of this jurisdiction it is not necessary for a complainant who is moving purely in the interests of the public to prevent misfeasance in office, or to protect public property from loss through the mistake, incompetence, or worse, of public officers, to show special injury.

Section 1549, Rev. Laws of Hawaii, requires the Attorney General as part of his duty to appear for and represent the officers of the Government in proceedings in court without charge. It is not the practice to bring cases of this character in the name of the Territory upon the information of an individual *ex relatione*. *Castle* v. *Kapena*, 5 Hawaii, 27; *Lucas* v. *Amer.-Haw. E. & C. Co.*, 16 Hawaii, 80; *Castle* v. *Atkinson*, 16 Hawaii, 769, and see also *U. P. Railroad Co.* v. *Hall*, 91 U. S. 343; *Crampton* v. *Zabriskie*, 101 U. S. 601.

It should make no difference as to this point that the exchange contemplated by the governor and the Commissioner of Public Lands was to be for lands of equal value. The right of a taxpayer to an injunction to prevent the illegal expenditure of public money is not maintained on the ground that the public was not to receive a *quid pro quo*, but on the lack of legal authority to make it. See *Winn* v. *Shaw*, 87 California, 631; *Nelson* v. *Commissioners*, 6 Colo. App. 279; *Stratford* v. *Greens-*

boro, 124 N. C. 127; *Times Pub. Co.* v. *Everett*, 9 Washington, 518; *Stevens* v. *St. Mary's School*, 144 Illinois, 336; *State* v. *Commissioners*, 22 Nevada, 87.

Mr. Charles R. Hemenway and *Mr. Henry E. Cooper*, with whom *Mr. William L. Whitney* and *Mr. Charles F. Clemons* were on the brief, for defendants in error:

Plaintiff in error has no standing in court because it appears that he has no interest whatever at stake. A court will only take cognizance of suits at law or proceedings in equity when some injury has been, or appears to have been, done, or is or appears to be threatening the complaining party. The aid of the court will not be extended to one who is suffering no wrong and is not fearing a threatened injury.

While a taxpayer in Hawaii may have his remedy by injunction against official acts which involve the misuse or waste of public funds, the case at bar is not within this rule. *Crampton* v. *Zabriskie*, 101 U. S. 601, 609; *Castle* v. *Kapena*, 5 Hawaii, 27; *Lucas* v. *Amer.-Haw. E. & C. Co.*, 16 Hawaii, 80; *Castle* v. *Atkinson*, 16 Hawaii, 769.

It must appear affirmatively from the pleadings that injury, and substantial injury, will be sustained by plaintiff from the acts complained of, before such acts will be enjoined. *Smith* v. *Indiana*, 191 U. S. 138, 146; *Caffrey* v. *Oklahoma*, 177 U. S. 346, 348; *Clark* v. *Kansas City*, 176 U. S. 114, 118; *Red River Valley Bank* v. *Craig*, 181 U. S. 548, 558; *Supervisors* v. *Stanley*, 105 U. S. 305, 314; *Ludeling* v. *Chaffe*, 143 U. S. 301, 304; *Giles* v. *Little*, 134 U. S. 645, 650; *Ewings* v. *Norwood*, 5 Cranch, 344, 348; *Montgomery* v. *Hernandez*, 12 Wheat. 129, 132; *Henderson* v. *Tennessee*, 10 How. 311, 322; *Hale* v. *Gaines*, 22 How. 144, 160; *Long* v. *Converse*, 91 U. S. 105.

In this case there is no allegation or claim of injury made in the bill upon which the prayer for an injunction is based, and the bill shows that plaintiff, as a taxpayer, will gain rather than lose by the exchange. The facts as they appear from the record are that an exchange of certain public lands was pro-

posed, not only for lands "equal in value" but also "of greater immediate service" to the Territory. As stated in the prevailing opinion below, the bill does not show whether the loss of revenue from rent would be offset by rents from land of equivalent value or by a saving of revenue which otherwise would be used. In the absence of an averment of loss none can be inferred. The taxpayer would gain from the transaction pecuniarily if the Territory should thereby obtain property for such public uses as schoolhouses, for instance, for which otherwise legislative appropriations would be made requiring increased taxation and in such cases the plaintiff's only interest would be his desire that the public land laws be correctly administered.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The plaintiff in error, who was plaintiff in the court below, and whom therefore we shall refer to as plaintiff, brought this suit in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at chambers, to enjoin George R. Carter, Governor of the Territory, and the defendant, Commissioner of Public Lands of the Territory, from exchanging certain lands of the Territory for other lands.

The governor promulgated, on the twenty-ninth of November, 1906, the following order:

"Lanai Lands—Notice is hereby given that having decided an exchange of the public lands of the island of Lanai to be advisable, the commissioner of public lands is prepared to receive offers of other lands that are equal in value to those of Lanai, and of greater immediate service to the Territorial government, from any responsible person, up to and including Saturday, the fifteenth day of December, 1906."

The island of Lanai contains a total area of 86,400 acres, of which the Territory owns 47,679 acres. The lands owned by the Territory are divided into five tracts, and are under lease to one Charles Gay for annual rentals which amount in all to

the sum of $1,600. These facts are alleged in the bill, and that the tracts are of great value—one containing 8,000 acres of land, which is good grazing land, and has three miles of sea frontage, and extends inland six miles, being worth $40,000. Another tract, it is alleged, is of the same kind of land, and has a sea frontage of five and one-half miles and an inland depth of six miles, and is worth $37,000. The other tracts are of the value of $5,000.

It is alleged that Pratt, as commissioner, threatens to and will exchange such lands for other lands if he receives an offer therefor from a responsible person, and that the governor will consent and approve the exchange unless he and Pratt be enjoined. It is further alleged that Pratt has no legal right to make the exchange nor the governor to approve it.

It is further alleged that the intended and proposed exchange of lands "is not proposed by way of compromise or equitable settlement of the rights of any claimants, nor by way of exchange for parcels of lands acquired for any road or roads, nor for a site or sites of a government building or buildings, nor for any other governmental purpose or purposes."

An injunction was prayed against the exchange and against issuing land patents for the lands received in exchange. A temporary injunction was granted, which, upon the motion of the governor, was dissolved, and the bill dismissed as to him. Pratt demurred to the bill and urged as grounds thereof that the bill was insufficient, that it did not appear that he, as commissioner, was doing or about to do any act in violation of law, that plaintiff had no legal capacity to sue, that no injury was threatened or otherwise to plaintiff, that he was not sufficiently interested to be entitled to an injunction or to any relief in a court of equity, that the complaint was not properly verified and that the allegation that the defendant, as commissioner, had no legal authority to exchange public lands, was a conclusion of law.

The demurrer was overruled, the court holding that the plaintiff had the right to bring and maintain the suit, and that

the proposed exchange of lands was "unlawful, illegal and unwarranted." Ten days were given to further plead, and in default of which the injunction was to be made permanent. The decree was reversed by the Supreme Court of the Territory. 18 Hawaii, 221. This writ of error was then sued out and George R. Carter, governor, named therein as a defendant, but the writ was subsequently dismissed, as to him, on motion of his successor, the present governor.

The Supreme Court of Hawaii assumed, without definitely deciding, that the plaintiff had a right to maintain the suit. The question of the validity of the exchange it decided against the contention of the plaintiff, holding that the commissioner had the power to make the exchange. Of the right of plaintiff to sue, the court said that it had been adjudicated in that court that a citizen and taxpayer had a right to obtain an injunction against official acts involving unauthorized use of public funds. To sustain this view the court cited *Castle* v. *Minister of Finance*, 5 Hawaii, 27; *Lucas* v. *Amer.-Haw. E. & C. Co.*, 16 Hawaii, 80; *Castle* v. *Secretary of the Territory*, 16 Hawaii, 769. It is an implication, from the comment of the court, that the ground of those decisions was the pecuniary loss that would come to the taxpayer from the action sought to be restrained. But the court, however, went farther, and said that perhaps the right of the taxpayer to "restrain official acts affecting public property ought not to be based on the pecuniary loss, however trivial or conjectural, but on the broad ground that any citizen may obtain a judicial inquiry into the validity of such acts, and an injunction against them if found to be unauthorized." The court remarked, however, that on account of the view it entertained of the validity of the acts of the officers, it would not decide the question of the right of the plaintiff to sue. On neither question are we called upon to pass, nor are we required to decide whether the land laws of the Territory are Federal statutes by virtue of § 83 of its organic act, which provides that its laws "relating to public lands shall continue in force until Congress shall otherwise

provide," and that therefore a Federal question is involved in the case. We have held that the jurisdiction of this court can only be invoked by a party having a personal interest in the litigation. *Smith* v. *Indiana*, 191 U. S. 138, 148.

The plaintiff has not such an interest. He sues as a property owner and taxpayer, and the relief he asks is an injunction against the Commissioner of Public Lands, to restrain him from exchanging the lands described in the bill for other lands. It is contended that such action is illegal, because that officer has no power to exchange lands under lease, nor has he power to exchange lands except in parcels of not over one thousand acres. The contention is based on the proviso of § 276 of the Revised Laws of Hawaii. We give the section in the margin,[1]

[1] SEC. 252. "The commissioner of public lands or superintendent of public works, as the case may be, by and with the authority of the governor, shall have power to lease, sell or otherwise dispose of the public lands, and other property, in such manner as he may deem best for the protection of agriculture, and the general welfare of the Territory, subject, however, to such restrictions as may, from time to time, be expressly provided by law."

SEC. 254. "The provisions of section 253 shall not extend or apply to cases where the government shall by quitclaim, or otherwise, dispose of its rights in any land, by way of compromise or equitable settlements of the rights of claimants, nor to cases of exchange, or sales of government lands in return for parcels of land acquired for roads, sites of government buildings, or other government purposes."

SEC. 276. "The commissioner may with the consent of the governor sell public lands not under lease, in parcels of not over one thousand acres, at public auction for cash. Upon any such sale and the payment of the full consideration therefor, a land patent shall be issued to the purchaser.

"And he may, with such consent, sell public lands not under lease in parcels of not over six hundred acres, at public auction upon part credit and part cash, and deliver possession under an agreement of sale containing conditions of residence on or improvement of the premises sold, or of payment by instalments or otherwise of the purchase price, or all or any of such conditions.

"And in case of default in the performance of such conditions, the commissioner may, with or without legal process and without notice,

and also §§ 252 and 253, which must be considered in connection with it. The argument to support the contention is that the proviso must be understood in the strict technicality of limiting or qualifying the preceding subject-matter, and to the carving out therefrom some special matter, and, it is insisted, giving the proviso that purpose the specially carved out matter "is the requirement of an auction sale in the case of the exchange of land," leaving as applicable to such exchange all the other limitations. The Supreme Court of the Territory, as we have seen, decided against the contention. Let us grant,

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demand or previous entry, take possession of the premises and thereby determine the estate created by such agreement. In case of such forfeiture, such land shall be sold at auction, either as a whole or in parcels, for cash or on terms of time payments in the discretion of the commissioner; and if such sale shall result in an advance on the original price, the original purchaser shall receive therefrom the amounts of his payments to the Government on account of purchase, without the interest, and a *pro rata* share in such advance in proportion to the amounts of his payments. If such sale shall result, however, in a less price than the original, the amount returnable to him shall be charged with a *pro rata* amount of such decrease proportioned to the amounts of his payments. The treasurer is hereby authorized to pay the amount returnable to the outgoing tenant, upon the requisition of the commissioner, out of any funds available for such purpose.

"Which agreement shall entitle the purchaser to a land patent of the premises upon the due performance of its conditions.

"The commissioner shall have authority to fix any upset price for all such sales for cash or part credit and part cash.

"All such sales shall be held in Honolulu, or in the district where the land to be sold is situated. Any person designated by the commissioner may act as auctioneer at such sales without taking out an auctioneer's license.

"Provided, however, that land patents may be issued in exchange for deeds of private lands or by way of compromise upon the recommendation of the commissioner and with the approval of the governor without an auction sale, and further provided, that the governor may in his discretion, upon such recommendation and approval, execute quitclaim deeds for perfecting the titles of private lands where such titles are purely equitable or where such lands are suffering under defective titles, or in cases of claims to use of lands upon legal or equitable grounds."

arguendo, that the decision may be disputed, what injury has plaintiff shown that he will suffer by the exchange? What injury, indeed, has he shown, either to the Territory or to any taxpayer of the Territory?

The plaintiff alleges that he is a taxpayer, but does not allege anything from which it can be inferred that he will be injured as a taxpayer, subject to a burden as such. It is true it is alleged that the lands which are offered for exchange are under lease for terms varying from twenty-five to thirty-five years, at a rental of sixteen hundred dollars. But it is also alleged that the purpose formed by the governor and commissioner, and the purpose advertised by them, was to get for the lands other lands of equal value and of greater immediate service to the territorial government. The suit was brought to restrain the execution of that purpose. Benefit, therefore, not injury, apparently may result from the exchange, and, so far as we are informed by the record, it may be even a benefit to the policy which plaintiff declares it is the purpose of the land laws of the Territory to promote, and upon which he, in part, bases his interpretation of them, the policy of encouraging "the settlement and homesteading of public lands," and the "parcelling out" of them "in limited areas on favorable terms." The plaintiff takes pains to justify this inference, for he avers that the exchange is not proposed for settlement of rights or claims, nor for the use of roads, nor for the site or sites of the government building or buildings, nor for any other government purpose. Therefore, as plaintiff has no personal interest in the matter in litigation, the writ of error is

Dismissed.

PADDELL *v.* CITY OF NEW YORK.

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

No. 42. Argued December 7, 1908.—Decided December 21, 1908.

Long settled habits of the community play an important part in determining questions of constitutional law and the fact that a method of taxation was in force for many years from a time antedating the adoption of the Fourteenth Amendment is a reason for not considering that it was overthrown thereby.

Notwithstanding the due process clause of the Fourteenth Amendment land subject to mortgage may be taxed for its full value without deduction of the mortgage debt from the valuation either of the land or of the owner's personal property.

In New York a tax on land operates *in rem*, at least without regard to the interests of different persons in the land.

A constitution cannot be carried out with mathematical nicety to logical extremes.

Quære and not decided, whether one disputing only the amount of a tax has any remedy except proceedings for an abatement.

187 New York, 552, affirmed.

THE facts are stated in the opinion.

Mr. Everett V. Abbott for plaintiff in error:

The general property tax, as customarily administered in this country, involves fictitious values, that is, of alleged values having no existence whatever. 1 Cooley Taxation, 1st ed., 159; 2d ed., 220; 3d ed., 387; Seligman, Taxation, 1st ed. (1895), 101; Wells, Theory and Practice of Taxation (1900), 474. Such taxation by fiction is unconstitutional. The fiction disappears, whenever a deduction is allowed, to the extent of the amount of the deduction; but when the deduction is not allowed the fiction is indubitably established. For that reason the plaintiff in error alleged that he was not assessed for any personal property.

A process whereby the State takes the property of its cit-

izens upon an official oath as to values which is false in fact is not due process of law.

The question herein involved has never been directly decided by this court. The nearest approach to a decision that taxation by fiction is unconstitutional is to be found in cases that relate, not to fiction of fact, but to fiction of law, and in those cases this court has refused to allow the fiction to be employed. See *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395.

If the plaintiff in error is taxed upon more property than he owns, then he is taxed upon property which somebody else owns, and therefore he does not receive the equal protection of the laws. The right of the mortgagee is a legal interest in the land itself. *United States* v. *Title Ins. Co.*, 193 U. S. 651; *Savings Society* v. *Multnomah Co.*, 169 U. S. 421. The interest of the mortgagor is limited to that which remains over and above the legal interest of the mortgagee, the so-called equity. *Everson* v. *McMullen*, 113 N. Y. 293; *Weber Piano Co.* v. *Wells*, 180 N. Y. 62; *Union Trust Co.* v. *Coleman*, 126 N. Y. 433.

Mr. David Rumsey, with whom *Mr. Francis R. Pendleton* was on the brief, for defendant in error:

The New York system of taxation, restricting deduction of debts to personal property, is just; deducting bonded indebtedness from mortgaged realty would create, not prevent, inequality of taxation. No discrimination in the burden of taxation is shown as between persons similarly situated; and a system of taxation by which an equal burden is imposed upon all in the same class is not repugnant to the Constitution of the United States. *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 464; *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 295; *Davidson* v. *New Orleans*, 96 U. S. 97, 104; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Kentucky R. R. Cases*, 115 U. S. 321; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to prevent the City of New York from completing the levy of a tax and thereby creating a cloud upon the plaintiff's title. The plaintiff owns lots numbered 592, 594 and 596 on Seventh avenue, subject to mortgages for $70,000 and $45,000, given by him. The premises have been valued, as the first step toward taxation, at $160,000, and it is alleged upon information and belief that this valuation makes no deduction for the mortgages. The ground of the bill, so far as it is before us, is that the tax if completed will be contrary to the Fourteenth Amendment. Some criticism might be made and was made on the form of the allegations, but we will take them as presenting what we believe they were intended to present, the question whether, consistently with the Constitution of the United States, a man owning land subject to a mortgage can be taxed for the full value of the land, while at the same time the mortgage debt is not deducted from his personal estate. A demurrer to the bill was sustained by the courts below.

The plaintiff has many difficulties in his way. In the first place the mode of taxation is of long standing, and upon questions of constitutional law the long settled habits of the community play a part as well as grammar and logic. If we should assume that, economically speaking, the present system really taxes two persons for the same thing, the fact that the system has been in force for a very long time is of itself a strong reason against the belief that it has been overthrown by the Fourteenth Amendment, and for leaving any improvement that may be desired to the legislature.

The weight of the plaintiff's argument is that he is taxed for what he does not own. The bill seems to have been drawn on the dominant notion of a right attached specifically to the mortgaged property, that is to say, the notion that the property represents so many units of value, from which the mortgage subtracts so many, leaving only the remainder subject to be taxed; and this is the plaintiff's view. But there is a subordi-

nate averment that the plaintiff has not been assessed for taxes in respect of personal property, and the allegation seems to convey, by indirection, that no deduction of the mortgage debt has been made from personal property, and to admit that such a deduction would have set the city right. As to the former notion, it will be observed that the mortgages were given by the plaintiff, and therefore charged him, as well as his land. If he should die, by the law of New York his personal property would have to exonerate the realty, so far as it would go. If he lives, and remains solvent, the chances are that he will pay the mortgages out of personalty. Therefore, the true deduction is not the amount of the mortgages, but the speculative chance that the land may have to be sold for the debt—a chance that would be insured at different rates to different persons. The other theory regards the mortgage debt as a deduction from total riches, to be compensated by an allowance to them indifferently, either in the valuation of the land or by a deduction from personal estate. And this logically leads to the conclusion that no scheme of taxation is constitutional that does not make allowance for all obligations and debts; a conclusion that the plaintiff seems to accept, while he does not make it plain that he does not receive both in law and in fact such an allowance by a deduction of debts from personal estate.

It cannot matter to the plaintiff's argument whether the obligation is directed to a specific object or to the whole mass of objects owned by the party bound. In the one case, as much as in the other, the obligation will take certain units of value from his riches, when under the compulsion of the law it is performed. But it is an amazing proposition of constitutional law that the law cannot fix its eye on tangibles alone and tax them by present ownership without regard to obligations that, when performed, would make some of them change hands; for instance, that under the Fourteenth Amendment a man having a thousand sheep as his only property could not be taxed for their full value without allowance for an unsecured debt of five thousand dollars, even if his creditors should be left untaxed.

a matter that hardly would concern him. *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Merchants' & Manufacturers' Nat. Bank* v. *Pennsylvania*, 167 U. S. 461, 464; *People* v. *Barker*, 155 N. Y. 330, 333. Undoubtedly he would be taxed for more than he owned if his total riches were computed on the footing that the law would keep its promise and make him pay, and that what would be done should be treated as done. If he owned other property, still there would be the chance that the sheep might be seized on execution, and, as we have said, the liability of the mortgaged land is no more, although the chance may be greater. It is a sufficient answer to say that you cannot carry a constitution out with mathematical nicety to logical extremes. If you could, we never should have heard of the police power. And this is still more true of taxation, which in most communities is a long way off from a logical and coherent theory. And it may perhaps be doubted whether there is even a logical objection to the sovereign power giving notice to all persons who may acquire property within its domain that when it comes to tax it will not look beyond the tangible thing, and that those who buy it must buy it subject to that risk.

The plaintiff's contention that the mortgage must be deducted from the land, whether the mortgage is taxed or not, stated a little differently, is that he was entitled to an apportionment of the tax to his interest, and that if the title to a lot is split up the government cannot tax it as a whole. To this we cannot agree, although it should be mentioned that the Greater New York Charter permits the owner of any interest to redeem it separately. Sec. 920. We have assumed so far that the tax on this real estate is a debt that might be collected by a personal suit against the plaintiff. As a matter of fact it is not collected in that way and we gather from what was said and admitted at the argument that it is doubtful at least whether such an action would lie. See *Durant* v. *Albany County*, 26 Wend. 66; *City of Rochester* v. *Gleichauf*, 82 N. Y. Supp. 750. Suppose that the tax law should operate only *in rem*, against

a lot defined by the limits of a separate title, and should simply give notice by sufficient means to all the world that it would be sold unless within a certain time some party in interest should see fit to pay a certain sum. Notwithstanding the position of the plaintiff, it cannot be doubted that such a proceeding would be as valid as the imposition of a personal liability upon individuals according to their interest. See *Witherspoon* v. *Duncan*, 4 Wall. 210, 217; *Castillo* v. *McConnico*, 168 U. S. 674, 681, 682. But the notion of a proceeding *in rem* is at the bottom of the usual tax on land, even where, as in Massachusetts, there is a personal liability superadded. This is shown by the doctrine that a valid tax sale cuts off all titles and starts a new one. *Hefner* v. *Northwestern Life Ins. Co.*, 123 U. S. 747, 751; *Emery* v. *Boston Terminal Co.*, 178 Massachusetts, 172, 184. Of course there is no question of allowances or deductions upon a proceeding *in rem*. All interests are proceeded against at once.

If there is no personal liability in New York the levy of a tax is a proceeding *in rem*, whatever requirements may be made for notice by naming parties in interest, and even if naming them is a condition to the validity of the tax. Indeed, it may be assumed that primarily it is such a proceeding in any event, and as a proceeding *in rem* might be sustained, even if the personal liability failed. A tax on special interests is not unknown, *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore*, 195 U. S. 375, 381, but the usual course is to tax the land as a whole, and that we understand to be the way in New York. "In all cases the assessment shall be deemed as against the real property itself, and the property itself shall be holden and liable to sale for any tax levied upon it." Laws of 1902, c. 171, § 1. See Greater New York Charter of 1901, §§ 1017, 1027.

More might be said, but we will add only that while in order to meet the plaintiff's arguments we have taken his bill as presenting the question that we believe it was intended to present, the assumption hardly could be made if our opinion otherwise was on his side. It does not appear that he has not received

an allowance for his mortgage debt except by a conjectural inference. Among the matters that we do not consider is whether the plaintiff has any remedy except proceedings for an abatement, when he admits that he was liable to a tax and disputes only the amount.

Judgment affirmed.

BAILEY *v.* STATE OF ALABAMA.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 538. Submitted November 12, 1908.—Decided December 21, 1908.

This court cannot require the state court to release persons held for trial because the evidence fails to show probable cause, and in this case the judgment of the highest court of the State dismissing a writ of *habeas corpus* is affirmed without consideration of the questions on the merit and the constitutionality of the state statutes under which the accused was held although such questions were discussed by the state court.

Quare and not decided, whether the statutes of Alabama involved in this case establish a system of peonage in violation of the Constitution and laws of the United States.

THE facts are stated in the opinion.

Mr. Fred S. Ball and *Mr. Edw. S. Watts,* for plaintiff in error.

Mr. Alexander M. Garber, Attorney General of the State of Alabama, and *Mr. Thomas W. Martin,* for defendant in error.

By leave of court, *Mr. Attorney General Bonaparte* and *Mr. Robert A. Howard* filed a brief as *amici curiæ* on the question of constitutionality of the Alabama statute.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error to reverse a judgment of the Supreme

Court of the State of Alabama, affirming a judgment of a judge of the Montgomery City Court, which denied a discharge on *habeas corpus* to the plaintiff in error. At the hearing on the writ in the City Court it appeared that after a preliminary trial before a justice of the peace the plaintiff in error was committed for detention on a charge of obtaining fifteen dollars under a contract in writing, with intent to injure or defraud his employer. At this stage the writ was issued.

If the Supreme Court had affirmed the denial of the discharge on the ground that the proper course was to raise the objections relied upon at the trial of the principal case on the merits and to take the question up by writ of error, it would have adopted the rule that prevails in this court and there would be nothing to be said. But the Supreme Court of the State dealt with the objections, and, as the matter is one of local procedure, it is not to be criticised for taking a different course. The unsatisfactoriness of such attempts to take a short cut will appear, however, we think, in a moment.

We gather from the opinion of the Supreme Court that the plaintiff in error is proceeded against under a law of 1907 (General Acts, 1907, p. 636), amending the Code of 1896, § 4730. This section of the Code made it an offense punishable like larceny to enter into a contract in writing for service with intent to injure or defraud the employer, and, after thereby obtaining money or personal property from such employer, with such intent, without just cause and without refunding the money or paying for the property to refuse to perform the service. The amendment, embodying and enlarging an earlier one, makes the refusal or failure without just cause *prima facie* evidence of the intent; makes the penalty a fine in double the damage suffered, one-half to go to the party injured, and creates a similar offense with regard to persons making contracts in writing "for the rent of land." It is contended that the statute as it now stands is unconstitutional under the Thirteenth and Fourteenth Amendments. The presumption is said to be artificial and not drawn from the facts of life.

When coupled with the local rule that the party cannot testify to his actual intent, it is said practically to make a crime out of a mere departure from service, which it is said, and it seems to have been conceded by the Supreme Court of Alabama, could not be done.

The trouble in dealing with this contention is due to the meager facts on which this case comes before us at this stage. If the principal case had been tried it is imaginable that it might appear that a certain class in the community was mainly affected, and that the usual course of events, including the consequences in case of inability to pay the fines, was such that in view of its operation and intent the whole statute ought to be held void. It may be, although presumptions of intent from somewhat remote subsequent conduct are not unknown to the common law, *Commonwealth* v. *Rubin*, 165 Massachusetts, 453, that the amendment creates a presumption that cannot be upheld. But we cannot deal with these questions now. All that appears from the record with regard to the foundation of the case against him is that the plaintiff in error is held on a charge of having obtained money under a written contract with intent to defraud. There is no doubt that such conduct may be made a crime. It may be questioned whether we ought to assume that the proceeding is under the statute, although it is admitted on all hands. But if we do assume it, there is nothing as yet to show that the section of the Code apart from the amendments is bad. The amendments are separable, as is sufficiently shown by the fact that the rest of the enactment originally stood without them. When the case comes to trial it may be that the prosecution will not rely upon the statutory presumption but will exhibit satisfactory proof of a fraudulent scheme, so that the validity of the addition to the statute will not come into question at all. It is true that it appears that the plaintiff in error was held for trial on the statutory evidence and with no other proof of fraudulent intent. But if that evidence was insufficient it hardly will be contended that this court should require the state courts to

release all persons held for trial, where in its opinion the evidence fails to show probable cause. We repeat, the trouble with the whole case is that it is brought here prematurely by an attempt to take a short cut. And as the Supreme Court of the State would have been warranted in denying the writ on that ground, perhaps we have done a work of supererogation in giving further reasons for affirming its judgment.

Judgment affirmed.

MR. JUSTICE HARLAN, dissenting.

The plaintiff in error, Bailey, was arrested and held for trial on the charge of having obtained from his employer with the intent to injure him the sum of fifteen dollars. Having been taken into custody he sued out a writ of *habeas corpus* from a subordinate court of Alabama, alleging that the statute under which he was arrested and deprived of his liberty was in violation of the Constitution of the United States.

The statute of Alabama referred to is as follows: "§ 6845 of Alabama Code of 1907, p. 522, c. 211.—Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money or paying for such property, refuses or fails to perform such act or service, must, on conviction, be punished by a fine in double the damage suffered by the injured party, but not more than three hundred dollars, one-half of said fine to go to the county and one-half to the party injured; and any person who, with intent to injure or defraud his landlord, enters into any contract in writing for the rent of land and thereby obtains any money or other personal property from such landlord, and with like intent, without just cause, and without refunding such money or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must, on conviction, be

punished by a fine in double the damage suffered by the injured party, but not more than three hundred dollars, one-half of said fine to go to the county and one-half to the party injured. And the refusal of any person who enters into such contract to perform such act or service, or to cultivate such lands, or refund such money, or pay for such property, without just cause, shall be *prima facie* evidence of the intent to injure his employer or landlord or to defraud him."

It appears that at the hearing of the application for *habeas corpus* the accused contended that the statute was in violation (1) of the Fourteenth Amendment of the Constitution of the United States in that it deprived him of his liberty without due process of law and denied him the equal protection of the laws; (2) of the Thirteenth Amendment, in that its effect was to subject him to involuntary servitude (not as a punishment for crime) if he failed to pay a debt preferred against him.

These contentions were overruled and the discharge of the accused having been refused he prosecuted an appeal to the Supreme Court of Alabama. That court considered upon its merits every question presented by the record, and affirmed the order under which the accused was held in custody. From that order the case was brought here by Bailey from that court upon writ of error granted by its Chief Justice.

Speaking generally, the statute has been assailed by the accused, as well as by the Attorney General of the United States (who, with the consent of this court, has filed a brief as *amicus curiæ*), as establishing and maintaining and as intended to establish and maintain, as to laborers or employés in Alabama, a system of peonage in violation of the Constitution and the laws of the United States. The statute of Alabama, the Attorney General contends, is in violation of the act of Congress of March 2, 1867, c. 187, now § 1990, Rev. Stat., which provides that "all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or any other Territory or State, . . . by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or

indirectly, the voluntary or involuntary service or labor of any persons as peons in liquidation of any debt or obligation, or otherwise, are declared null and void." 14 Stat. 546.

The Supreme Court of Alabama, by its final order, overruled the objections which the accused urged, on constitutional grounds, against the statute and refused to direct his discharge from custody. If that statute is repugnant to the Constitution and laws of the United States it is void, and the accused is deprived of his liberty in violation of Federal law. That every one will admit. But this court refuses, although the case is before it upon writ of error regularly sued out by the defendant, to consider and determine that question. It affirms the judgment of the state court and leaves the accused in custody upon the ground—if I correctly interpret the opinion—that he took a "short cut" when seeking, upon *habeas corpus*, to be discharged from custody in advance of his trial. If the accused, in advance of his trial, had sought a discharge on a writ of *habeas corpus* sued out from *a Circuit Court of the United States*, that might have been deemed a "short cut." For it is well established that "in the light of the relations existing under our system of government between the judicial tribunals of the Union and the State, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution," the courts of the United States will not, except in certain cases of urgency, and in advance of his trial, discharge upon *habeas corpus* one who is alleged to be held in custody by the State in violation of the Constitution or the laws of the United States. *Ex parte Royall*, 117 U. S. 241, 248, 249; *Minnesota* v. *Brundage*, 180 U. S. 499, 501, *and the authorities there cited.* But whether the accused, in seeking his discharge by the state court, adopted a mode of procedure authorized by the local law was for the Alabama courts, not for this court, to determine. The state court recognized the proceeding by *habeas corpus* to be in accordance with the local law; for, the Supreme Court of Ala-

bama, without even intimating that the accused took a "short cut," or pursued the wrong method to obtain his discharge, entertained his appeal and passed upon the constitutionality of the statute under which he was held in custody. As the state court by its final order held that the detention of the accused by the state authorities was not inconsistent with any privilege secured by the Constitution or laws of the United States, he was entitled, *of right*, to bring the case here upon writ of error and have this court determine the question, distinctly raised, whether the statute of Alabama, as applied to his case, did not infringe privileges belonging to him under the Constitution and laws of the United States. We say, of right, because § 709, Rev. Stat., expressly authorizes a writ of error to reëxamine the final judgment of the highest court of a State, which denies a title, right, privilege or immunity, specially set up or claimed under the United States. This is a right of great value. I submit that this court cannot properly refuse or fail to meet the constitutional question decided by the state court and plainly raised by the present writ of error for its consideration. Such refusal or failure cannot, I submit, be justified except on the ground that an order of the highest court of a State rendered on a formal appeal which affirms that the accused is not held in custody in violation of the Constitution and laws of the United States, is not a *final judgment* within the meaning of § 709—a proposition which this court does not announce and which, I cannot believe, it will ever announce. The course pursued in the disposition of this case by the court has not, so far as I am aware, any precedent in its history. If it was the right and duty of the state court to determne by its final order whether the accused was constitutionally deprived of his liberty or was subjected to involuntary servitude or labor, not in punishment for crime, but really in liquidation of a debt, it is then the right, and, I think, the duty of this court, upon the present writ of error, regularly brought by the accused, to reëxamine that judgment and decide the question whether he is deprived of his liberty

in violation of the Constitution or laws of the United States. It is a curious condition of things if this court must remain silent when the question comes before it regularly, whether the final judgment of the highest court of a State does not deprive the citizen of rights secured to him by the Supreme Law of the Land.

For the reasons stated I dissent from the opinion and judgment of the court.

MR. JUSTICE DAY also dissented.

BUTLER v. FRAZEE.

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

No. 36. Argued December 3, 1908.—Decided December 21, 1908.

The common-law rule of assumption of known risk by the employé has never been modified by statute in the District of Columbia, and even if hardship results the court must enforce the rule.

One understanding the condition of machinery and dangers arising therefrom, or who is capable of so doing, and voluntarily, in the course of employment, exposes himself thereto, assumes the risk thereof and if injury results cannot recover against his employer.

Although the plaintiff, if of full age and understanding, may testify to the contrary, where the elements and combination out of which the danger arises are so visible and have been of such long standing that the dangers are obvious to all, the question is one of law for the court and the judge should instruct the jury that a verdict for plaintiff cannot be sustained.

In this case, *held* that an employé in a laundry, who had been employed in laundries for two years and was familiar with the machinery used therein, could not recover for injuries received by a machine on which she had been working for three months, and the imperfections, if any, of which she did not at any time report to her employer.

25 App. D. C. 392, affirmed.

THE facts are stated in the opinion.

Mr. John C. Gittings, with whom *Mr. Justin Morrill Chamberlin* was on the brief, for plaintiff in error:

The master is under obligation not to expose servants, when conducting the master's business, to perils or hazards against which they may be guarded by proper diligence on the part of the master. The defendant in error, under the implied contract between employer and employé, was negligent in failing to so adjust the guard that it would prevent plaintiff's hands from coming into contact with the dangerous machinery. *Hough's Case*, 100 U. S. 213; *McDaniels' Case*, 107 U. S. 454; *Herbert's Case*, 116 U. S. 642; *Archibald's Case*, 170 U. S. 665; *McDade's Case*, 191 U. S. 64.

Although plaintiff may have known of the defect in the machinery, this will not defeat her recovery unless she knew that the defect rendered the thing absolutely dangerous. *Hayzel* v. *Railway Co.*, 19 App. D. C. 372.

"The master should inform the servant of the danger, and it is not enough that the servant knew or ought to have known the actual character and condition of the defective instrumentalities furnished for his use. He must also have understood, or by means of ordinary observation ought to have understood, the risks to which he was exposed by their use." *Russel* v. *Railway Co.*, 32 Minnesota, 234.

That this guard, remaining at the height of one and one-half inches from the feed board, exposed plaintiff to an unnecessary danger is perfectly obvious from the fact of the accident. *Choctaw R. R. Co.* v. *McDade*, 191 U. S. 64; *Indermaur* v. *Dame*, L. R. 1 C. P. 288; *B. & O. R. R. Co.* v. *Baugh*, 149 U. S. 386.

It cannot be fairly said as a matter of law, from the facts in this case, that the danger incident to having the finger guard one and one-half inches in height was "something which inheres in the thing itself, which is a matter of necessity and cannot be obviated. *Pikesville R. R. Co.* v. *Russell*, 88 Maryland, 571. See also *Wabash Ry. Co.* v. *McDaniels*, 107 U. S. 457; *David* v.

Garrett, 6 Bingham, 724; *R. R. Co.* v. *Reaney*, 42 Maryland, 137; *Stergis* v. *Kuntz*, 165 Pa. St. 358; *Fronk* v. *Evans' Steam Laundry Co.*, 70 Nebraska, 75; *Stager* v. *Troy Laundry Co.*, 38 Oregon, 480.

Mr. Leonard J. Mather, with whom *Mr. Charles A. Keigwin* was on the brief, for defendant in error:

The defects complained of were open and obvious to the plaintiff in error, who, giving no notice thereof, thereby assumed the risk of using the defective machine. *Medairy Case*, 86 Maryland, 168; *Hayzel Case*, 19 App. D. C. 369; *Ciraack* v. *Merchants' Woolen Co.*, 6 L. R. A. 733; *Connolly* v. *Eldredge*, 160 Massachusetts, 560; *Ry. Co.* v. *Archibald*, 170 U. S. 672; *Hough's Case*, 100 U. S. 224; *Tuttle* v. *Ry.*, 122 U. S. 189; *Way* v. *Railway*, 40 Iowa, 341; *Murphy* v. *Rockwell Eng. Co.*, 70 N. J. L. 374; *Schofield* v. *Ry. Co.*, 114 U. S. 615; *Kohn* v. *McNulta*, 147 U. S. 271; *Dist. of Columbia* v. *McElligott*, 117 U. S. 621; *Richardson* v. *Cooper*, 88 Illinois, 270; Shearman and Redfield's Negligence, § 209*a*.

Even where the master has neglected to provide safeguards required by statute, the servant cannot recover if he used the machine in its unprotected condition and could see the danger. *Krusley* v. *Pratt*, 148 N. Y. 372; *Keenan* v. *Edison Co.*, 159 Massachusetts, 379.

The rule is well stated in *Hickey* v. *Taafe*, 105 N. Y. 26. See, also, *Ogley* v. *Miles*, 139 N. Y. 458; *Caudet* v. *Stansfield*, 182 Massachusetts, 451; *Hoyle* v. *Excelsior Steam Laundry Co.*, 95 Georgia, 34; *Blom* v. *Yellowstone Park Assn.*, 86 Minnesota, 237; *Keenan* v. *Waters*, 181 Pa. St. 247; *Jones* v. *Roberts*, 57 Ill. App. 56; *Hanson* v. *Hammell*, 107 Iowa, 171; *Crowley* v. *Pacific Mills*, 148 Massachusetts, 228; *Greef Brothers* v. *Brown*, 7 Kans. App. 394.

Mr. Justice Moody delivered the opinion of the court.

The plaintiff in error brought an action against the defend-

ant in error in the Supreme Court of the District of Columbia, in which she sought to recover damages for injuries suffered by her while in the defendant's employ. The injuries were incurred while the defendant was operating a mangle in the defendant's steam laundry. The function of the machine was to iron and dry clothes by drawing them between a cylinder and a series of rollers. The cylinder was of steel, four feet in diameter and eight feet long, and heated by steam. Above and in contact with it were five rollers. When in motion the cylinder and the rollers revolved inwardly. In front of the cylinder and closely fitted to it was a feed board, twelve to fifteen inches wide and eight feet long. It was the duty of the operator of the machine to spread the damp article to be ironed upon the feed board and push it forward until it touched the cylinder, by whose motion it was drawn upward to the point of engagement between the cylinder and the first roller, thereby being drawn through between the cylinder and the rollers. For the safety of the operator the machine was equipped with a finger guard, which was a bar of steel eight feet long, three inches wide and one-eighth of an inch thick, extending from side to side of the machine, and about four inches distant from the revolving cylinder. The guard was painted red. It was adjustable and could be set at a height above the feed board of from one-fourth of an inch to four inches, depending upon the thickness of the clothes to be ironed. On this mangle the guard had always been adjusted at a height of one and one-half inches above the feed board. The various parts of the machine described and their relation to each other and the mode of operation were in plain view of the operator. The plaintiff was twenty-two years of age, apparently of full intelligence, and before entering the employ of the defendant had had two years' experience in the operation of mangles in other establishments. She testified that those mangles were equipped with finger guards, which prevented the operator's hands from coming into contact with the steam cylinder, and that she had never known of any injury happening to an operator by con-

tact with the cylinder. She received no instructions or warning of any danger. When she was set to work upon the mangle in October, 1902, the feed board was loose, thereby permitting clothing occasionally to drop between its edge and the steam cylinder. This condition continued unchanged until the time of the plaintiff's injury, and it was not reported or complained of by her. In the following December she was injured. The only testimony as to how the injury occurred was given by the plaintiff herself, and was stated in the bill of exceptions as follows:

"A. Why, the morning of the accident nearly every piece we put in the mangle, Miss Cumberland's end would go in before mine and I would have to push, and my hand caught on. . . . A. The morning of the accident nearly every piece would catch on Sidney's side before it would catch on mine; and the table cloth would take my hand right on up with it. It dropped down between the board and the cylinder, and when it caught, it carried my hand right on up with it. . . . A. Well, the linen would drop down between the board and the cylinder and you had to push it up. Q. Do you mean us to understand that you put your hand deliberately inside this finger guard and down into the space between the feed board and the cylinder? A. No, sir. Q. How did the linen drop? A. The linen instead of going in would drop down between the board and the cylinder and you would push it up, and the young lady working on the other side, hers would catch before mine. Q. You had to get hold of the end in some way to push it up? A. No, sir; you had to push it up the feed board. Q. If the edge of the linen you were feeding had dropped down between the feed board and the cylinder, how could you push it up? A. You could push it up and it would come down wrinkled. Q. If it had dropped down between the feed board and the cylinder, how could you push it up? A. It dropped down between the feed board and the cylinder, and when you pushed it up and it came out of the mangle it would come out wrinkled. Q. You did not hold the table cloth as it fed into

the machine? A. Yes, I had hold of the table cloth. Q. You pushed the table cloth over the feed board; but you could not catch hold of it, as a matter of fact? A. I had hold of the table cloth and was pushing it up and it dropped. And this day it was worse; every piece we put in it dropped down and we had to push it up; and as I pushed it up in some way or other it took my hand with it. Q. You say it was getting worse? A. Yes. We had to sprinkle the clothes every day, and this day we had to sprinkle the clothes more than ever. Q. And that is the only day you put your hand inside the finger guard? A. Yes. Q. Why did you put your hand inside then? A. I didn't put my hand inside. The table cloth pulled it in. My hand was on the table cloth pushing it up, and the table cloth caught and it caught my hand with it. Q. On this particular occasion even you didn't push your hand inside the finger guard? A. No, sir; I didn't put my hand under the finger guard until the table cloth pulled it under. Q. So the table cloth had hold of your hand before your hand had gotten past the finger guard? A. The table cloth dropped and I gave it another push to make it catch, and after it dropped it caught it on the cylinder and carried my hand right with it. Q. So that your hand had gone past the finger guard before the table cloth caught it and carried it into the mangle? A. The table cloth took my hand right along with it. Q. What I want to find out is the exact time that this table cloth became wrapped around your hand in such a way as to take it into that mangle? A. The table cloth dropped. Sidney's end had gone in and my end had dropped, and I pushed it and it caught. As soon as the table cloth—it caught, and after it caught in some way it took my hand right up with it. Q. Where did it drop? Between the feed board and the cylinder? A. Between the feed board and the cylinder. Q. And it was not until after it dropped that your hand was caught? A. It dropped between the feed board and the cylinder, and I had my hand on the feed board to make it catch, and my hand caught and went right up with it."

The plaintiff offered the testimony of expert witnesses, who said that no kind of laundry work required the finger guard to be more than one-half an inch above the feed board. Apart from the extent of the injuries, this was all the evidence tending to sustain plaintiff's cause of action. The presiding judge directed a verdict to be returned for the defendant. Upon exceptions this ruling was sustained by the Court of Appeals, and the case was brought here by writ of error.

The evidence tended to show that in one respect at least the machine operated by the plaintiff was out of repair. The feed board was loose, thereby permitting the fabric to be ironed sometimes to drop between it and the steam cylinder. How far this was a cause contributing to the injury does not clearly appear, and at the bar it was not relied upon as the cause of the plaintiff's injury. This was the prudent attitude, because the ill-repair of the machine in this respect, and the effect upon its operation, were in existence from the first and well known to the plaintiff, and she failed to report or complain of the defect to her employer. *Washington &c. Railroad Co.* v. *McDade*, 135 U. S. 554, 570. The single ground upon which the plaintiff's right to recover was rested was that the guard rail was adjusted at an excessive height, so that it would permit the plaintiff's hand to be drawn between it and the feed board up to the point of engagement between the revolving cylinder and rollers. The judgment of the court below went against the plaintiff, upon the theory that she assumed the risk of this danger, and that is the question to be considered. One who understands and appreciates the permanent conditions of machinery, premises and the like, and the danger which arises therefrom, or by the reasonable use of his senses, having in view his age, intelligence and experience, ought to have understood and appreciated them, and voluntarily undertakes to work under those conditions and to expose himself to those dangers, cannot recover against his employer for the resulting injuries. Upon that state of facts the law declares that he assumes the risk. The rule is too well settled to warrant an

extensive discussion of it or an attempt to analyze the different reasons upon which it has been held to be justified. The rule of assumption of risk has been thought by many a hard one when applied to the complicated conditions of modern industry, so largely conducted by the aid of machinery propelled by irresistible and merciless mechanical power, and the criticism frequently has been made that the imperative need of employment leaves to the workman no real freedom of choice, such as the rule assumes. That these considerations have had an influence is shown by the notorious unwillingness of juries to apply the rule, and by the legislative modifications of it which, from time to time, have been made, as, for instance, by Congress in the Safety Appliance Law. *Schlemmer* v. *Buffalo, Rochester &c. Ry. Co.*, 205 U. S. 1. But the common law in this regard has not been modified in the District of Columbia, and we have no other duty than to enforce it. No question has been made in the case at bar that the rule prevails and is relevant to the facts of this case. The contention, however, is that as the plaintiff testified in substance that she did not know and appreciate the danger which she was encountering, that testimony, with the other facts in the case, raised an issue for the jury, and that it could not be said, as matter of law, that the risk had been assumed. This contention is sustained by a well-considered case. *Stager* v. *Troy Laundry Co.*, 38 Oregon, 480. See *Fronk* v. *Evans' Steam City Laundry Co.*, 70 Nebraska, 75.

Where the elements and combination out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employé must be held, as matter of law, to understand, appreciate and assume the risk of it. *Texas & Pacific Ry. Co.* v. *Swearingen*, 196 U. S. 51; *Fitzgerald* v. *Connecticut River Paper Co.*, 155 Massachusetts, 155. The visible conditions may have been of recent origin, and the danger arising from them may have been obscure. In such cases, and perhaps others that could be stated, the question of the assumption of the risk is plainly for the jury. But

where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employé is of full age, intelligence and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly. *Patton* v. *Texas & Pacific Railway Co.*, 179 U. S. 658, and cases there cited. The case at bar falls within this class.

The plaintiff was a person of mature years, intelligent and of adequate experience. She had worked for some months upon this particular machine and during that time it was always in exactly the same condition in which it was upon the day of the injury. The elements out of which the danger arose were plainly visible to her. The employer had no duty, statutory or otherwise, to use a rail to guard against so obvious a danger as that arising out of two cylinders in contact with each other and seen to be revolving inwardly. *Hickey* v. *Taafe*, 105 N. Y. 26. We see nothing in the manner of the adjustment of the guard rail which constituted an allurement or was calculated to blind the plaintiff to the danger. The adjustment of the parts of the machine was continually before her eyes. The danger of being drawn between the cylinder and the rollers by contact with the cylinder was illustrated to her every minute of the day by the drawing in of the clothes to be ironed by contact with the revolving cylinder. The distance between the guard rail and the feed board was constant, and its relation to the thickness of her hand was apparent. She must have understood that if her hand became inextricably entangled with the clothes, as seems from the rather vague testimony of the plaintiff was the case here, it would be drawn between the cylinder and receive the injuries which unhappily occurred.

We think that it must be said, as matter of law, that she voluntarily assumed the risk of the danger. *Tuttle* v. *Milwaukee Railway*, 122 U. S. 189; *Crowley* v. *Pacific Mills*, 148 Massachusetts, 228; *Gleason* v. *Railroad*, 159 Massachusetts, 68; *Connolly* v. *Eldredge*, 160 Massachusetts, 566; *Lemoine* v. *Aldrich*, 177 Massachusetts, 89; *Burke* v. *Davis*, 191 Massachusetts. 20.

Judgment affirmed.

PEOPLE OF THE STATE OF NEW YORK *ex rel.* KOPEL *v.* BINGHAM, POLICE COMMISSIONER OF THE CITY OF NEW YORK.

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

No. 167. Argued October 26, 1908.—Decided January 4, 1909.

Under § 17 of the act of April 12, 1900, c. 191, 31 Stat. 77, 81, the governor of Porto Rico has the same power that the governor of any organized Territory has to issue requisitions for the return of fugitive criminals under § 5278, Rev. Stat.

While subd. 2, § 2, Art. IV, Const. U. S., refers in terms only to the States, Congress, by the act of February 12, 1793, c. 7, 1 Stat. 302, now § 5278, Rev. Stat., has provided for the demand and surrender of fugitive criminals by governors of Territories as well as of States, and the power to do so is as complete with Territories as with States. *Ex parte Reggel*, 114 U. S. 642.

Section 5278, Rev. Stat., will not be construed so as to make territory of the United States an asylum for criminals, and that section is not locally inapplicable to Porto Rico within the meaning of § 14 of the act of April 12, 1900, c. 191, 31 Stat. 77, 80.

Porto Rico, although not a Territory incorporated into the United States, is a completely organized Territory.

189 N. Y. 124, affirmed.

THE facts are stated in the opinion.

Mr. Alfred R. Page for plaintiff in error:

Extradition between States, Territories and countries subject to the jurisdiction of the United States depends solely on the provisions of the Constitution of the United States and the acts of Congress. There is no reserve power in the State to surrender a fugitive as a matter of favor or comity. *Corkran* v. *Hyatt*, 172 N. Y. 183; *S. C.*, aff'd, 188 U. S. 691.

This case does not come within any of the four provisions of law for extradition between Porto Rico and the State of New York.

There are four distinct provisions of law authorizing extradition of an alleged fugitive from justice, none of which applies to this case.

1. Extradition between States upon the demand of the governor of one State upon the governor of another. Const. U. S., Art. IV, § 2.

2. Extradition between States and Territories of the United States upon the demand of the governor. Rev. Stat., §§ 5278, 5279.

3. Extradition between foreign countries or Territories occupied by or under the control of the United States and other parts of the United States, on demand of the chief executive officer upon the Secretary of State of the United States. Rev. Stat., § 5270, as amended June 6, 1900.

4. Extradition between States, Territories and Districts or insular possessions under special statutes. Dist. of Col., Rev. Stat. D. C., § 843; Indian Territory, Act of Congress, May 2, 1890, Rev. Stat., § 14; Philippine Islands, c. 529, Laws of U. S., 1903; c. 454, Laws of U. S., 1905; Alaska (when same was a District), c. 429, Laws 1899.

To these might be added the right of removal of a person charged with an offense against the laws of the United States when indicted in the United States court from the District in which he was apprehended to the District in which he was indicted. Rev. Stat., § 1014.

This case does not come within the provisions of the Con-

stitution, because Porto Rico is not a State. Nor under § 5270, Rev. Stat., as the proceedings were not had through the Secretary of State; nor is there any special statute providing for extradition for Porto Rico; the proceedings in this case were had under §§ 5278 and 5279, which do not apply, as Porto Rico is not a Territory of the United States.

The word "territory" as used in § 5278, Rev. Stat., does not mean "The entire domain over which a sovereign state exercises jurisdiction as by right of sovereignty; as within United States territory," but it means "a division of the national domain of the United States that by Act of Congress has been organized under a separate government in the expectation that it or some part thereof will ultimately be admitted into the Union as a State; as Arizona is a territory." Standard Dictionary; *Ex parte Lane*, 135 U. S. 443, 447; *Ex parte Morgan*, 20 Fed. Rep. 304; *Thompson* v. *Utah*, 170 U. S. 343, 346, and cases cited.

Porto Rico possesses none of the attributes necessary to constitute a Territory. A resident of Porto Rico is not and cannot become a citizen of the United States, and his children, even though born after the island was acquired, do not become citizens of the United States.

That Porto Rico is not a Territory, is recognized by the organic act, 31 Stat. 77. Provisions in that statute would be unnecessary if Porto Rico was a Territory of the United States.

The acts of Congress relating to extradition cannot be extended by construction to apply to places other than those specified in the acts themselves.

In addition to States and Territories, it is a well-recognized fact that there exists territory occupied by and under the jurisdiction of the United States, which is not covered by either the designation of a State or Territory. *Downes* v. *Bidwell*, 182 U. S. 244; *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138.

Sections 5278 and 5279 are not applicable to Porto Rico, because it is neither a State nor a Territory of the United States,

and hence by the terms of the statute itself are made inapplicable and are therefore "locally inapplicable."

Mr. Robert C. Taylor, with whom *Mr. Robert S. Johnstone* was on the brief, for defendant in error:

The word "territory" in § 5278, Rev. Stat., comprehends all Territories which are organized in fact.

Porto Rico is an organized Territory in the full sense of the word and is necessarily contemplated by § 5278, Rev. Stat. *Ex parte Lane*, 135 U. S. 443; Foraker Act (chap. 191, 31 Stat. 77); *In re Kopel*, 148 Fed. Rep. 505, 507; *National Bank* v. *County of Yankton*, 101 U. S. 129, 133; *Ex parte Morgan*, 20 Fed. Rep. 298, 305; 28 Am. & Eng. Enc. of Law (2d ed.), 57, and cases cited; *Gonzales* v. *Williams*, 192 U. S. 15; *Garzot* v. *De Rubio*, 209 U. S. 283.

In any event, the powers given to the governor of Porto Rico by § 17 of the Foraker Act show that Congress expressly intended that Porto Rico, by virtue of these powers, should have the right to demand the extradition of fugitives under § 5278. *People ex rel. Kopel* v. *Bingham*, 189 N. Y. 124; *S. C.*, aff'g, 117 App. Div. 411; *In re Kopel*, 148 Fed. Rep. 505, 508.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

September 11, 1906, Kopel was taken into custody by defendant in error Bingham, who is the police commissioner of the city of New York. The arrest was made in pursuance of a rendition warrant issued by the governor of the State of New York, which recited that Kopel was charged with having committed embezzlement in Porto Rico; that he had fled therefrom and taken refuge in New York, and that his return had been lawfully demanded by the governor of Porto Rico.

Kopel thereupon sued out a writ of *habeas corpus* from the Supreme Court of the State of New York. Bingham made

return to the writ, and set up the rendition warrant as his authority for detaining the prisoner. Kopel demurred to the return as insufficient in law, and that the governor's warrant had been issued without authority, etc. The matter coming on at special term before Truax, J., the demurrer was overruled and the writ dismissed, and the police commissioner directed to deliver Kopel to the agent of Porto Rico, to be conveyed back to Porto Rico.

From this order Kopel appealed to the Appellate Division of the Supreme Court in the First Department, and the order of Judge Truax was unanimously affirmed.

Kopel then appealed to the Court of Appeals, which affirmed the order below. The record was remitted to the Supreme Court, to be proceeded upon according to law, and thereupon the order of the Court of Appeals was made the order of the Supreme Court, whereby it was ordered that the original order of the Supreme Court which had been affirmed should be enforced and carried into execution and effect. To this order upon the remittitur this writ of error is addressed.

The questions involved are whether the governor of Porto Rico had power and authority to make a requisition upon the governor of the State of New York for the arrest and surrender of the fugitive criminal of Porto Rico who had taken refuge in the State of New York, and whether the governor of the State of New York had power and authority to honor such requisition and to issue his rendition warrant for the arrest and surrender of such fugitive.

Section 5278 of the Revised Statutes reads as follows:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony or other crimes, certified as authentic by the governor or chief magistrate of the State or Territory from whence the

person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive and to cause the fugitive to be delivered to such agent when he shall appear. . . ."

By § 827 of the Code of Criminal Procedure of New York it is provided:

"It shall be the duty of the governor, in all cases where by virtue of a requisition made upon him by the governor of another State or Territory, any citizen, inhabitant or temporary resident of this State is to be arrested as a fugitive from justice . . . to issue and transmit a warrant for such purpose to the sheriff of the proper county . . . (except in the city and county of New York, where such warrant shall only be issued to the superintendent or any inspector of police). . . . Before any officer to whom such warrant shall be directed or intrusted shall deliver the person arrested into the custody of the agent or agents named in the warrant of the governor of this State, such officer must, unless the same be waived, as hereinafter stated, take the prisoner or prisoners before a judge of the Supreme Court or a county judge, who shall, in open court, if in session, otherwise at chambers, inform the prisoner or prisoners of the cause of his or their arrest, . . ." and that he or they may have a writ of *habeas corpus* upon filing an affidavit to the effect that he or they are not the person or persons mentioned in said requisition.

By § 14 of the Organic Act of Porto Rico, commonly called the Foraker Act, it is provided that "the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws," etc. 31 Stat. 80, chap. 191.

Section 17 provides that the governor "shall at all times faithfully execute the laws, and he shall in that behalf have

all the powers of governors of the Territories of the United States that are not locally inapplicable."

Among the powers of governors of Territories of the United States is the authority to demand the rendition of fugitives from justice under § 5278 of the Revised Statutes, and we concur with the courts below in the conclusion that the governor of Porto Rico has precisely the same power as that possessed by the governor of any organized Territory to issue a requisition for the return of a fugitive criminal. *People &c. ex rel. Kopel* v. *Bingham, Police Commissioner,* 189 N. Y., 124; *S. C.,* 117 App. Div. 411. It was so held by Judge Hough, of the District Court of the United States for the Southern District of New York, in passing upon a similar application by this same relator. *In re Kopel,* 148 Fed. Rep. 505.

Subdivision 2 of § 2 of Art. IV of the Federal Constitution refers in terms to the States only, but the act of Congress of February 12, 1793, carried forward into § 5278 of the Revised Statutes, made provision for the demand and surrender of fugitives by the governors of the Territories as well as of the States, and it was long ago held that the power to extradite fugitive criminals as between State and Territory is as complete as between one State and another. *Ex parte Reggel,* 114 U. S. 642, 650. If § 5278 does not apply, no other statute does. And as to §§ 14 and 17 of the Foraker Act, no contention is made that they are locally inapplicable, except as it is argued that § 5278 of the Revised Statutes is not applicable at all, because Porto Rico is not a "Territory," as that word is used therein. We quite agree with Judge Hough that "to allege that the only existing law under which a Porto Rican fugitive from justice can be returned thereto from the United States is 'locally inapplicable' would be to make a jest of justice."

It is impossible to hold that Porto Rico was not intended to have power to reclaim fugitives from its justice, and that it was intended to be created an asylum for fugitives from the United States.

In the case of *Ex parte Morgan,* 20 Fed. Rep. 298, 305, the

question involved was the right of the governor of Arkansas to honor a requisition for the surrender of a fugitive criminal received from the principal chief of the Cherokee Nation, and the court, in holding that the governor was not authorized to honor such a requisition, for the reason that the chief of the Cherokee Nation was not the executive authority of any "State" or "Territory," inasmuch as the Cherokee Nation or Indian Territory was not an organized government, with an executive, legislative and judicial system of its own, but was exclusively under the jurisdiction of the United States, defined a Territory within the meaning of the extradition statute as follows:

"A portion of the country not included within the limits of any State, and not yet admitted as a State into the Union, but organized under the laws of Congress with a separate legislature under a territorial governor and other officers appointed by the President and Senate of the United States."

In the case of *In re Lane*, 135 U. S. 443, the accused was charged with the commission of an offense "within that part of the Indian Territory commonly known as Oklahoma." He was tried and convicted upon an indictment, found under an act of Congress, which excepted the "Territories" from its operation; and it was claimed that Oklahoma, which was then a part of the Indian Territory, was a Territory and came within the exemption of the act. But the court, Miller, J., said:

"But we think the words 'except the territories' have reference exclusively to that system of organized government, long existing within the United States, by which certain regions of the country have been erected into civil governments. These governments have an executive, a legislative and a judicial system. They have the powers which all these departments of government have exercised, which are conferred upon them by act of Congress, and their legislative acts are subject to the disapproval of the Congress of the United States. They are not in any sense independent governments; they have no Senators in Congress and no Representatives in the lower

house of that body, except what are called Delegates, with limited functions. Yet they exercise nearly all the powers of government, under what are generally called organic acts passed by Congress conferring such powers on them. It is this class of governments, long known by the name of Territories, that the act of Congress excepts from the operation of this statute, while it extends it to all other places over which the United States have exclusive jurisdiction.

"Oklahoma was not of this class of Territories. It had no legislative body. It had no government. It had no established or organized system of government for the control of the people within its limits, as the Territories of the United States have and have always had. We are therefore of opinion that the objection taken on this point by the counsel for prisoner is unsound."

Oklahoma was given a territorial government by the act of May 2, 1890, 26 Stat. 81, §§ 1 to 100, chap. 182.

In *Gonzales* v. *Williams*, 192 U. S. 15, the court unanimously held that a citizen of Porto Rico was not an alien immigrant, and among other things an opinion of Attorney General Knox, relating to a Porto Rican named Molinas, was quoted from as follows:

"He [*i. e.*, Molinas] is also clearly a Porto Rican; that is to say, a permanent inhabitant of that island, which was also turned over by Spain to the United States. As his country became a domestic country and ceased to be a foreign country within the meaning of the tariff act above referred to, and has now been fully organized as a country of the United States by the Foraker act, it seems to me that he has become an American, notwithstanding such supposed omission."

It may be justly asserted that Porto Rico is a completely organized Territory, although not a Territory incorporated into the United States, and that there is no reason why Porto Rico should not be held to be such a Territory as is comprised in § 5278.

Order affirmed.

BEERS v. GLYNN, COMPTROLLER OF THE STATE OF NEW YORK.[1]

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

No. 45. Argued December 9, 1908.—Decided January 4, 1909.

So far as the Federal Constitution is concerned, the power of the State in respect to taxation is very broad, and includes exemption of certain classes of property from taxation to which other property is subjected, and different classes may be taxed by different methods of procedure without violating the due process and equal protection provisions of the Fourteenth Amendment.

The provisions in the New York Inheritance Tax Law, chap. 713 of Laws of 1887, amending chap. 483 of the Laws of 1887, for taxing personalty of non-resident decedents who had owned realty in that State, are not unconstitutional as denying to those interested in estates of that class of decedents due process or equal protection of the laws, because no provision is made for taxing personalty of non-resident decedents who had not owned any realty in New York.

THE facts which involve the constitutionality of §§ 1 and 15 of the New York Inheritance Tax Law are stated in the opinion.

Mr. Lucius H. Beers for plaintiffs in error:

Chapter 713 of the Laws of 1887, in so far as it applied to the property of non-residents, was not capable of verbal separation as between provisions relating to the property of non-residents who owned land in the State and provisions relating to the property of non-residents who did not own land in the State, nor can the legislature have intended that it should apply to the former and not to the latter. Being unconstitutional under the Fourteenth Amendment as to the

[1] Original docket title Lord v. Glynn, Comptroller, etc.

property of such non-residents as did not own land in New York, in that it takes their property without due process of law, it was therefore unconstitutional as to the property of all non-residents.

It is quite clear from its language that the act of 1887 did not authorize any tribunal or officer to assess the tax on property of non-resident decedents, except in cases where the non-resident had owned land in New York. But if any question had existed it would have been settled by the decision of the Court of Appeals in *Matter of Embury*, 19 App. Div. 214; affirmed by Court of Appeals on opinion below, 154 N. Y. 746. Such being the provision of the act, it follows that the act was unconstitutional with respect to the large class of non-resident decedents who did not own real estate, because it sought to deprive the persons interested in such estates of their property without due process of law. *Hagar* v. *Reclamation District*, 111 U. S. 701, 710; *Spencer* v. *Merchant*, 125 U. S. 345, 355, 356; *Palmer* v. *McMahon*, 133 U. S. 660, 669; *Lent* v. *Tillson*, 140 U. S. 316, 328; *Fallbrook Irr. Dist.* v. *Bradley*, 164 U. S. 112, 157; *Bauman* v. *Ross*, 167 U. S. 548, 590; *Carson* v. *Brockton Comm.*, 182 U. S. 398, 401.

The constitutional and unconstitutional portions of a statute, to be separable, must each be capable of being read by itself; and further, even in a case where constitutional provisions may be severed from those which are unconstitutional, the rule applies only where it is plain that the legislative body would have enacted the legislation with the unconstitutional provisions eliminated. *Virginia Coupon Cases*, 114 U. S. 269; *United States* v. *Reese*, 92 U. S. 214; *Trade-Mark Cases*, 100 U. S. 82; *Allen* v. *Louisiana*, 103 U. S. 80; *Baldwin* v. *Franks*, 120 U. S. 678; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *United States* v. *Ju Toy*, 198 U. S. 253, 262; *Illinois Central R. R.* v. *McKendree*, 203 U. S. 514; *Employers' Liability Cases*, 207 U. S. 463.

Applying this rule to the present case, it will be seen that if the portions of the act of 1887 which relate to non-resident

decedents who do not own land in the State,—which provisions are unconstitutional under familiar decisions of this court,—are stricken from the act, there is no provision left in the act imposing a tax in this case.

The clauses above referred to have been brought to the attention of the highest court of New York State and that court in *Matter of Embury, supra*, held that as to non-residents who do not own land no officer or tribunal has been given power to assess the tax. With respect to non-residents who do not own land, the act of 1887 is therefore unconstitutional under the Fourteenth Amendment of the United States Constitution, in that it attempts to take their property without due process of law. *Hagar* v. *Reclamation District*, 111 U. S. 701, 710, and other cases cited, *supra*.

The rule of separability requires that the remaining portion of the act, after the unconstitutional provisions have been eliminated, shall be such as it is clear that the legislature would have enacted without the eliminated portions. That rule is not satisfied in the case at bar.

The discrimination shown by the attempt to tax the bonds of the decedent while bonds of the same class belonging to the estate of her husband, who died only ten days before her, were not taxed, constitutes a violation of the rule requiring the equal protection of the laws. *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593, 598; *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232, 237; *Walston* v. *Nevin*, 128 U. S. 578, 582; *Minneapolis Ry. Co.* v. *Beckwith*, 129 U. S. 26, 29; *Magoun* v. *Illinois Tr. & S. Bank*, 170 U. S. 283, 293; *A., T. & S. F. Ry.* v. *Matthews*, 174 U. S. 96, 104; *Mo., K. & T. Ry.* v. *May*, 194 U. S. 267, 269; *St. John* v. *New York*, 201 U. S. 633, 636; *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150; *Matter of City of New York*, 190 N. Y. 350, 360.

Mr. D. Cady Herrick for defendant in error:

The power of the legislature of the State of New York to impose an inheritance tax upon personal property within the

State of New York, belonging to non-residents, has been upheld both by the courts of New York and this court. *Matter of Romaine*, 127 N. Y. 83; *Matter of Whiting*, 150 N. Y. 29; *Eidman* v. *Martinez*, 184 U. S. 582, and cases cited.

The imposition of the tax in the case at bar did not deprive plaintiffs in error of their property without due process of law. The decision in this case of the Court of Appeals of the State of New York, is conclusive upon this court, that the statute under which the tax was imposed was not in violation of the state constitution, and that the proceedings had, did not deprive the plaintiffs in error of their property without due process of law, within the meaning of the state constitution. Neither the statute under which the tax was imposed nor the proceedings by which it was imposed, are obnoxious to the Fourteenth Amendment of the Constitution of the United States.

The Fourteenth Amendment in no wise undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard before the issues are decided. *I. C. R.* v. *Iowa*, 160 U. S. 393.

There is nothing in the Federal Constitution to prevent the State of New York from imposing a tax upon personal property within the State of non-residents who own real estate therein, and exempting from taxation personal property within the State of non-residents owning no real estate therein. *Bell's Gap Ry. Co.* v. *Pennsylvania*, 134 U. S. 236, 238; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 351; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 287, 299; *Metropolitan Street Ry. Co.* v. *New York*, 199 U. S. 1, 47.

The plaintiffs in error present no case for this court under the Fourteenth Amendment to the Constitution, showing that they have been deprived of their property without due process of law, or that they have been denied the equal protection of the law.

Inequality of taxation presents no question for review under the Fourteenth Amendment of the Constitution. *Hayes* v. *Missouri*, 120 U. S. 68; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, 464; *Travelers' Ins. Co.* v. *Connecticut*, 185 U. S. 372.

The plaintiffs in error were not denied the equal protection of the law. A law cannot be held unconstitutional because there are no means provided for enforcing it against certain classes of persons or property.

The plaintiffs in error cannot assert the alleged defect in the law, because not affected by it. Cooley's Constitutional Limitations (7th ed.), 232; *Lee* v. *State of New Jersey*, 207 U. S. 67; *Hatch* v. *Reardon*, 204 U. S. 152, 160.

Mr. Justice Brewer delivered the opinion of the court.

The question presented in this case is the validity of a collateral inheritance tax on certain property bequeathed to plaintiffs in error by Emily M. Lord, deceased. The testatrix and her husband had lived for many years at Morristown, New Jersey. She died there January 18, 1892. At the time of her death she owned real estate situate in the State of New York, and certain personal property on deposit in a safe deposit company in the city of New York. The inheritance tax was claimed under chap. 713 of the Laws of the State of New York for 1887, entitled "An act to amend chap. 483 of the Laws of 1885, entitled 'An act to tax gifts, legacies and collateral inheritances in certain cases.'"

That act has twenty-six sections. It is sufficient, however, to refer to a part of § 1 and § 15:

"Sec. 1. After the passage of this act all property which shall pass by will or by the intestate laws of this State, from any person who may die seized or possessed of the same while a resident of this State, or if such decedent was not a resident of this State at the time of death, which property, or any part thereof, shall be within this State, . . . shall be and is

subject to a tax of five dollars on every hundred dollars of the clear market value of such property."

"SEC. 15. The Surrogate's Court in the county in which the real property is situate of a decedent who was not a resident of the State, or in the county of which the decedent was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act, and the surrogate first acquiring jurisdiction hereunder shall retain the same, to the exclusion of every other."

It appears that the husband of the testatrix died in Morristown only ten days before his wife, but as he owned no real estate situate in the State of New York no inheritance tax was collected from his estate. In claiming the equal protection of the law under the Fourteenth Amendment counsel for plaintiffs in error, after pointing to the discrimination between the two cases, contend that—

"The act of 1887, in so far as it applied to the property of non-residents, was not capable of verbal separation as between provisions relating to the property of non-residents who owned land in the State and provisions relating to the property of non-residents who did not own land in the State, nor can the legislature have intended that it should apply to the former and not to the latter. Being unconstitutional under the Fourteenth Amendment as to the property of such non-residents as did not own land in New York, in that it takes their property without due process of law, it was therefore unconstitutional as to the property of all non-residents."

Also that—

"The imposition of a tax under the act of 1887 on the property bequeathed to these plaintiffs in error cannot be made without such a discrimination as will deny to them the equal protection of the laws."

We do not understand that the Court of Appeals of the State of New York has decided that the State has no power to collect an inheritance tax where the only property belong-

ing to the decedent situate within the State of New York is personalty, but simply that no provision has been made for reaching such a case.

Both parties refer to the *Matter of Embury*, 19 App. Div. 214, which was decided in June, 1897, by the First Department, and affirmed by the Court of Appeals on the authority of the opinion of the Appellate Division, 154 N. Y. 746. In that case it appears from the opinion in the Appellate Division that Philip Embury was a citizen and resident of New Jersey, and died at West Orange in that State after the passage of the act of 1887. He had no real estate in New York, but only certain personal property. He left a will, which was duly probated in the county of his residence, and thereupon the executors withdrew the personal property from New York to New Jersey, and settled up the estate in accordance with the terms of the will. The opinion, after referring to § 15 of the act of 1887, said (pp. 216–217):

"The statute, therefore, only conferred on the surrogate jurisdiction in the case of such non-resident decedents as should die seized of real estate within the surrogate's county. . . . In other words, the statute of 1885, as amended by the act of 1887, declared such of Embury's property as was in New York taxable, but omitted to give the Surrogate's Court jurisdiction to impose the tax, a situation to which an expression of the Court of Appeals in *The Matter of Stewart*, 131 N. Y. 284, is applicable: 'It is not enough for the legislature to declare that such interests are taxable. If no mode is provided for assessing and collecting the tax the law is imperfect and cannot, as to such interests, be executed.' A tax cannot be legally imposed unless the statute, in addition to creating the tax, provided for an officer or tribunal who shall appraise and assess the property on notice to the owner. *Stuart* v. *Palmer*, 74 N. Y. 188; *Remsen* v. *Wheeler*, 105 N. Y. 575. The principle decided in the cases cited applies to the transfer tax as well as to assessments for public improvements. *Matter of McPherson*, 104 N. Y. 321. . . . It is apparent, therefore,

that when the executors took the deposits and the bank stock out of the State for distribution, no tax had been imposed upon such property, and there was no method provided by law by which a tax could legally be imposed upon it. What they did they had not only the right, but it was their duty, to do. The legal title to the property in this State vested in them as the personal representatives of their testator by force of the laws of New Jersey. *Matter of Bronson*, 150 N. Y. 1. They were bound to take possession of it and make distribution according to the decree of the court having jurisdiction of the estate. Had a tax been imposed on the property, or had a statute providing for its imposition been in force, it would have been their duty to have paid it or to have requested the imposition of the tax, as the case might be, before removing the property."

Subsequently the Court of Appeals, in *The Matter of Fitch*, 160 N. Y. 87, 90, said, referring to the *Embury case*, that it "held by an affirmance on the opinion below, that while the statute declared such of Embury's property to be taxable as was situated in the city of New York, nevertheless as it omitted to authorize the surrogate to impose the tax, the order made by that officer was without jurisdiction."

Under this condition an inheritance tax may be collected where the decedent owns both personal and real property within the State of New York and not where the only property belonging to the decedent situate within the State is personalty. But though the operation of the statutes creates a difference, this even if intentional is not of itself sufficient to invalidate the tax. The power of the State in respect to the matter of taxation is very broad, at least so far as the Federal Constitution is concerned. It may exempt certain property from taxation while all other is subjected thereto. It may tax one class of property by one method of procedure and another by a different method. *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, 238; *Pacific Express Company* v. *Seibert*, 142 U. S. 339; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, 464;

Travelers' Insurance Company v. *Connecticut*, 185 U. S. 364; *Michigan Central Railroad* v. *Powers*, 201 U. S. 245. The right of exemption has been applied to succession taxes (*Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 299), in which this court said:

"Nor do the exemptions of the statute render its operation unequal within the meaning of the Fourteenth Amendment. The right to make exemptions is involved in the right to select the subject of taxation and apportion the public burdens among them, and must consequently be understood to exist in the lawmaking power wherever it has not in terms been taken away. To some extent it must exist always, for the selection of subjects of taxation is of itself an exemption of what is not selected. Cooley on Taxation, 200; see also the remarks of Mr. Justice Bradley in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232."

Indeed, it may be laid down as a general rule that mere inequalities or exemptions in the matter of state taxation are not forbidden by the Federal Constitution.

There is no error in the rulings of the courts of the State of New York, and the judgment is

Affirmed.

KNOP v. MONONGAHELA RIVER CONSOLIDATED COAL AND COKE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 449. Argued December 18, 1908.—Decided January 4, 1909.

The mere construction of a state statute does not of itself present a Federal question.

Where the constitutionality of a state statute, as construed by the highest court of the State, is admitted, and only its applicability to the facts is denied, no question as to the construction or applica-

tion of the Federal Constitution is involved, and a direct appeal to this court from the Circuit Court will not lie under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 826.

THE appellants are gaugers of coal and coke, appointed by the State of Louisiana. The appellee is a corporation organized under the laws of Pennsylvania, engaged in mining bituminous coal outside the State of Louisiana and transporting it to that and other States for sale. The transportation to Louisiana is in coal boats or barges. For some years the sales were largely in bulk by the boat or barge load, but within a year or two prior to the commencement of this suit, in consequence of the introduction and general use of fuel oil, the sale in boat or barge loads had been reduced to some thirty-five or forty loads per annum, although the appellee was transporting to Louisiana from 800 to 1,000 loaded boats and barges. By far the bulk of the sales were thus by barrel or weight and not by boat or barge load, and the amount of each sale was fixed and determined by actual measurement or weighing at the time of delivery to the purchaser.

An act was passed by the State of Louisiana, in 1888, in respect to gauging. Laws 1888, p. 207, chap. 147. The validity of this statute was challenged in the state courts, but sustained by the Supreme Court. *State* v. *Pittsburg & Southern Coal Company*, 41 La. Ann. 465. That court, refusing a rehearing, said (p. 473):

"Nothing in this application shakes our conviction of the correctness of our interpretation of the statute as making the gauging of the coalboats and barges, before sale, compulsory. We may remark, however, that the act applies exclusively to sales of boat loads or barge loads of coal, and not to sales of a particular number of barrels of coal from a boat or barge."

The case was brought to this court and the ruling of the Supreme Court of Louisiana sustained, it appearing that the sales were "to dealers, planters, and other purchasers, but in no quantity less than a boat or barge load." Subsequent leg-

islation was had in Louisiana. Acts 1894, page 172, Act 137; Acts 1902, page 81, being an amendment of the act of 1894, and Acts 1904, page 201, an amendment of the act of 1888. The only difference between the later legislation and the act of 1888 which is material is that in the act of 1888, § 8, it is provided "no boat load of coal or coke shall be sold in this city or State until it has been inspected, as provided for by this act," while § 3 of the act of 1904 reads, "no boat load of coal or coke, nor any part thereof, shall be delivered to the purchaser thereof, whether the sale was made within or without the State, until it has been inspected as provided for in this act."

On December 10, 1906, the appellee filed its bill in the Circuit Court of the United States for the Eastern District of Louisiana to restrain the gaugers of coal from proceeding under the acts except as to coal sold or intended for sale by boat or barge load. On June 11, 1908, a decree was entered for the plaintiff, in accordance with the prayer of the bill, the court in its opinion saying:

"The title of the act of 1902, and of the act of 1904, is 'An act to compel the weighing or gauging in the State of all bituminous or anthracite coal or coke sold in Louisiana by boat, barge or car load.' The act of 1904, sec. 8, reads, 'No boat load of coal or coke, nor any part thereof, shall be delivered to the purchaser,' and in the next sentence reads, 'And any person, partnership, firm or corporation who shall sell or deliver in this State a boat load or a barge load of coal or coke, or any part thereof.' Construing the word part with reference to the object of the statute and with reference to the words that immediately precede it, I do not see how there can be any doubt that the part meant is an aliquot fraction of a load."

From this decree of the Circuit Court the appellants appealed directly to this court.

Mr. E. Howard McCaleb, Junior, with whom *Mr. Walter Guion* was on the brief, for appellants.

Mr. Charles S. Rice, for appellee.

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

An appeal was taken under § 5 of the act creating the Circuit Court of Appeals. 26 Stat. 826, 827. The mere construction of a state statute does not of itself present a Federal question. But the contention of appellants is that the Circuit Court improperly construed the act of 1904; that correctly construed it applies not merely to sales by boat or barge load, or some aliquot part thereof, but also to sales by weight or measurement, and that under such construction a question is presented of a conflict between it and the Federal Constitution.

But the difficulty with this contention is, first, that the statute construed as applied to boat and barge loads has been declared valid by this court; and further, that there is no claim by the appellee of any invalidity in the statute, but only of its inapplicability to the facts. In the face of the decision of this court and the claim of the appellee it is difficult to see how there can be any question of a conflict between the legislation and the Federal Constitution. After a final decision, it is going too far to hold that there still remains an undecided question, and that when we have held that a statute of a State is valid there remains a controversy as to its validity, and this is emphatically true when neither party challenges that decision. Nor for like reason does there appear any ground for holding that there is a question as to the construction or application of the Constitution. While in § 10 of Art. I of the Federal Constitution there is a recognition of the power of the State to pass inspection laws, yet to justify a holding that the application of the Federal Constitution is involved there should be a question as to the relation between some constitutional provision and the state statute.

Under these circumstances we are of opinion that this court has no jurisdiction, and the appeal must be

Dismissed.

LEMIEUX *v.* YOUNG, TRUSTEE.

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

No. 48. Argued December 9, 1908.—Decided January 4, 1909.

It is within the police power of the State to regulate sales of entire stocks in trade of merchants so as to prevent fraud on innocent creditors; and a state statute prohibiting such sales except under reasonable conditions as to previous notice is not unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment; and so *held* as to §§ 4868 and 4869, General Laws of Connecticut, as amended by chap. 72 of the Public Acts of 1903.

79 Connecticut, 434, affirmed.

THE facts are stated in the opinion.

Mr. Charles F. Thayer and *Mr. John J. Phelan* for plaintiff in error:

The provisions of the amended statute, requiring the spreading upon the town records of a notice of intention to sell, seven days before the sale, were in violation of the Constitution of the United States, as abridging and depriving the plaintiff in error of his liberty, or property or his contract rights, as provided by the Fourteenth Amendment. Case below, 79 Connecticut 434, see dissenting opinion of Hammersley, J.; *In re Jacobs*, 98 N. Y. 98; *People* v. *Marx*, 99 N. Y. 377; *People* v. *Gillson*, 109 N. Y. 389; *State* v. *Goodwill*, 33 W. Va. 179, *S. C.*, 6 L. R. A. 621; *Lawton* v. *Steele*, 152 U. S. 133, 137; *Colon* v. *Lisk*, 153 N. Y. 188; *People* v. *Arensburg*, 103 N. Y. 399; *Health Department* v. *Rector*, 145 N. Y. 32, 39.

The statute cannot be justified as an exercise of the police power. No legislative enactment can impute a crime, under the guise of police power, to any person while pursuing the

exercise of a constitutional right. *Tynoler* v. *Warden*, 157 N. Y. 116; *State* v. *Julow*, 129 Missouri, 163; *Commonwealth* v. *Perry*, 155 Massachusetts, 117; *Godcharles* v. *Wigeman*, 113 Pa. St. 431; *State* v. *Goodwill*, 33 W. Va. 179; *Ramsey* v. *People*, 142 Illinois, 380; *State* v. *Missouri Tie Co.*, 65 L. R. A. 588; *Ritchie* v. *People*, 155 Illinois, 98; *People ex rel. Rodgers* v. *Coler*, 166 N. Y. 1; *State* v. *Dalton* (R. I.), 48 L. R. A. 775; *People ex rel. Cossey* v. *Grout*, 179 N. Y. 417.

The following cases appear to involve the precise principles upon which the statute here complained of is based: *Block* v. *Schwartz*, 76 Pac. Rep. 22; *S. C.*, 65 L. R. A. 308; *Wright* v. *Hart*, 182 N. Y. 330; *Neas* v. *Borches*, 109 Tennessee, 398; *S. C.*, 71 S. W. Rep. 50, dissenting opinion; *McDaniels* v. *Connelly Shoe Co.*, 30 Washington, 549; *S. C.*, 60 L. R. A. 947; *Squire & Co.* v. *Tellier*, 69 N. E. Rep. 312.

The amended statute violates § 1, of Art. XIV, of the Amendments to the Constitution of the United States, because it denies to the plaintiff in error as the vendee of said Hendrick, and to persons placed in a position similar to that of the plaintiff in error, the equal protection of the laws of Connecticut, and abridges their respective privileges and immunities as citizens of the United States. *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Ruhstrat* v. *People*, 185 Illinois, 183; *Gulf, Colorado & Santa Fe Railway Co.* v. *Ellis*, 165 U. S. 150, 159; *Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Matter of Pell*, 171 N. Y. 48; *McPike* v. *Van DeCarr*, 178 N. Y. 425; *Ballard* v. *Mississippi River Bill Co.*, 81 Mississippi, 507.

Mr. Donald G. Perkins for defendant in error:

The need or wisdom of such legislation as the act here in question is a matter of legislative discretion, and this court will not consider that question. *Powell* v. *Pennsylvania*, 127 U. S. 685.

This act was clearly within the police power of the State under the reasoning and within the decisions cited by the court

in its opinion. Statutes upon the same subject, but with much more rigorous and burdensome conditions, have been held to be constitutional. *Squire & Co.* v. *Tellier*, 185 Massachusetts, 18.

The fact that property may be destroyed through the enforcement of a statute, and the right of contract either prohibited or restricted, is not decisive on the question of constitutionality. *Frisbie* v. *United States*, 157 U. S. 165; *Soon Hing* v. *Crowley*, 113 U. S. 709; *Booth* v. *Illinois*, 184 U. S. 429; *Otis* v. *Parker*, 187 U. S. 606; *Jacobson* v. *Massachusetts*, 197 U. S. 27; *Ah Sin* v. *Williamson*, 198 U. S. 500; *Reduction Co.* v. *Sanitary Works*, 199 U. S. 318.

Mr. Justice White delivered the opinion of the court.

Whether the following provisions of the general laws of Connecticut are repugnant to the Fourteenth Amendment because wanting in due process of law and denying the equal protection of the laws, is the question for decision:

"Sec. 4868, as amended by chapter 72 of the public acts of Connecticut of 1903. No person who makes it his business to buy commodities and sell the same in small quantities for the purpose of making a profit, shall at a single transaction, and not in the regular course of business sell, assign, or deliver the whole, or a large part of his stock in trade, unless he shall, not less than seven days previous to such sale, assignment, or delivery, cause to be recorded in the town clerk's office in the town in which such vendor conducts his said business, a notice of his intention to make such sale, assignment, or delivery, which notice shall be in writing describing in general terms the property to be so sold, assigned, or delivered, and all conditions of such sale, assignment, or delivery, and the parties thereto.

"Sec. 4869. All such sales, assignments, or deliveries of commodities which shall be made without the formalities required by the provisions of sec. 4868 shall be void as against

all persons who were creditors of the vendor at the time of such transaction."

The controversy thus arose. Philip E. Hendricks conducted a retail drug store at Taftville, Connecticut. While engaged in such business, in August, 1904, he sold his stock in bulk to Joseph A. Lemieux, his clerk, for a small cash payment and his personal negotiable notes. The sale was made without compliance with the requirements of the statute above quoted. Subsequently Hendricks was adjudicated a bankrupt, and the trustee of his estate commenced this action against Lemieux and replevied the stock of goods. Among other grounds the trustee based his right to recover upon the non-compliance with the statutory requirements in question. In the trial one of the grounds upon which Lemieux relied was the assertion that the statute was void for repugnancy to the Fourteenth Amendment to the Constitution of the United States, because wanting in due process of law and denying the equal protection of the laws. The trial court adjudged in favor of the trustee and his action in so doing was affirmed by the Supreme Court of Errors of Connecticut, to which the case was taken on appeal. 79 Connecticut, 434. The cause was then brought to this court.

The Supreme Court of Errors, in upholding the validity of the statute, decided that the subject with which it dealt was within the police power of the State, as the statute alone sought to regulate the manner of disposing of a stock in trade outside of the regular course of business, by methods which, if uncontrolled, were often resorted to for the consummation of fraud to the injury of innocent creditors. In considering whether the requirements of the statute were so onerous and restrictive as to be repugnant to the Fourteenth Amendment, the court said:

"It does not seem to us, either from a consideration of the requirements themselves of the act, or of the facts of the case before us, that the restrictions placed by the legislature upon sales of the kind in question are such as will cause such serious inconvenience to those affected by them as will amount to an

unconstitutional deprivation of property. A retail dealer who owes no debts may lawfully sell his entire stock without giving the required notice. One who is indebted may make a valid sale without such notice, by paying his debts, even after the sale is made. Insolvent and fraudulent vendors are those who will be chiefly affected by the act, and it is for the protection of creditors against sales by them of their entire stock at a single transaction and not in the regular course of business, that its provisions are aimed. It is, of course, possible that an honest and solvent retail dealer might, in consequence of the required notice before the sale, lose an opportunity of selling his business, or suffer some loss from the delay of a sale occasioned by the giving of such notice. But 'a possible application to extreme cases' is not the test of reasonableness of public rules and regulations. *Commonwealth* v. *Plaisted*, 148 Massachusetts, 375. 'The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public. *Chicago &c. R. Co.* v. *State*, 47 Nebraska, 549, 564."

That the court below was right in holding that the subject with which the statute dealt was within the lawful scope of the police authority of the State, we think is too clear to require discussion. As pointed out by Vann, J., in a dissenting opinion delivered by him in *Wright* v. *Hart*, 182 N. Y. 350, the subject has been, with great unanimity, considered not only to be within the police power, but as requiring an exertion of such power. He said:

"Twenty States, as well as the Federal Government in the District of Columbia, have similar statutes, some with provisions more stringent than our own, and all aimed at the suppression of an evil that is thus shown to be almost universal. California: Civ. Code, § 3440, as amended March 10, 1903 (St. 1903, p. 111, c. 100). Colorado: Sess. Laws 1903, p. 225, c. 110. Connecticut: Pub. Acts 1903, p. 49, c. 72. Delaware: Laws 1903, p. 748, c. 387. District of Columbia: 33 Stat.

555, c. 1809; Acts 58th Con., April 28, 1904. Georgia: Laws 1903, p. 92, No. 457. Idaho: Laws 1903, p. 11, H. B. 18. Indiana: Acts 1903, p. 276, c. 153. Kentucky: Acts 1904, p. 72, c. 22. Louisiana: Acts 1896, p. 137, No. 94. Maryland: Laws 1900, p. 907, c. 579. Massachusetts: Acts and Resolves 1903, p. 389, c. 415. Minnesota: Gen. Laws 1899, p. 357, c. 291. Ohio: Laws 1902, p. 96, H. B. 334. Oklahoma: Sess. Laws 1903, p. 249, c. 30. Oregon: B. & C. Com., p. 1479, c. 7. Tennessee: Acts 1901, p. 234, c. 133. Utah: Laws 1901, p. 67, c. 67. Virginia: Acts approved January 2, 1904; Acts 1902–04, p. 884, c. 554 (Va. Code 1904, p. 1217, § 2460*a*). Washington: Laws 1901, p. 222, c. 109. Wisconsin: Laws 1901, p. 684, c. 463. A statute with the same object attained by a similar remedy has been held valid by the highest courts in Massachusetts, Connecticut, Tennessee and Washington. *J. P. Squires & Co.* v. *Tellier*, 185 Massachusetts, 18; *Walp* v. *Mooar*, 76 Connecticut, 515; *Neas* v. *Borches*, 109 Tennessee, 398; *McDaniels* v. *J. J. Connelly Shoe Co.*, 30 Washington, 549. An act declaring such sales presumptively fraudulent was assumed to be valid by the courts of last resort in Wisconsin and Maryland. *Fisher* v. *Herrman*, 118 Wisconsin, 424; *Hart* v. *Roney*, 93 Maryland, 432. On the other hand, a statute with more exacting conditions was held unconstitutional in Ohio (*Miller* v. *Crawford*, 70 Ohio, 207), and a similar act met the same fate in Utah, where a violation of the statute was made a crime (*Block* v. *Schwartz*, 27 Utah, 387)."

To the cases thus cited may be added *Williams* v. *Fourth National Bank*, 15 Oklahoma, 477, where a statute was sustained, which made sales in bulk presumptively fraudulent when the requirements of the statute were not observed.

The argument here, however, does not deny all power to pass a statute regulating the subject in question, but principally insists that the conditions exacted by this particular statute are so arbitrary and onerous as to cause the law to be repugnant to the Fourteenth Amendment. To support this view in many forms of statement it is reiterated that the con-

ditions imposed by the statute so fetter the power to contract for the purchase and sale of property of the character described in the statute as to deprive of property without due process of law, and, moreover, because the conditions apply only to retail dealers, it is urged that the necessary effect of the statute is, as to such dealers, to give rise to a denial of the equal protection of the laws. We think it is unnecessary to follow in detail the elaborate argument by which it is sought to sustain these propositions. Their want of merit is demonstrated by the reasoning by which the court below sustained the statute as partially shown by the excerpt which we have previously quoted from the opinion announced below. Indeed, the court below in its opinion pointed out that the statute did not cause sales which were made without compliance with its requirements to be absolutely void, but made them simply voidable at the instance of those who were creditors at the time the sales were made. Moreover, the unsoundness of the contentions is additionally shown by the number of cases in state courts of last resort sustaining statutes of a similar nature, which we need not here cite, as they are referred to in the excerpt heretofore made from the opinion of Vann, J., in *Wright* v. *Hart, supra.*

Much support in argument was sought to be deduced from the opinion in *Wright* v. *Hart; Miller* v. *Crawford* (70 Ohio St. 207), and *Block* v. *Schwartz* (27 Utah, 387). It is true that in those cases statutes dealing with the subject with which the one before us is concerned were decided to be unconstitutional. But we think it is unnecessary to analyze the cases or to intimate any opinion as to the persuasiveness of the reasoning by which the conclusion expressed in them was sustained. This is said because it is apparent from the most casual inspection of the opinions in the cases in question that the statutes there considered contained conditions of a much more onerous and restrictive character than those which are found in the statute before us.

As the subject to which the statute relates was clearly

within the police powers of the State, the statute cannot be held to be repugnant to the due process clause of the Fourteenth Amendment, because of the nature or character of the regulations which the statute embodies, unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power. *Booth* v. *Illinois*, 184 U. S. 425. This, we think, is clearly not the case. So, also, as the statute makes a classification based upon a reasonable distinction, and one which, as we have seen, has been generally applied in the exertion of the police power over the subject, there is no foundation for the proposition that the result of the enforcement of the statute will be to deny the equal protection of the laws.

Affirmed.

MILLER *v.* NEW ORLEANS ACID & FERTILIZER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 32. Argued December 1, 1908.—Decided January 4, 1909.

Where the state court decides that a trustee in bankruptcy can avoid a preference under the state law against the contention that the exertion of such power conflicts with the bankrupt law, and that if the preference is given by a member of a firm that the trustee need not establish that there were other individual creditors, Federal questions are involved and necessarily decided, and the judgment does not rest on non-Federal grounds broad enough to sustain it and may be reviewed by this court under § 709, Rev. Stat.

Where no question is made below that the state court was not competent to authorize the trustee to prosecute, judgment in his favor will not be reversed when presumably the want of authority from the bankrupt court would have been supplied if challenged.

The authority to preserve liens of pending actions under subd. *f* of § 67 of the bankrupt law extends to causes of action under state law and is cumulative, and not in abrogation of rights under the state law.

Where, as in Louisiana, copartnership creditors coequally share with individual creditors in the individual estates of the members of the firm, copartnership creditors are prejudiced by preferences made by

a member to individual creditors, and, if the preference is illegal under state law, the trustee can succeed to a suit of the partnership creditor in the state court even if there be no other individual creditors; but the distribution of the preferential payment when paid in depends, as between the individual and copartnership creditors, on the provisions of § 5 of the bankrupt law.

THE facts are stated in the opinion.

Mr. E. B. Dubuisson, for plaintiff in error.

Mr. William J. Sandoz, with whom *Mr. G. L. Dupré* was on the brief, for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The law of Louisiana considers the property of the debtor as the common pledge of all his creditors. C. C. 1969. As a general rule, therefore, it contemplates an equality of right in all creditors as to all the property of the debtor, existing at the time an obligation against the debtor arises, unless a creditor, as the result of some lawful contract or from the particular nature of the debt to which the law gives a preference, has acquired a higher and privileged right to payment than that which belongs to the general mass of creditors. C. C. 1968. Under that law the creditors of a partnership are preferred as to the partnership assets over the individual creditors of the members of the firm. C. C. 2823. This privilege does not, however, conversely exist, since it has been held from an early day in that State that individual creditors of members of the firm have no preference on the individual assets of the estate of the members of a firm, and therefore the partnership creditors and the individual creditors have a concurrent right to payment out of the individual estates. *Morgan* v. *Creditors*, 8 Martin (N. S.), 599; *Flower* v. *Creditors*, 3 La. Ann. 189.

As a result of the common pledge which all creditors are presumed to have upon the property of their debtors the law of Louisiana gives to every creditor an action to revoke any contract made in fraud of their common right of pledge. C.

C. 1970–1977. As a consequence it is permissible to attack, even collaterally, any mere fraudulent and simulated (that is, fictitious and unreal) transfer of his property by a debtor. See authorities collected in 2 Hennen's Digest, verbo Obligations VII, p. 1031. This right, however, even in case of bad faith, does not enable a creditor to avoid a real contract of a debtor unless the act has operated to the injury and prejudice of creditors who were such at the time the act sought to be revoked was done. C. C. 1937. Every contract, however, is deemed to have been in fraud of creditors and prejudicial to their rights "when the obligee knew that the obligor was in insolvent circumstances and when such contract gives to the obligee, if he be a creditor, any advantage over other creditors of the obligor." C. C. 1984. From this rule are excepted sales of property or other contracts made in the usual course of business and all payments of a just debt in money. C. C. 1986. But this exception does not include the "giving in payment to one creditor to the prejudice of others any other thing than the sum of money due." C. C. 2658.

In 1903 the commercial firm of O. Guillory & Co., composed of Olivrel Guillory, Olivrel E. Guillory and Ambrois Lafleur, carried on business in the State of Louisiana. In 1904 the senior member, Olivrel Guillory, sold various parcels of real estate, which were his individual property, as follows: One sale to J. A. Fontenot, another to Alexandre Miller, and a third to John A. and Samuel Haas. All these sales were, apparently, on their face not susceptible of being assailed by creditors, because in form they were embraced within the excepted class to which we have referred.

On February 2, 1905, three corporations—which, for the sake of brevity, we shall designate as the Wooden Ware, the Fertilizing and the Elevator Companies—sued in a state district court the firm of O. Guillory & Co., the senior member, O. Guillory, individually, and the purchasers at the respective sales above mentioned. As to the first company, the cause of action was based upon an alleged open account for the purchase

price of goods sold to the firm prior to the making of the sales by the senior partner of his individual property above mentioned. As to the two other corporations the action was based upon notes held by the corporations signed by the individual members of the firm, and averred to have been given for the price of merchandise bought, also prior to said sales, from the corporations by the firm, it being alleged that the notes signed by the individual members had been received by the corporations as cumulative, and not in any wise as a novation of the firm obligation to pay the price of the goods by it bought. The sales were attacked as fraudulent simulations, or, if not unreal, as subject to be revoked, because they were made at a time when the firm was notoriously embarrassed or insolvent to the knowledge of the purchasers, and were not within the excepted class, because they were, in substance, not what they purported to be, but were givings in payment of the individual property of O. Guillory in order to prefer the purchasers.

The prayer was for a judgment for the amount of the debts, for a revocation of the sales, for a direction that they be sold by judicial decree to pay the judgments to be rendered, the payments to be made by preference out of the proceeds arising from the sale.

The cause was put at issue by general denials filed for the firm, for O. Guillory individually and for the purchasers. Before trial, in consequence of an adjudication in bankruptcy as to Guillory & Co., made on April 28, 1905, a petition was filed in the cause by W. J. Sandoz, alleging himself to be "the duly appointed and qualified trustee of the bankrupt estate of O. Guillory & Co." It was alleged that "since the institution of this suit the said O. Guillory & Co. have made application for and been adjudged bankrupts in the District Court of the United States for the Western District of Louisiana." And it was further averred that under the bankrupt law of the United States "the trustee succeeds to the rights of the creditors who may have brought actions to annul any transactions

affecting the property of the bankrupts, and the law makes it his duty to prosecute the same for the benefit of the said bankrupt estate in his capacity as trustee." The prayer of the petition was that Sandoz, as trustee, "be made a party plaintiff in this suit and duly authorized to prosecute the same to final judgment for the benefit of said bankrupt estate of O. Guillory & Co." The state court, after notice to the parties, entered an order substituting Sandoz as party plaintiff in his capacity "as trustee of the estate of O. Guillory & Co. . . . with authority to prosecute the same to final judgment for the benefit of said bankrupt estate."

Sandoz, trustee, was thereafter the sole plaintiff, and prosecuted an appeal to the Supreme Court to reverse a judgment of the trial court sustaining the sales. The Supreme Court, for reasons given in an elaborate opinion, held the sale to Fontenot to have been simulated and sustained the validity of the Haas and Miller sales. It was found that Olivrel Guillory had made the sales of his individual property principally for the purpose of assisting the firm which was embarrassed as the result of a decline in the price of cotton held by the firm; that at the time Guillory had no individual debts whatever, except one of three thousand dollars due to Miller and another of six thousand dollars, which was assumed and provided for in the Haas sale. Granting a rehearing asked by trustee Sandoz, a different conclusion was reached as to the Miller sale. The court found that when that sale was made Guillory owed Miller three thousand dollars, and although the price of seventy-five hundred dollars was actually paid to Guillory, yet as immediately after the sale Guillory had paid the three thousand dollar debt which he owed to Miller, "the transaction was an indirect preference of the son-in-law (Miller) over other creditors by a disguised giving in payment." This writ of error sued out by Miller was allowed by the chief justice of the state court.

By the assignments of error it is contended, first, that the court erred in testing, at the instance of Sandoz, trustee, the

validity of the sale to Miller by the state law instead of by the bankrupt law of the United States, which was alone controlling; second, under the bankrupt law of the United States the court erred in holding that the transfer by Guillory of his individual property to pay Miller, his individual creditor, was revocable, although there was no other individual creditor to be prejudiced thereby; and, third, that in any event the court erred in holding that prejudice could have resulted under the bankrupt law to individual creditors by the sale to Miller without ascertaining whether there were such creditors who could have been prejudiced. In other words, that the court erred in decreeing the sale to Miller to the extent of three thousand dollars to be revocable as a prejudicial preference, and at the same time relegating to the bankruptcy court the determination of whether there were any individual creditors who could have been prejudiced; thus decreeing a preference and yet declining to determine a question which was essential to be ascertained before a preference could be adjudged.

Our jurisdiction is challenged, first, because it is urged no Federal question was set up or claimed in the trial court, and therefore no such question was cognizable by the Supreme Court; second, because no Federal question was raised in or decided by the Supreme Court; third, even if incidentally a Federal question may have been passed upon below, nevertheless the court based its conclusions upon a non-Federal ground broad enough to sustain its judgment. The first question is involved in the second, because if the court below decided a Federal question we may not decline to review its action in so doing upon the assumption that the court transcended its powers under the state law by passing on a question which it had no right to examine because not raised in the trial court. The second contention embraces an irrelevant element, that is, that no Federal question was raised in the court below, since if such a question was expressly decided by the court our duty to review may likewise not be avoided by assuming that the court decided a question not raised in the cause.

The proposition, therefore, reduces itself to this: Did the court below expressly decide a Federal question adversely to the plaintiff in error?

In its opinion on the rehearing the court said:

"The trustee in bankruptcy, was, on his own petition, made a party plaintiff and was authorized by order of court to prosecute the suit to final judgment for the benefit of the bankrupt estate. Neither the capacity of the trustee nor his right to stand in judgment have been questioned. It is argued, however, by counsel for Miller that the partnership alone was adjudged a bankrupt and not the members as individuals, and that as Miller, under the bankrupt act of 1898, is entitled to be paid by preference over partnership creditors out of the net proceeds of the individual estate of O. Guillory, plaintiffs were not prejudiced by the payment of the note held by Miller out of the individual assets of the debtor. The answer to this contention is that the petition of the bankrupt shows that O. Guillory filed schedules of his individual debts and of his individual property. 'Where a firm goes into bankruptcy it is a proceeding against each and every member, and both the firm and individual assets must be administered in bankruptcy.' Collier on Bankruptcy, p. 60. Hence all rights of preference must be determined by the court having jurisdiction of the insolvency."

In view of the statement that no question was raised "as to the capacity of the trustee and his right to stand in judgment," and the fact that the record does not contain the full proceedings had in the bankruptcy court, and the further fact that no question as to the capacity of the trustee is raised in the assignment of errors, we take it that the intimation made by the court concerning the effect of the adjudication of a firm as being also an adjudication of the individual estates of the members was but a method of reasoning resorted to by the court to sustain its decision concerning the right of the trustee to avail of the state law under the circumstances of the case, irrespective of the rule as to preferences provided in the bank-

rupt law, and, further, to support its conclusion that it was its duty to abstain from determining whether there were individual creditors who were prejudiced, and to remit that question to the court in which the bankruptcy proceedings were pending.

But thus limiting the passage referred to it nevertheless results that the court below both considered and necessarily decided two distinct Federal questions: First, the right of the trustee to avoid a preference under the state law, although it was contended that the exertion of such power was in conflict with the bankrupt law; and, second, that the preference might be avoided under the state law at the instance of the trustee without establishing that there were creditors of the individual estate. So far as the third contention concerning jurisdiction it is apparent from what we have just said that it is without merit. While it is true that the court applied the state law in testing the existence of the preference, such application of that law is obviously not alone broad enough to sustain its conclusion that the trustee under the bankrupt law had the right to avail of the preference under the state law, and this is also true concerning the ruling that there was power to determine the preference under the state law without previously ascertaining the existence under the bankrupt act of individual creditors.

We come then to the merits. Eliminating, as we have done, the expressions of the court below, as to the effect of the adjudication in bankruptcy of the partnership upon the estates of the individual members, we need not approach the very grave question which would arise for consideration if that subject had been decided by the court below. *In re Stokes*, 106 Fed. Rep. 312; *Dickas* v. *Barnes*, 140 Fed. Rep. 849; *In re Bertenshaw*, 157 Fed. Rep. 363.

While § 5 of the bankrupt act expressly authorizes an adjudication in bankruptcy against a firm, the controlling provisions following are the direct antithesis of the rule prevailing in the State of Louisiana.

Thus, subdivision *f* of § 5 commands that "the net proceeds of the partnership property shall be appropriated to the pay-

ment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts." To enforce these provisions the act compels (sub. *d*) the keeping of separate accounts of the partnership property and of the property belonging to the individual partners; the payment (sub. *e*) of the bankrupt expenses as to the partnership and as to the individual property proportionately; and, permits (sub. *g*) the proof of the claim of the partnership estate against the individual estate, and *vice versa*, and directs the marshalling of the assets of the partnership estate and the individual estates, "so as to prevent preferences and secure the equitable distribution of the property of the several estates."

Now, by § 60 of the bankruptcy law, as amended by the act of 1903, it is provided that 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 . . . made a transfer of any of his property, and the effect of the enforcement of such . . . 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." It is obvious that if at the time of the alleged preferential transfer to Miller there were no other creditors of the individual estate of Guillory than Miller under the rule laid down by the bankrupt act, the transfer to him of assets of the individual estate in payment of an individual debt did not constitute a preference. That it might have constituted a preference under the state law results from the difference in the classification made by the state law on the one hand and the bankruptcy law on the other. So, also, it is evident, having regard to the separation between the partnership and individual estates made by the bankrupt act and the method of distribution of those estates,

that if there were no individual creditors and the sum paid to Miller was returned to the estate as a preference, it would be his right to at once receive back by way of distribution that which he was obliged to pay in upon the theory that it was a preference.

The questions then to be decided are these, 1st, Was the trustee authorized by the bankrupt law to avoid the sale to Miller to the extent of the three thousand dollars which constituted the giving in payment under the state law? And, 2d, if so, was it incumbent on the trustee, under the bankrupt act, to such recovery to show the existence of individual creditors at the time the giving in payment to Miller took place who were prejudiced thereby, and if not was the trustee obliged to show the existence of individual creditors at the time of the adjudication in bankruptcy who would be prejudiced in the distribution of the bankrupt estate if the giving in payment to Miller was not annulled?

As the suit by the creditors was brought within four months before the adjudication in bankruptcy, their right to a lien or preference arising from the suit was annulled by the provisions of subdivision *f* of § 67 of the bankrupt law. But that section authorized the trustee, with the authority of the court, upon due notice, to preserve liens arising from pending suits for the benefit of the bankrupt estate, and to prosecute the suits to the end for the accomplishment of that purpose. *First National Bank* v. *Staake*, 202 U. S. 141. It is inferable that the parties proceeded upon the erroneous conception that the state court, where the suit was pending, was competent to authorize the trustee, but as no question on that subject was made below or is here raised, we may not reverse the judgment in favor of the trustee because of the absence of authority from the bankrupt court, when presumably the want of authority would have been supplied had its absence been challenged. Assuming, therefore, that the trustee was properly authorized, it follows that he was entitled to preserve and enforce the privilege or lien, which arose in favor of the cred-

itors, resulting from their pending action, even although the cause of action arose from the state law, and the application of that law was essential to secure the relief sought. To the accomplishment of this end the bankrupt law was cumulative and did not abrogate the state law. See *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356.

Undoubtedly, the trustee, in prosecuting the suit to judgment was obliged to prove the existence of the facts which were essential under the state law, since to hold otherwise would be but to decide that he could recover without proof of his right to do so. But as under the state law creditors of the partnership had a coequal right to payment with the individual creditors of a member of the firm out of his individual estate, it follows that even if there had been no individual creditor but Miller, recovery was justified because of the prejudice suffered by the partnership creditors as the result of the giving in payment made by Guillory to Miller. In view of the distinction between the estates of partnerships and the estates of the members of the firm, which is made by the bankrupt law, and the method of distribution for which that law provides, of course the trustee will hold the fund as an asset of the estate of the individual member, and primarily for the benefit of his creditors. Although, on proof of the claims against such individual estate, if it be that Miller is the only individual creditor he will be entitled, by way of distribution, to the full amount paid in by him because of the method of distribution ordained by the bankrupt law, that fact does not establish that there was a necessity, in order to avoid the preference under the state law, to make proof that at the time of the alleged giving in payment there were other individual creditors who were prejudiced. While the power in the state court to pass on the question of preference involved the duty of deciding whether, at the time of the assailed transaction there were creditors to be prejudiced, that duty did not involve ascertaining what creditors, at the time of the adjudication in bankruptcy, were entitled to participate in the distribution. The one was within the province

of the state court for the purpose of the case before it; the other was a different question, depending on independent considerations exclusively cognizable in the bankruptcy court. The state court was, therefore, right in so deciding.

Affirmed.

UNITED STATES *v.* BIGGS.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 289. Argued December 16, 17, 1908.—Decided January 4, 1909.

United States v. *Keitel, ante*, p. 370, followed as to the power of this court to review judgments in criminal cases at the instance of the Government under the act of March 2, 1907, c. 2546, 34 Stat. 1246.

The timber and stone act of June 3, 1878, c. 151, 20 Stat. 89, as amended by the act of August 4, 1892, c. 375, § 2, 27 Stat. 348,[1] while prohibiting the entryman from entering ostensibly for himself but in reality for another, does not prohibit him from selling his claim to another after application and before final action. *Williamson* v. *United States*, 207 U. S. 425.

An indictment for conspiracy to defraud the United States by improperly obtaining title to public lands will not lie under § 5440, Rev. Stat., where the only acts charged were permissible under the land laws.

When this court in affirming a judgment in a criminal case under the act of March 2, 1907, c. 2546, 34 Stat. 1246, has decided on a broad ground that the Government cannot prosecute the case, it is not necessary for it to decide the other questions involved which thereby become irrelevant.[2]

157 Fed. Rep. 264, affirmed.

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[1] For an abstract of the timber and stone act see note in *Williamson* v. *United States*, 207 U. S. 425, 455.

[2] The point not passed on was, as stated in the syllabus of the opinion in the case below: An indictment under Rev. Stat. § 5440 for conspiracy to defraud the United States, which sets out a number of overt acts on different dates, is either bad for duplicity, as charging more than one conspiracy, or if held to charge a single continuing conspiracy, the offense was consummated when the first overt act was committed, and from that date the statute of limitations began to run.

THE facts are stated in the opinion.

The Attorney General and *The Solicitor General*, with whom *Mr. Edwin W. Lawrence*, Special Assistant to the Attorney General, was on the brief for the United States:

Here, as in the coal land cases, the argument is that the court below merely held that the facts charged in the indictment were not within the statute, and therefore the indictment and not the statute was interpreted or construed. That contention, the court in those cases held to be devoid of all merit. *United States* v. *Keitel*, *ante*, p. 370.

As the court below in construing the indictment really construed the law and merely applied that construction to the indictment, it seems proper for the Government to discuss the indictment in the light of its language as drawn from the law itself, notwithstanding this court held in the *Keitel case* that, on such a writ of error, it has not jurisdiction to consider alleged defects in the indictment or misconstruction of the indictment irrespective of construction of the statute.

"To enter" in the third section of the law refers to final proofs and payment, but "make entries" in the indictments is not to be so construed. The word "entry" often refers to the filing of the inceptive right as in the early case of *Chotard* v. *Pope*, 12 Wheat. 586. That is the popular sense as shown by the dictionaries, but the technical meaning includes the proceedings as a whole and the complete transfer of title. *Dealy* v. *United States*, 152 U. S. 539, 544, 545; *Hastings &c. R. R.* v. *Whitney*, 132 U. S. 357, 363.

"To obtain" lands signifies similarly the complete process of acquisition, and since the indictment, following the law, describes these lands as "open to entry," the charge includes the initial application. In *Adams* v. *Church*, 193 U. S. 516, referring to the timber culture law, the meaning attached to *entry* is the original application, the court using the language, "after entry and before final proof." And under this very law in *Williamson* v. *United States* the court uses the

term in precisely the same sense, viz.: "in the interim between entry and final proof." 207 U. S. 461.

The indictments sufficiently charge a conspiracy to defraud, although the conspiracy did not embrace the making of false and fraudulent applications.

The timber and stone act restricts the quantity of timber land to be sold to 160 acres to any one person or association of persons. A corporation could not, without violating the law, step into the shoes of the various applicants and in its own name take the steps which the law requires for completion of the entries. But this is what the indictments charge that the defendants conspired to do, except that it is alleged that they planned that the applicants should complete the entries without disclosing the interest of the corporation. The applicants would be acting merely as the agents of the corporation, and in each case the sale would be made by the United States to the corporation and not to the entrymen. This is not a *bona fide* contract by an entryman to convey after patent. The *Williamson case* can be distinguished. See *United States* v. *Budd*, 144 U. S. 154; *United States* v. *Trinidad Coal Co.*, 137 U. S. 160.

The coal land statutes did not require the applicant to make an affidavit at entry that he was purchasing solely for his own benefit; neither does the timber and stone act require such an affidavit to be made at the time the lands are *purchased* from the United States. Both statutes prohibit the acquisition from the United States by one person of more than a certain quantity of land. The plan carried out by the Trinidad Coal Company was held fraudulent because the company did indirectly what it could not do directly. This is exactly what the defendants in the present cases are charged with. The end, fraud, being unlawful, it was unnecessary to set out in detail the indirect means contemplated by the conspiracies. *Dealy* v. *United States*, 152 U. S. 539, 543; *Burton* v. *United States*, 202 U. S. 344; *Thomas* v. *United States*, 156 Fed. Rep. 897; *United States* v. *Grunberg*, 131 Fed. Rep.

137; *Thomas* v. *People,* 113 Illinois, 131; *People* v. *Bird,* 126 Michigan, 631.

If there ever was a rule that the statute of limitations begins to run as soon as the first overt act in pursuance of a conspiracy has been committed and in three years thereafter the bar is complete, it has been entirely superseded by the rule that the crime consists in putting a corrupt agreement into operation, and the limitation runs from the date of the last overt act committed for the purpose of effecting the object of the conspiracy. The question is whether the conspiracy is in existence, and overt acts of individual conspirators committed within the period of the statute are evidence of a renewal and continuance of the conspiracy. *Ware* v. *United States,* 154 Fed. Rep. 577, and cases cited. At least four cases involving this point have recently been brought before the court on petition for certiorari, and the petitions have been denied. *Lorenz* v. *United States,* 196 U. S. 640; *Bradford* v. *United States,* 206 U. S. 563; *Ware* v. *United States,* 207 U. S. 588; *Jones* v. *United States,* this term, *post.*

All that was decided in *Adams* v. *Church* and *Williamson* v. *United States* touching the point in the present case was that an entryman has the right to dispose of his holding acquired in good faith before the final certificate. No question was involved in either case of the acreage restriction in the timber culture law and this law, respectively, or of the right of a purchaser to *buy.* It was determined that the entryman had the right to *sell.* An entryman's right to sell *ad interim* depends upon his good faith, and he is bound in good faith to disclose his principal, although it may not be criminal for him not to do so or even to swear to the contrary. A purchaser cannot legally buy in the interim between application and final proof, that is, before title has been acquired from the United States, if he has already bought one tract. He is a disqualified purchaser. Entrymen who are not themselves conspirators and who are acting separately are nevertheless the agents, although unconscious and innocent, it may be,

of an undisclosed principal. The Government is not prosecuting the entrymen but the conscious agents of the principal conspiring to violate the law and evading its prohibition by procuring from the United States indirectly through the entrymen more land than the principal could buy directly. If the *Williamson case* means that title vests in the entryman as soon as he makes preliminary application, and that a purchaser in the interim before final proof would be buying from him and not from the United States, just as much as after final proof and payment or after patent, then indeed it is conclusive against the Government here, and there is no violation of law, for the law does not mean what it seems to mean by its acreage restriction. Otherwise this scheme is a fraud, because it is sought to obtain lands from the United States indirectly in violation of law, just as much as the scheme in the *Trinidad case*, or in the *Keitel case*, or the *Forrester case*, which is said by the court not to be distinguishable from the *Keitel case* as involving a violation of the coal land law.

Unless there is less meaning and force in the prohibition of the timber and stone law than in the prohibition of the coal land law, and unless there is some difference which we do not perceive between the interim status of an entryman here and the status of a preference entryman in the corresponding interval under the coal land law, this case is not distinguishable from the case of the coal preference entries (the *Forrester case*), and if the *Williamson case* does not rule that case, neither does it rule this.

Mr. Charles J. Hughes and *Mr. Clyde C. Dawson* for defendants in error:

This court is without jurisdiction of these writs of error under the act of March 2, 1907:

Because neither § 5440 nor the timber and stone act were held invalid; nor were either of said statutes the subject of construction by the District Court; nor can the jurisdiction of this court be sustained under the clause of the act of March 2,

1907, relating to judgments sustaining "a special plea in bar," for neither a "special plea in bar" nor a judgment sustaining a "special plea in bar" appear in the records.

No offense is charged in the indictments.

There are many "laws" of the United States under which timber lands may be entered. There is only one of those laws which indicates any policy of the Government restricting the amount of land which may be entered by any one individual or corporation. These indictments charge conspiracy to procure the entering of lands under some of these laws, but do not in any manner allege that this conspiracy was a conspiracy to procure entries under the one law which restricts the amount that can be entered. The defendants are entitled to the presumption that their combination was one to procure entries under the laws which do not so restrict the area of entry, and not under the law which does so restrict it.

And, therefore, these indictments do not charge any attempt to "defraud the United States in any manner for any purpose."

Under the restrictive law to which we have referred, the only thing which the Congress of the United States attempted to prevent is the making of contracts, before the making of applications to purchase, whereby the entryman binds himself to convey the title which he shall acquire from the Government to some other person.

It must be presumed that the intent of the entrymen was innocent, and that they did not conspire to make these contracts of conveyance at any time when the laws of the United States, as interpreted by its Supreme Court, prohibited such action. *Williamson* v. *United States*, 207 U. S. 425.

The only point where any representation in regard to such agreements of conveyance is required, is at the making of the application; that is to say, when the first application is made to the officers of the Government.

To "defraud the United States" a false representation of some fact is necessary, and these indictments show no con-

spiracy to procure the making of any representations by any person whatsoever. It is only by the most violent presumption that such conclusions can be reached from the allegations of these indictments. In the absence of such affirmative allegations the defendants are entitled to the presumption that they did not conspire to procure the making of any false representations whatsoever, or any representation at a time when the same would be false, and hence did not conspire to "defraud the United States" in any manner or for any purpose.

The making of false representations, if alleged, in violation of a Land Department regulation imposing on the entryman a condition not contained in the law, would constitute no offense. *Williamson* v. *United States, supra.*

If such regulation exists it has not been pleaded, and hence cannot be relied upon. *United States* v. *Bedgood,* 49 Fed. Rep. 54; *United States* v. *Eaton,* 144 U. S. 677, 687, 688; *United States* v. *Maid,* 116 Fed. Rep. 650; *United States* v. *Blassingame,* 116 Fed. Rep. 654; *Anchor* v. *Howe,* 50 Fed. Rep. 366; *United States* v. *Howard,* 37 Fed. Rep. 666; *Hoover* v. *Salling,* 110 Fed. Rep. 43; *United States* v. *Manion,* 44 Fed. Rep. 801; *United States* v. *Hoover,* 133 Fed. Rep. 950; *United States* v. *Matthews,* 146 Fed. Rep. 306; *United States* v. *United Verde Copper Co.,* 196 U. S. 207; *Williamson* v. *United States,* 207 U. S. 425.

Conclusions of law and of the pleader and not facts are pleaded.

References to the overt acts are necessary in order to determine definitely the conspiracy charged.

There is no certainty of allegation as to the time of the alleged offense conspired to be accomplished.

There is no allegation that the defendants conspired to defraud the United States.

The overt acts, alleged in each indictment, show on their face that no one of them was done in pursuance of the conspiracies charged nor to effect the object of the same, and

hence in failing to charge an overt act to effect the object of the conspiracies the indictments fail to charge a crime.

MR. JUSTICE WHITE delivered the opinion of the court.

It is adequate to an understanding of the questions which are here necessary to be decided in general terms to say that the indictment against the defendants in error charged them with conspiracy in violation of the second clause of § 5440, Rev. Stat., which makes it criminal to conspire to defraud the United States "in any manner or for any purpose." The means by which it was contemplated that the United States should be defrauded was charged in the indictment to have been the unlawful obtaining by purchase under the timber and stone act of public land of the United States in excess of the quantity authorized by law to be acquired. The timber and stone act when originally enacted in June, 1878, related solely to public lands within particular States. 20 Stat. c. 151, 89. In 1892, however, that act was amended by striking out the designation of particular States, thus causing the act to apply to "surveyed public lands of the United States within the public land States." 27 Stat. c. 375, 348. As it is essential to have that act in mind we excerpt from the opinion of the court below a succinct but comprehensive and accurate statement of its provisions:

"This act in its first section specifies the qualifications of purchasers or entrymen thereunder, and limits the amount of land which each may acquire to one hundred and sixty acres. The second section provides that the applicant, at the time of his application, shall file a written statement in duplicate under oath with the register, describing the land which he desires to purchase and its quality, that he has made no other application under this act, and that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or

contract in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself. It then provides that if he swears falsely he shall be guilty of perjury and forfeit the money which he paid for said lands, and all right and title to the same, and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void. The third section provides that on the filing of the applicant's statement the register shall post a notice of the application in his office for a period of sixty days, and that the applicant shall publish the same notice in a newspaper nearest the location of the premises for a like period of time, and after the expiration of said sixty days, if no adverse claim shall have been filed, the party desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, etc., etc., and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and receiver, etc., etc., the applicant may be permitted to enter said land, and a patent shall issue thereon. It further provides that any person having a valid claim to any portion of the land may object in writing to the issuance of the patent, and evidence shall be taken thereon as to the merits of said objection."

The indictment contained one count, supported by averments of fourteen overt acts.

The accused after moving to quash on the ground of the illegality of the organization of the grand jury, demurred to the indictment on a number of technical grounds, and upon the contentions that the facts stated in the indictment were insufficient to charge an offense within any statute of the United States, and that as the indictment had not been found

within three years of the commission of the acts therein alleged, the right to prosecute for the same was barred by the statute of limitations. The court held the indictment stated no offense against the United States, and, sustaining the demurrer upon that ground, discharged the accused without date. It was also held that if the indictment was construed as embracing but one offense, the three years' bar of the statute of limitations was controlling, but that if it were held that the indictment stated more than one offense, thus saving one of the offenses from the operation of the statute of limitations, the indictment would be void for duplicity.

The reasons which caused the court to reach the conclusions just stated were expounded in an opinion. Therein, in order to determine whether the indictment stated an offense against the United States, the court came first to construe it in the light of the provisions of the timber and stone act. In doing so the court said:

"We find that the indictment sets in where the second section of the timber and stone act leaves off. It charges that the purpose of the conspiracy was to 'hire and under agreements' with entrymen have them pay for the lands with moneys of the corporation and have them make entries. It does not charge the date on which such hiring and agreements to make entries were to be made, nor that the entrymen were hired to make applications, nor that said hiring and agreements were prior to any application. The indictment appears to attempt to challenge some acts done by the entrymen under the provisions of section 3 of said act, to wit: The hiring of and agreement with entrymen (who had made application before that under section 2 of the act) to make entries and pay for the land with moneys furnished by the corporation. . . . But it is said the indictment charges a violation of section 1 of the act in the acquisition of more land by the corporation than there limited. When it comes to that the indictment does not charge that the several entrymen were disqualified as such,

nor that when they made application they had outstanding contracts to sell, or were then acting under agreements or hire for said defendants or said corporation. A compliance with the timber and stone act, by the entrymen, in both its spirit and letter, prior to and at time of application is not challenged by the indictment."

Having thus construed the indictment it was then considered whether any offense was therein stated against the United States. In deciding that no offense was stated it was held that although it were conceded that the timber and stone act prohibited an entryman or applicant from making an application ostensibly in his own name, but in reality for and on behalf of another, that if an applicant or entryman made an application in good faith for his own exclusive use and benefit the statute contained no prohibition, express or implied, against the right of the entryman, after his application and before the final action thereon, to sell to another the claim to the land which had arisen from his application. It was therefore decided that such applicant was at liberty to contract with another to convey the land covered by the application and to perfect his entry for the purpose of fulfilling his contract to convey the land after patent. In reaching this conclusion the court was controlled by the decision in *Adams* v. *Church*, 193 U. S. 510, giving a like construction to the timber culture act of June 14, 1878, c. 190, 20 Stat. 113. Having thus decided that the indictment as construed charged the doing of no unlawful act, but simply the exercise of a lawful right not in any way prohibited, but on the contrary impliedly sanctioned by the statute, it was decided that under no possible construction could the acts charged constitute an unlawful conspiracy within the second clause of § 5440, Rev. Stat. And for additional reasons expressed in the opinion the conclusions of the court concerning the bar of the statute of limitations and the duplicity of the indictment, if it were so construed as to save it from the statute, were fully expressed.

This writ of error, direct from this court, is prosecuted by the United States under the authority of the act of 1907.[1]

Our right to review the decision below is questioned by the defendants in error on the ground, first, that the court below did not construe, but simply interpreted, § 5440, Rev. Stat., and the provisions of the timber and stone act; and, second, because, although it applied the bar of the statute of limitations, the court did not do so by way of sustaining a plea in bar, but simply incidentally passed upon that question in deciding the demurrer.

The want of merit in the first contention is established by *United States* v. *Keitel*, No 286 of this term, *ante*, p. 370.

As therefore we have in any event jurisdiction to review the action of the trial court in construing the timber and stone act and in fixing the meaning of § 5440, Rev. Stat., in the light of that construction, we presently pass the consideration of the ruling made by the court in respect to the statute of limitations. We do this because if it be found that the court below was right in its conclusions as to the construction of the timber and stone act and of § 5440, Rev. Stat., its judgment quashing the indictment will be sustained, and its action concerning the statute of limitations will become irrelevant, and will not require examination, unless it be our duty under the act of 1907, which we shall also hereafter consider, to pass upon that question, although its decision will have become wholly unnecessary.

It is also settled by *United States* v. *Keitel*, *supra*, that the right given to the United States to obtain a direct review from this court of the rulings of the lower court on the subjects embraced within the statute of 1907 does not give authority to revise the action of the court below as to the mere construction of an indictment, and therefore in the exercise of our power to review on this record we must accept the construction of the indictment made by the lower court and test its construction of the statute in that aspect.

[1] The act of March 2, 1907, is reproduced in full on p. 398, *ante*.

While not questioning this general rule, the United States insists that the case here presented is an exception to that rule, because of the contention that the construction given by the court below to the indictment was but the necessary result of the misconstruction which the court applied to the timber and stone act, and hence that a review of the construction given to the indictment is necessarily involved in the determination of the correctness of the construction given by the court to the statute. Conceding the premise for the sake of argument, the deduction by which it is sought to apply it to the case in hand is, we think, without foundation. It proceeds upon a subtle separation of particular words or phrases in the indictment from the context of that pleading and the affixing to the words thus separated a penetrating but, nevertheless, too narrow significance for the purpose of establishing the proposition relied upon. On the contrary, we think the conclusion cannot be escaped that the construction given by the court below to the indictment was the result merely of the analysis which the court made of the indictment as an entirety, of its appreciation of the nature and character of the acts therein referred to and of the overt acts alleged, the whole read in the light of the elementary canons of construction applicable to criminal pleadings and elucidated, as the court expressly stated, by the entire absence of anything in the indictment tending to show that the pleader contemplated alleging the existence of any conspiracy to induce the making of applications to purchase.

Coming to consider the construction given by the court to the timber and stone act as applied to the allegations of the indictment, as interpreted by the court, the correctness of the construction given by the court below to the statute is established beyond controversy by the decision in *Williamson v. United States*, 207 U. S. 425, announced since the decision below was rendered.

The *Williamson case* was a prosecution for a conspiracy in violation of § 5440, Rev. Stat., to procure the commission of

the crime of subornation of perjury by causing certain affidavits to be made for the purpose of acquiring land under the timber and stone act. At the trial, over exceptions, affidavits as to the *bona fides* of a number of applicants and of the purpose of each in making his application to acquire only for himself were offered in evidence, and like affidavits which were required by the rules and regulations of the Land Department at the time of the final entry were also offered in evidence. The Government insisted that the papers were admissible because the indictment charged a conspiracy to suborn perjury, not only at the time of the application to purchase but also in the subsequent stage of making the final entry, and that even if this were not the case the affidavits made after application were admissible for the purpose of showing the motive which existed at the time the application was made. It was decided that the indictment only charged subornation of perjury at the time of the application. Passing on the alleged contention as to motive, it was held that in view of the requirements as to an affidavit exacted by the statute to be made at the time of the application as to the *bona fides* of the applicant and his intention to buy for himself alone and the absence of any such requirement in the statute as to the final entry, that the prohibition of the statute applied only to the condition of things existing at the time of the application to purchase and did not restrict an entryman after said application was made from agreeing to convey to another and perfecting his entry for the purpose after patent of transferring the land in order to perform his contract. It was, therefore, held that the affidavits made at the final stage of the transaction were not admissible to show motive at the time of the applications to purchase, and that any requirements contained in the rules and regulations of the Land Department making an affidavit essential to show *bona fides*, etc., at the final stage were *ultra vires* and void. In passing upon the subject the ruling to the like effect concerning the timber culture act, made in *Adams* v. *Church*, *supra*, was

reiterated and approved, and declared to be applicable to the timber and stone act, despite immaterial differences in the phraseology of the two acts. The court, after approvingly referring to *Adams* v. *Church,* and after reviewing the timber and stone act, and calling attention to the entire omission of all requirement that statement as to the purpose and intention of the entryman should be made at the date of the final step in the acquisition of the land, said (p. 460): "Indeed, we cannot perceive how under the statute if an applicant has, in good faith, complied with the requirements of the second section of the act, and pending the publication of notice, has contracted to convey, after patent, his rights in the land, his doing so could operate to forfeit his right."

It is insisted by the Government that, however conclusive may be this ruling as to the power of the applicant to sell after application and to perfect his entry for the purpose of enabling him to perform such contract, such ruling does not conclude the contention that a conspiracy formed to induce an entryman who has made his application to purchase subsequently to agree to convey his interest in the land would be a violation of the statute. But we are constrained to say that this is a mere distinction without a difference. The effect of the ruling in the *Williamson case* was to hold that the prohibition of the statute only applied to the period of original application, and ceased to restrain the power of the entryman to sell to another and perfect his entry for the purpose of transferring the title after patent. This being concluded by the decision in the *Williamson case,* the distinction now sought to be made comes to this, that it is unlawful under the statute to conspire to have that done which the statute did not prohibit, and, on the contrary, by implication recognized could be lawfully done without prejudice or injury to the United States in any manner whatever. This also serves to demonstrate that no error was committed by the court below in holding that under § 5440, Rev. Stat., the acts charged in the indictment could not possibly have constituted a defrauding

of the United States in any manner or for any purpose within the intendment of that section.

It remains only to notice the ruling of the court below as to the bar of the statute of limitations. While the act of 1907[1] gives authority to come directly here to obtain a review of the construction of a statute under the circumstances which the act enumerates, and also authorizes us to review a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy," we consider that the power given is coincident with the purpose for which it was conferred, that is, to have determined in a case within the statute the question whether or not the Government is entitled to further prosecute the case, and therefore does not of course call upon us to decide every question of the character referred to in the statute, when by the decision of one of such questions the case is completely disposed of and the other questions have become so irrelevant as to cause it to be in our opinion unnecessary to consider and determine them. Of course, under these circumstances, we intimate no opinion whatever concerning the correctness of the construction adopted by the court below in respect to the statute of limitations.

Affirmed.

UNITED STATES *v.* SULLENBERGER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 290. Argued December 16, 17, 1908.—Decided January 4, 1909.

Decided on the authority of *United States* v. *Biggs*, *ante*, p. 507.

THE facts are stated in the opinion.

[1] The act of March 2, 1907, is reproduced in full, *ante*, p. 398.

The Attorney General and *The Solicitor General*, with whom *Mr. Edwin W. Lawrence*, Special Assistant to the Attorney General, for the United States.[1]

Mr. Edmund F. Richardson, with whom *Mr. Horace N. Hawkins* was on the brief, for defendants in error:

The indictment contains no charge of a crime, in that it charges the plan or alleged conspiracy of defendants to have been simply an agreement or plan to obtain *indirectly* lands for a corporation that could not, according to the indictment, have been *directly* purchased by the said corporation. A plan to obtain indirectly lands from the Government may or may not be a plan to defraud the Government. Whether or not it is a scheme to defraud the Government necessarily depends upon the question of whether or not the means to be adopted are criminal or unlawful.

No unlawful or criminal means are charged to have been planned or contemplated, there being no claim made in the indictment that the defendants agreed, or planned to hire, employ or induce anyone to make application to purchase lands. In other words, no claim is made anywhere in the indictment that the alleged conspiracy embraced the making of a deal or agreement with any person in advance of that person having made, in good faith, an application to purchase the land. There is, therefore, no charge of a conspiracy to defraud the United States.

The Sixth Amendment to the Constitution secures to the defendants, among other things, the right "to be informed of the nature and cause of the accusation." *United States* v. *Miller*, 7 Pet. 1422; *United States* v. *Cruikshank*, 92 U. S. 542, 558; *Evans* v. *United States*, 153 U. S. 584.

All the essential elements of fact required to be set forth in an indictment must be there charged in direct, positive and explicit language. Any omission in that behalf cannot be

[1] For argument of counsel for United States in this case, see *United States* v. *Biggs et al.*, *ante*, p. 507.

aided by implication, inference, argument, recital or intendment. This principle has been well stated in *United States* v. *Post*, 113 Fed. Rep. 854; *Pettibone* v. *United States*, 148 U. S. 197; *United States* v. *Hess*, 124 U. S. 486; *United States* v. *Staats*, 8 How. 41, 44; *In re Wolf*, 27 Fed. Rep. 606, 611; *In re Corning*, 51 Fed. Rep. 205, 210.

"In an indictment nothing material shall be taken by intendment or implication." *Salla* v. *United States*, 104 Fed. Rep. 544, 547; *Miller* v. *United States*, 133 Fed. Rep. 337; *United States* v. *Hess*, 124 U. S. 483; *United States* v. *Walsh*, 5 Dill. 58, 63; *S. C.*, 28 Fed. Cas., No. 16,636, p. 396; *United States* v. *Martin*, 26 Fed. Cas., No. 15,728; *In re Wolf*, 27 Fed. Rep. 606, 611; *United States* v. *Crafton*, 25 Fed. Cas., No. 14,881; *United States* v. *Watson*, 17 Fed. Rep. 145; *United States* v. *Taffe*, 86 Fed. Rep. 113, 115; *In re Greene*, 52 Fed. Rep. 104, 111, 112, 114; *Evans* v. *United States*, 153 U. S. 584, 587; *Pettibone* v. *United States*, 148 U. S. 197, 203; *United States* v. *Milner*, 36 Fed. Rep. 890; *Conrad* v. *United States*, 127 Fed. Rep. 789, 801; *Stearns* v. *United States*, 152 Fed. Rep. 900, 904; *People* v. *Willis*, 54 N. Y. Supp. 130, 137, citing other authorities.

Mr. Justice White delivered the opinion of the court.

In this case the United States seeks the reversal of the action of the court below in quashing an indictment, the writ of error being prosecuted directly from this court upon the assumption that the case comes within the act of March 2, 1907. The indictment charged a conspiracy in violation of § 5440, Rev. Stat., to unlawfully acquire land of the United States under the timber and stone act. The court gave to the indictment the same construction which it affixed to the indictment in the case of *United States* v. *Biggs et al.*, No. 289, which we have just decided, *ante*, p. 507, and applied the same principles which it expounded in the opinion in that case. Disregarding mere immaterial differences in the form of the pleadings

this case is like the *Biggs case*, and is disposed of by the opinion which we have just announced in that case.

Affirmed.

UNITED STATES *v.* FREEMAN.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 288. Argued December 16, 17, 1908.—Decided January 4, 1909.

Decided on the authority of *United States* v. *Biggs*, *ante*, p. 507.

THE facts are stated in the opinion.

The Attorney General and *The Solicitor General*, with whom *Mr. Edwin W. Lawrence*, Special Assistant to the Attorney General, was on the brief for the United States.[1]

Mr. Charles J. Hughes and *Mr. Clyde C. Dawson* for defendants in error.[1]

MR. JUSTICE WHITE delivered the opinion of the court.

In this case the court below quashed an indictment, and a writ of error direct from this court is prosecuted on behalf of the United States, upon the theory by which it prosecuted the writ in the case of *United States* v. *Biggs et al.*, No. 289, just decided. The case presented by the record, omitting references to irrelevant distinctions in the form of the pleadings, is like that in the *Biggs case*, and is controlled and disposed of by the opinion just announced therein.

Affirmed.

[1] For abstracts of arguments see *ante*, p. 507.

RUSCH *v.* JOHN DUNCAN LAND AND MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 53. Argued December 14, 1908.—Decided January 4, 1909.

The decision of the highest court of the State that a statutory notice complies with the statute is determinative.

Where title is taken subject to statutory provisions for redemption, the exercise of the right of redemption so reserved does not deprive the owner of his property without due process of law.

THE facts are stated in the opinion.

Mr. O. H. Reed, with whom *Mr. E. C. Chapin* was on the brief, for plaintiff in error.

Mr. J. F. Carey, with whom *Mr. C. C. Lancaster* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is a bill in equity brought by defendant in error, hereinafter called the land and mining company, against plaintiff in error in the Circuit Court for the county of Gogebic, State of Michigan, to remove a cloud from the title to certain lands caused by a tax deed held by plaintiff in error, and to compel a reconveyance to that company of the land described therein.

The foundation of the suit and the questions in it depend upon the tax laws of the State.

The bill alleged that the land and mining company was the owner in fee simple of the lands, and that Albert H. Rusch, the plaintiff in error here, held a tax deed therefor, issued by the auditor general of the State for delinquent taxes for the years 1889 to 1901, both inclusive, for which plaintiff in error paid the sum of $648.74. That the deed was issued after the provisions of Act No. 229 of the Laws of 1897, Public Acts 294, went into effect, and that the notice given by plaintiff in error to the owners of the land of the sale to him did not comply

with the provisions of the tax law. It was alleged that plaintiff in error claimed absolute title to the land by virtue of the tax deed and the notice which he claimed to have served upon the then owners of the lands, because the six months allowed for redemption had expired and no redemption had been made. An offer by the land and mining company to refund the amount paid by plaintiff in error with the percentage and costs required by the laws is alleged.

The answer of plaintiff in error admitted certain of the allegations of the bill, denied others, and set up, with a recitation of circumstances, the sufficiency of the notice to cut off the right of redemption of the owners of the lands. And it alleged that the Act No. 229 of the Public Laws of 1897 with the amendments thereto violated certain sections of the constitution of the State of Michigan and the Fourteenth Amendment of the Constitution of the United States.

After proofs taken the Circuit Court dismissed the bill. The court held that the notice given by plaintiff in error to the predecessors in title of the land and mining company of the sale of the lands for taxes and the issuing of deeds therefor was sufficient under the statute to cut off the right of redemption, and considered that, in view of such holding, it was not necessary to pass on the constitutionality of Act No. 229. The Supreme Court of the State, however, decided that the notice was insufficient and reversed the decree of the Circuit Court. Plaintiff in error then sued out this writ of error, asserting jurisdiction in this court, because he contends a question under the Fourteenth Amendment of the Constitution of the United States is presented.

It will be observed that the Circuit Court held that the notice of the tax sale was sufficient and that the Supreme Court decided that it was insufficient. Of course, the decision of the Supreme Court is determinative, and equally, of course, if there is nothing else in the case but a matter of statutory construction, we have nothing to do with it. And that such is the case a brief statement will demonstrate.

In August, 1902, plaintiff in error purchased from the State, under the provision of its statutes, tax titles to the lands involved in this case, receiving two deeds therefor, one conveying a portion of the lands and the other conveying the remainder. Each deed contained the following proviso: "Provided, however, that this indenture is subject to the relevant conditions imposed by Act No. 229 of the Public Acts of 1897 as amended." That act requires the grantee in a tax deed, before instituting proceedings to obtain possession, to serve upon the original owner, as shown by the records in the office of the register of deeds, a notice giving such original owner a period of six months from the time of service of the notice in which he may redeem the property by paying to the owner of the tax title the amount invested therein, and 100 per cent in addition thereto, and the further sum of $5.00 for each description of land contained in the tax deed. Plaintiff in error attempted to give that notice and its sufficiency constituted the controversy in the state courts.

The trial court held it sufficient, as we have seen; the Supreme Court held it insufficient. The decision of the Supreme Court would seem to settle the meaning of the statute, and to get rid of the effect of the decision plaintiff in error attacks the constitutionality of the statute. He is put thereby in the dilemma of attacking the law upon which he relies for title. The argument by which this anomaly is sought to be sustained is somewhat involved, but, as we understand it, its ultimate reliance is the contention that by the proceedings under the tax laws the State acquired the absolute title to the lands and conveyed that title to plaintiff in error, and that the aim of Act No. 229 is to divest such title and transfer it to another, and therefore it is further contended the property of the plaintiff in error is taken without due process of law. There is also a contention, based upon the construction of the laws, that they are unequal in their operation.

If the title was taken subject to redemption it cannot be said to be divested without due process of law if redemption

was exercised according to law. And how redemption should be exercised and how it could be cut off depended upon the provisions of the statute and, therefore, the best answer to the assumption of plaintiff in error, that he acquired an indefeasible title, is the answer given by the Supreme Court of the State, whose province it is to pronounce the meaning of the statutes of the State without question by this court. The court said: "The deeds which the defendant received from the State are expressly made subject to the relevant conditions imposed by Act No. 229, Public Acts of 1897, as amended. Whatever the title which the State held, it sold to defendant [plaintiff in error] an interest in the lands which was liable to be divested." And the court sustained the bill and ordered a decree to be entered in accordance with its prayer.

Judgment affirmed.

REID *v.* UNITED STATES.

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

No. 552. Argued December 11, 14, 1908.—Decided January 4, 1909.

Suits can be maintained against the sovereign power only by its permission and subject to such restrictions as it sees fit to impose, *Kawananakoa* v. *Polyblank*, 205 U. S. 349, and a statutory change in the ordinary business of the courts will not be held to extend that permission when the general policy as to such suits is maintained. *United States* v. *Dalcour*, 203 U. S. 408.

The act of March 3, 1891, 26 Stat. 826, c. 517, deals with general, and not special, jurisdiction, and nothing in §§ 5, 6, or 14 extended the right of review of judgments of the District Court sitting as a court of claims under the act of March 3, 1887, c. 359, 24 Stat. 505, and a writ of error will not lie to review a judgment in favor of the Government on a claim of less than $3,000.

Courts must take notice of the limits of their jurisdiction, and the Government should not consent to allow a suit against it to proceed if the court has not jurisdiction.

Not decided, the court not having jurisdiction of the appeal, whether an enlisted man can, under the circumstances of this case, be discharged without honor by order of the President without trial by court-martial.

THE facts are stated in the opinion.

Mr. Chase Mellen, with whom *Mr. Francis Woodbridge* was on the brief, for plaintiff in error:

The powers to raise, support and govern the army are vested in Congress. Constitution, Art. I, §§ 8, 10; Art. II, §§ 1, 2, 3; Fifth Amendment; U. S. Comp. Stat., 1901, pp. 814, 817; Articles of War (U. S. Rev. Stat., § 1342).

The discharge of the petitioner was intended to be, and was, in fact, a punishment.

A discharge without honor is of doubtful legality. 2 Winthrop on Military Law (2d ed.), 847, 848; Davis on Military Law, 357; O'Brien's American Military Law.

Assuming that the riotous disturbance was participated in by some member of the battalion, the punishment of the innocent was not thereby justified.

The President has no powers except such as are conferred upon him by the Constitution and the laws of Congress enacted thereunder. *Kansas* v. *Colorado*, 206 U. S. 46, 90; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Ex parte Merryman*, Taney's Rep. 246; *The Floyd Acceptances*, 7 Wall. 666; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; 3 Elliott's Debates, 58, 59; Bryce's American Commonwealth; Miller on the Constitution, 156; The Federalist, Nos. 67, 69, 74; De Lolme's British Constitution, Book I, chap. 7; 1 Kent's Commentaries, 221, 282; 1 Blackstone's Commentaries, 262, 408–421; *Kneedler* v. *Lane*, 45 Pa. St. 238; Story on the Constitution, § 1197; *Dynes* v. *Hoover*, 20 How. 65.

The President's act in discharging the petitioner without trial was in excess of his powers and in violation of the petitioner's rights. U. S. Comp. Stat., 1901, p. 973; Articles of

War; U. S. Rev. Stat., § 1342; U. S. Comp. Stat., 1901, p. 868; 4 Opinions Attorney General, 1; 4 *Id.*, 603; 6 *Id.*, 4; 12 *Id.*, 421; 15 *Id.*, 421; *Blake* v. *United States*, 103 U. S. 227; *Street* v. *United States*, 133 U. S. 299; *Mullan* v. *United States*, 140 U. S. 240; *Hartigan* v. *United States*, 196 U. S. 169; U. S. Rev. Stat., § 1253; *United States* v. *Kingsley*, 138 U. S. 87; *United States* v. *Barnett*, 189 U. S. 474.

The contention that the President acted according to precedent cannot be maintained; the so-called precedents cited by the Military Secretary have no application whatsoever to the present case. *Thompson* v. *Kentucky*, 209 U. S. 340, 346; *Rathbone* v. *Wirth*, 150 N. Y. 459, 477; *Swaim* v. *United States*, 28 C. Cl. 173, 221.

The President's belief that the good of the service and the maintenance of the morale of the army required that there should be in the army only such troops as he could absolutely rely upon and safely quarter under arms among the people is not a justification in law for the discharge without trial of 167 enlisted men accused of serious crime. *Ex parte Milligan*, 4 Wall. 2.

The President's act in ordering the discharge of the petitioner without trial is tantamount to nullification of the provision of the Constitution which gives Congress the power to raise and support armies. Arbitrary action by any branch of the Government is not favored in American jurisprudence. Constitution of Kentucky; Constitution of Wyoming; *Standard Oil Co.* v. *United States*, Mss.; *United States* v. *Delaware & Hudson Co.*, Mss.; *Ex parte Merryman*, Taney's Rep. 246; Dicey's Law and Opinion in England, 174, 215.

The petitioner upon enlistment acquired the right to serve out his term of enlistment unless legally discharged and the right not to be punished except for violations of the Articles of War after court-martial. *Slaughter-House Cases*, 16 Wall. 32, 116, 122; U. S. Rev. Stat., § 1118; *In re Grimley*, 137 U. S. 147; Articles of War.

Enlistment in the army of the United States did not deprive

the petitioner of his rights as a citizen. O'Brien's American Military Law, 27, 28, 30, 175; Dicey's Introduction to the Study of the Law of the Constitution (6th ed.), 295, 301; *Ex parte Merryman*, Taney's Rep. 246; *Ex parte Milligan*, 4 Wall. 2; *United States* v. *Clark*, 31 Fed. Rep. 710; Dicey's Law of the Constitution, 305; Mutiny Act, 1 William & Mary, c. 5 of 1689; The Federalist, Nos. 25, 84; Cooley's Constitutional Limitations (7th ed.), 500, 504; *Norman* v. *Heist*, 5 W. & S. 171, 173; *Swaim* v. *United States*, 28 C. Cl. 221.

No citizen of the United States can be deprived of liberty or property without due process of law. *Dartmouth College Case*, 4 Wheat. 518, 581; *Hurtado* v. *California*, 110 U. S. 516; *Holden* v. *Hardy*, 169 U. S. 366; *St. Louis R. Co.* v. *Davis*, 132 Fed. Rep. 633; *Simon* v. *Craft*, 182 U. S. 427; *Wilson* v. *Standefer*, 184 U. S. 399; *Chicago &c. R. Co.* v. *Chicago*, 166 U. S. 226; McGehee, Due Process of Law, 49, 60, 73, 76; *Matter of Jacobs*, 98 N. Y. 98, 106; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Hovey* v. *Elliott*, 167 U. S. 409; Guthrie, Fourteenth Amendment, 67; *Davidson* v. *New Orleans*, 96 U. S. 97; *Stuart* v. *Palmer*, 74 N. Y. 183; U. S. Comp. Stat., 1901, pp. 801, 814, 855, 912, 913; Rev. Stat., U. S., §§ 1293, 1305–1308; Pollock's Essays in Jurisprudence, 212–221; 1 Holdsworth, History of English Law, 277.

Article 4 of the Articles of War did not authorize the discharge of the petitioner. Penal Code of Texas, Art. 698; *Bartemyer* v. *Iowa*, 18 Wall. 129; *Ex parte Virginia*, 100 U. S. 339, 347.

If the maintenance of discipline or other necessities of the army require that discretion to discharge without trial be given to the Commander-in-Chief or other officers, it is a matter for legislation and such discretion cannot be established by precedent and should not be sanctioned by judicial legislation. Act of February 2, 1901, 31 Stat. 748; Rev. Stat., U. S., §§ 1105, 1158, 1342; Act of June 16, 1890, 26 Stat. 157; Act of October 1, 1890, 26 Stat. 562; Act of February 27, 1890, 26 Stat. 13; Act of February 16, 1897, 29 Stat. 530; Act of May 17,

1886, 24 Stat. 50; Act of February 26, 1901, 31 Stat. 810; Act of March 1, 1875, 18 Stat. 337; *Smith* v. *United States*, 38 C. Cl. 257, 273; *McBlair* v. *United States*, 19 C. Cl. 528, 541.

An enlisted man is not an officer of the Government within the meaning of the act of March 3, 1887, as amended by the act of June 27, 1898. Rev. Stat., U. S., § 1094, superseded by Act of February 2, 1901, 1104, 1108, 1261, 1280; *In re Grimley*, 137 U. S. 147; *United States* v. *Smith*, 124 U. S. 525, 532; *United States* v. *Mouat*, 124 U. S. 303; *United States* v. *Germaine*, 99 U. S. 508; U. S. Comp. Stat., 1901, pp. 549, 753, § 707; *United States* v. *McCrory*, 91 Fed. Rep. 295; *United States* v. *March*, 92 Fed. Rep. 689; *Strong* v. *United States*, 93 Fed. Rep. 257; *McGregor* v. *United States*, 134 Fed. Rep. 187; *United States* v. *Maurice*, 2 Brock, 96; Mechem's Public Offices & Officers, § 6; Articles of War, Art. 2; Rev. Stat., U. S., § 1757.

The Solicitor General for defendant in error:

The court is without jurisdiction and the case should be dismissed. This court examines into its own jurisdiction or the jurisdiction of the lower court of its own motion whether the question is raised and discussed by counsel or not. *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449; *Mansfield &c. Ry. Co.* v. *Swan*, 111 U. S. 379; *Louisville &c. Ry.* v. *Mottley*, 211 U. S. 149.

As to the jurisdiction of this court: The amount involved is $122.26. Under the Court of Claims statutes $3,000 must be involved to enable a claimant to bring a case into this court on appeal from the Court of Claims. § 707, Rev. Stat. The Tucker Act, which re-defines and enlarges the claims jurisdiction, and extends it to the District and Circuit Courts, makes no difference in respect to jurisdiction and the right of appeal between cases in the Court of Claims proper and such cases in the District and Circuit Courts. The statutes governing appeals in such cases in the District and Circuit Courts are the

Court of Claims statutes and not the statutes generally governing appeals and writs of error in the District and Circuit Courts. *United States* v. *Jones*, 131 U. S. 1; *United States* v. *Davis*, 131 U. S. 36.

This case squarely presents the question whether § 14 of the Circuit Court of Appeals Act so far repealed the Tucker Act and the other Court of Claims statutes as to permit a claims case involving less than the jurisdictional amount to be brought to this court on appeal from a District Court when a constitutional question is involved, although such case could not be brought to this court on appeal from the Court of Claims. The Government contends that it was not the intention of Congress by this general repeal provision to disturb the peculiar and special jurisdiction of the District and Circuit Courts sitting as courts of claims.

A similar question was presented in the case of *Dalcour* v. *United States*, 203 U. S. 408, where it was held that although the Circuit Court of Appeals Act was intended to supersede previous general provisions, it did not repeal a special act giving jurisdiction to the Supreme Court of appeals direct from a District Court on a claim of title to public lands. The phrase "unless otherwise provided by law" in § 6 of that act was held in *United States* v. *Dalcour*, 203 U. S. 408, as relating to existing and not future provisions of law, and as saving some although not all existing provisions. Those words were inserted in the statute to guard against implied repeals and that they are to be construed as referring only to laws in force at the time of the passage of the act. *Law Ow Bew* v. *United States*, 144 U. S. 47; and see also *Louisville Public Warehouse Co.* v. *Collector*, 49 Fed. Rep. 561; *United States* v. *Sutton*, 47 Fed. Rep. 129.

As to the jurisdiction of the lower court: The Tucker Act (amendment of June 27, 1898, 30 Stat. 494) provides that the jurisdiction thereby conferred upon the Circuit and District Courts shall not extend to claims for compensation for official services of officers of the United States. A private soldier, although standing in emphatic contrast to an officer *of the army*,

is fairly within the meaning of the term "officer of the United States" as used in the act. The legal definitions of officer include within their scope a private soldier. 2 Bl. Com. 36; *Henly* v. *Mayor of Lyme*, 5 Bing. 91; *United States* v. *Hartwell*, 6 Wall. 385; Mechem's Pub. Offices and Officers, § 1; *United States* v. *Morris*, 2 Brock. 96; *United States* v. *McCrory*, 91 Fed. Rep. 295; *Ex parte Smith*, 2 Cr. C. C. 693; *United States* v. *Tinklepaugh*, 3 Blatchf. 425; and this construction is in accordance with the legislative intent as shown by the proceedings in Congress, and the necessity of concentrating all suits for statutory compensation for official services in the Court of Claims proper. Report House Judiciary Committee, No. 325, 55th Cong., 2d Sess.

As to the merits: No real constitutional question is involved. The contention that plaintiff's discharge before the expiration of his term of enlistment amounted to depriving him of property without due process of law is untenable. The power to appoint includes the power to remove. Public office or employment creates no vested right, and a soldier's enlistment is not different from any other public service. *Parsons* v. *United States*, 167 U. S. 324; *Blake* v. *United States*, 103 U. S. 227; *Street* v. *United States*, 133 U. S. 299; *Crenshaw* v. *United States*, 134 U. S. 99; *Mullen* v. *United States*, 140 U. S. 169; *United States* v. *Blakeney*, 3 Gratt. 405; *In re Morrissey*, 137 U. S. 157. The President has inherent constitutional authority as Commander-in-Chief summarily to discharge a soldier; the right has been expressly recognized by the Articles of War, and has the sanction of uninterrupted administrative practice; and the power involves an exercise of discretion not reviewable by the courts. *Ex parte Milligan*, 4 Wall. 2; *Legal Tender Case*, 110 U. S. 421; *Swaim* v. *United States*, 165 U. S. 553; Articles of War, 1806, Art. 11, 2 Stat. 359; Hetzel's Mil. Laws U. S. 36; § 1342, Rev. Stat.; *United States* v. *Kingsley*, 138 U. S. 87; Army Regulations of 1821, Art. 71; Act of March 2, 1821, 3 Stat. 615; Army Regulations, 1841, Art. 31; *Id.*, 1857, Art. 19; *Id.*, 1904, par. 138; *Martin* v. *Mott*, 12 Wheat. 19.

By leave of court the *Judge Advocate General of the Army* filed a brief as *amicus curiæ*.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit for $122.26, alleged to be due to the plaintiff in error as an enlisted man in the regular army from November 16, 1906, to July 18, 1907, when his term of service expired. The plaintiff in error was one of the members of Companies B, C and D, of the First Battalion of the Twenty-fifth United States Infantry, who were discharged without honor by order of the President on the former date, without trial, after certain disturbances in Brownsville, Texas, in which the order averred members of those companies to have participated. The petition alleges that the plaintiff in error had no part in the disturbance and no knowledge as to who was concerned in it, and denies the power of the President to make such a discharge. The answer, after certain preliminaries, suggests for a second defense that the District Court has no jurisdiction, by reason of the act of March 3, 1887, c. 359, § 2, 24 Stat. 505, as amended by the act of June 27, 1898, c. 503, § 2, 30 Stat. 494, which provides that the jurisdiction conferred "shall not extend to cases brought to recover fees, salary, or compensation for official services of officers of the United States," etc. For a third defense the answer alleges the investigations that were made, the reported impossibility of identifying the culprits unless the soldiers would take it in hand or turn State's evidence, the President's belief that the crimes under consideration were committed by a considerable group of the members of the regiment and that the greater part of the regiment must know who were the guilty men, and the issuing of the order in consequence, not as a punishment but for the good of the service, and affirms that it was in accordance with precedent. The third defense was demurred to, the demurrer was sustained, the petition was dismissed on the merits and this writ of error was brought.

As the case comes here on the merits and not on a certificate under the act of March 3, 1891, c. 517, § 5, 26 Stat. 826, the first question that we have to consider is the jurisdiction of this court, and on this point, without going further, we must yield to the argument submitted, although not urged, on behalf of the United States. The jurisdiction of the District Court is derived from the act of March 3, 1887, c. 359, § 3, 24 Stat. 505, by which it is made concurrent with that of the Court of Claims when the amount of the claim does not exceed one thousand dollars, and that of the Circuit Court is made concurrent for amounts between one thousand and ten thousand dollars. By § 4, the right of appeal "shall be governed by the law now in force," and by § 9, the plaintiff, or the United States, in any suit brought under the provisions of the act "shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made." This meant the same right of appeal as was given from the Court of Claims, *United States* v. *Davis*, 131 U. S. 36; so that it hardly admits of doubt that when that statute went into effect an appeal or writ of error under it by a claimant demanding less than three thousand dollars would have been dismissed. Rev. Stat., § 707. See *Strong* v. *United States*, 40 Fed. Rep. 183.

The real question is whether this limitation is done away with or qualified by the act of March 3, 1891, c. 517, §§ 5, 6, and 14, 26 Stat. 826. By § 14 "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed." By § 5, writs of error may be taken from the District Courts direct to this court when the jurisdiction of the court is in issue, the question of jurisdiction alone being certified; in which case no other question is open. *United States* v. *Larkin*, 208 U. S. 333, 340. That clause does not apply here. The only other clauses of § 5 that are or could be relied upon are "In any case that involves the construction or application of the Constitution of the United States." "In any case in which the constitutionality

of any law of the United States . . . is drawn in question." The latter may be dismissed as having no bearing, although it was mentioned, so that the possible application of § 5, and the consequent inference that the former limitations on the right to come to this court are repealed, so far as this case is concerned, depend on the suggestion in the petition that by his discharge the plaintiff was deprived of his property without due process of law.

We shall not discuss that suggestion, because we are of opinion that in any event the repealing words that we have quoted do not apply to the special jurisdiction of the District Court sitting as a Court of Claims. Suits against the United States can be maintained, of course, only by permission of the United States, and in the manner and subject to the restrictions that it may see fit to impose. *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353. It has given a restricted permission, and has created a pattern jurisdiction in the Court of Claims, with a limited appeal. The right to take up cases from that court by writ of error still is limited as heretofore. It would not be expected that a different rule would be laid down for other courts that for convenience are allowed to take its place, when originally the rule was the same. It does not seem to us that Congress has done so unlikely a thing. The act of March 3, 1891, c. 517, is dealing with general, not special jurisdiction. It has been decided in some cases of special jurisdiction that there is an implied exception to almost equally broad words in the same act. *United States* v. *Dalcour*, 203 U. S. 408. Congress, when its mind was directed to the specific question, determined for all courts what the amount must be before the grace of the sovereign power would grant more than one hearing. It has not changed that amount for the usual case. A change looking to the ordinary business of the courts should not be held to embrace that, merely on the strength of words general enough to include it, when the policy of the repealing law, and the policy of the law alleged to be repealed, have such different directions, and when it appears that the general policy

of the latter still is maintained. The limitation with reference to amount unquestionably remains in force for the District Court in cases outside of the act of 1891, § 5, as well as for the Court of Claims. In our opinion, the act of 1891, § 5, was not intended to create exceptions, when no such exceptions exist for the Court of Claims.

We observe that the plaintiff in error gives a hint at dissatisfaction with the Government for raising this point. But jurisdiction is not a matter of sympathy or favor. The courts are bound to take notice of the limits of their authority, and it is no part of the defendant's duty to help in obtaining an unauthorized judgment by surprise.

Writ of error dismissed.

McLEAN *v.* STATE OF ARKANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 29. Submitted November 30, 1908.—Decided January 4, 1909.

Liberty of contract which is protected against hostile state legislation is not universal, but is subject to legislative restrictions in the exercise of the police power of the State.

The police power of the State is not unlimited and is subject to judicial review, and laws arbitrarily and oppressively exercising it may be annulled as violative of constitutional rights.

The legislature of a State is primarily the judge of the necessity of exercising the police power and courts will only interfere in case the act exceeds legislative authority; the fact that the court doubts its wisdom or propriety affords no ground for declaring a state law unconstitutional or invalid.

In the light of conditions surrounding their enactment this court will not hold that the legislative acts requiring coal to be measured for payment of miners' wages before screening are not reasonable police regulations and within the police power of the State; and so held that the Arkansas act so providing is not unconstitutional under the

due process or the equal protection clauses of the Fourteenth Amendment.

It is not an unreasonable classification to divide coal mines into those where less than ten miners are employed and those where more than that number are employed, and a state police regulation is not unconstitutional under the equal protection clause of the Fourteenth Amendment because only applicable to mines where more than ten miners are employed.

81 Arkansas, 304, affirmed.

THE facts, which involved the constitutionality of the Arkansas coal miners' wages act, are stated in the opinion.

Mr. Daniel B. Holmes for plaintiff in error:

The act violates the Fourteenth Amendment to the Constitution by restricting the right to contract, by taking property without due process of law, by unlawful discrimination and by denying to certain operators and workers in coal mines the right of civil liberty and the pursuit of happiness.

Such a statute acts as a restriction upon the liberty both of employer and employed. *Ritchie* v. *People*, 155 Illinois, 88; *In re Morgan*, 58 Pac. Rep. 1072.

The right to purchase or sell labor is one of the rights protected by the Fourteenth Amendment. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Adair* v. *United States*, 208 U. S. 161; *State* v. *Haun*, 61 Kansas, 146; *Ritchie* v. *People*, 155 Illinois, 88, and cases cited; *Ramsey* v. *People*, 32 N. E. Rep. 364; *State* v. *Wilson*, 61 Kansas, 32; *In re House Bill, No. 203*, 39 Pac. Rep. 432; *Whitebreast Fuel Co.* v. *People*, 51 N. E. Rep. 853; *State* v. *Loomis*, 115 Missouri, 316; *Godcharles* v. *Wigeman*, 6 Atl. Rep. 354; *Braceville Coal Company* v. *People*, 35 N. E. Rep. 62; *State* v. *Julow*, 129 Missouri, 163; *Ex parte Kubach*, 24 Pac. Rep. 737.

The act herein in question is not a proper or valid exertion of the police power of the State. *State* v. *Haun*, 61 Kansas, 146; *People* v. *Warden &c.*, 51 N. E. Rep. 1011; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 757; *Mugler* v. *Kan-*

sas, 123 U. S. 623; *Lawton* v. *Steele*, 152 U. S. 137; *Allgeyer* v. *Louisiana*, 165 U. S. 589; *Lochner* v. *New York*, 198 U. S. 57; *People* v. *Gillson*, 98 N. Y. 108; *Live Stock Dealers' Association* v. *Crescent City Association*, 1 Abb. U. S. 388; *S. C.*, 15 Fed. Cas. 652.

The courts have often placed limitations upon the power of the State to interfere with ordinary private business under the guise of an exercise of the police power. *In re Aubery*, 78 Pac. Rep. 900; *Horwich* v. *Laboratory Co.*, 68 N. E. Rep. 938; *Liquor Co.* v. *Platt*, 148 Fed. Rep. 902; *Ruhstrat* v. *People*, 57 N. E. Rep. 41; *Iron Co.* v. *State*, 66 N. E. Rep. 1004; *Fisher Co.* v. *Woods*, 79 N. E. Rep. 837.

The act is clearly unconstitutional and void because of the classification which it adopts of operators and laborers in mines where ten or more men are employed underground, leaving operators and laborers in all other mines free to make their own bargains and contracts for labor therein. *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150; *Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79; *State* v. *Haun*, 61 Kansas, 146.

Mr. James Brizzolara, *Mr. Henry L. Fitzhugh* and *Mr. William F. Kirby*, Attorney General of the State of Arkansas, submitted:

The sole object of this statute is to protect the miner; to see that he is honestly paid for his labor, and to prevent fraud in the measurement of coal mined. The Arkansas screen law is substantially the same as, we might say almost identical with, the statutes of other States. § 8786, Dig. Mo. Stat., 1899; chap. 82, Acts of Legislature W. Va., 1891; §§ 4000–4005, Gen. Stat. of Kansas, 1899; § 7840, Rev. Stat of Ind., 1897; *State* v. *Peel Splint Coal Co.*, 36 W. Va. 802; *Wilson* v. *State*, 61 Kansas, 34.

There can be no liberty of contract when such contract is in conflict with the public welfare. The State's right to exercise its police power in restraint of liberty of contract has been recognized in a large number of instances. *Patterson* v.

Enders, 190 U. S. 169; *Harbinson* v. *Knoxville Iron Co.*, 183 U. S. 13; *In re Considene*, 83 Fed. Rep. 157; *Frisbie* v. *United States*, 157 U. S. 160; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Holden* v. *Hardy*, 169 U. S. 366; *Munn* v. *Illinois*, 94 U. S. 113; *Pierce* v. *Kimball*, 9 Maine, 54; *State* v. *Moore*, 10 S. E. Rep. 143.

The statute is not void because of the classification adopted, which is reasonable and proper. *Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S. 205; *St. L., I. M. & S. Ry. Co.* v. *Paul*, 173 U. S. 404; *Dow* v. *Beidelman*, 125 U. S. 680; *New York Ry. Co.* v. *People*, 165 U. S. 628; *Mason* v. *State*, 179 U. S. 328.

See also the following decisions upon the right of the legislature to discriminate between different classes of corporations and individuals. *Ford* v. *Chicago Milk Shippers' Association*, 155 Illinois, 166; *Harding* v. *Am. Glucose Co.*, 182 Illinois, 551; *Re Oberg*, 21 Oregon, 406; *State ex rel. Chandler* v. *Main*, 16 Wisconsin, 399; *Mo. Pac. Ry.* v. *Humes*, 115 U. S. 512; *Sullivan* v. *Hong*, 82 Michigan, 548; *Covington Ry. Co.* v. *Sandford*, 164 U. S. 578; *New York Ry.* v. *Bristol*, 151 U. S. 556; *Brown* v. *Dakota*, 153 U. S. 391; *Lowe* v. *Kansas*, 163 U. S. 81; *Duncan* v. *Missouri*, 151 U. S. 377; *Munn* v. *Illinois*, 94 U. S. 133.

Equal protection is not denied where the law operates alike upon all persons similarly situated. *Watson* v. *Nervin*, 128 U. S. 578; *State* v. *Schlemmer*, 42 La. Ann. 8; *State* v. *Moore*, 104 N. C. 714; *Ex parte Swann*, 96 Missouri, 44; *Barbier* v. *Connelly*, 113 U. S. 32; *Soon Hing* v. *Crowley*, 113 U. S. 709; *Hayes* v. *Missouri*, 120 U. S. 68; *Minneapolis & St. L. Ry. Co.* v. *Beckwith*, 129 U. S. 26; *Kentucky Ry. Tax Cases*, 115 U. S. 321; *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S. 282.

Mr. Justice Day delivered the opinion of the court.

This proceeding is brought to review the judgment of the Supreme Court of Arkansas (81 Arkansas, 304), affirming a conviction of the plaintiff in error for violation of a statute of the State of Arkansas, entitled "An act to provide for the

weighing of coal mined in the State of Arkansas as it comes from the mine and before it is passed over a screen of any kind." The act provides:

"SEC. 1. It shall be unlawful for any mine owner, lessee, or operator of coal mines in this State, where ten or more men are employed underground, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or any other device which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employé sending the same to the surface and accounted for at the legal rate of weights fixed by the laws of Arkansas, and no employé within the meaning of this act shall be deemed to have waived any right accruing to him under this section by any contract he may make contrary to the provisions thereof, and any provisions, contract, or agreement between mine owners, lessees, or operators thereof, and the miners employed therein, whereby the provisions of this act are waived, modified or annulled shall be void and of no effect, and the coal sent to the surface shall be accepted or rejected; and if accepted, shall be weighed in accordance with the provisions of this act, and right of action shall not be invalidated by reason of any contract or agreement; and any owner, agent, lessee or operator of any coal mine in this State, where ten or more men are employed underground, who shall knowingly violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than two hundred dollars nor more than five hundred dollars for each offense, or by imprisonment in the county jail for a period of not less than sixty days nor more than six months, or both such fine and imprisonment; and each day any mine or mines are operated thereafter shall be a separate and distinct offense; proceedings to be instituted in any court having competent jurisdiction." Acts 1905, c. 219, § 1.

The case was tried upon an agreed statement of facts, as follows:

"That the Bolen-Darnall Coal Company is a corporation organized and existing under the laws of the State of Missouri, and is also doing business under the laws of the State of Arkansas, and has complied with the laws of Arkansas permitting foreign corporations to transact and do business within said State.

"It is further agreed that John McLean, defendant, is the managing agent of the said Bolen-Darnall Coal Company, and as such has charge of the coal mine of said company situated near Hartford, in Sebastian County, Arkansas.

"It is further agreed that the said Bolen-Darnall Coal Company employs more than ten men to work underground in its mine situated near Hartford, of which the said John McLean is agent and manager.

"It is further agreed that the said Bolen-Darnall Coal Company, by and through said John McLean, as its agent and manager, did on the 19th day of June, 1906, in Greenwood District of said Sebastian County employ one W. H. Dempsey and others, coal miners, to mine coal underground in said mine by the ton at the rate and price of 90 cents per ton for screened coal, and that the said John McLean in the said district and county did knowingly pass the output of coal, so mined and sent up from underground by the said W. H. Dempsey and others, over a screen according to and as provided by a contract between it and the said Dempsey and others, and paid the said Dempsey and others for only the coal that passed over said screen, according to and as provided under the contract and paid or allowed them nothing for the coal which passed through said screen, part of the value of said coal having passed through said screen, which part of said coal was not weighed or accredited to the said Dempsey and others, and for which they received no pay; said coal not having been weighed or accredited to the said Dempsey or others before the same was passed over said screen, as provided for by the statutes of Arkansas.

"It is further agreed that more than ten men were employed and did work under said employment underground in mining

coal for the said Bolen-Darnall Coal Company in said mine aforesaid at said time; and it is also agreed that there are coal mines in said State and county operated by both corporations and individuals in which less than ten men are employed underground by the ton and bushel rates.

"It is further agreed that the said John McLean did violate the provisions of section 1, Act No. 219, duly passed by the legislature of Arkansas in 1905, which law went into operation and became effective on the 1st day of April, 1906, as hereinabove set out, and the only question herein raised being the validity of said act of the legislature aforesaid, under the law and facts herein."

The objections to the judgment of the state Supreme Court of a constitutional nature are twofold: First, that the statute is an unwarranted invasion of the liberty of contract secured by the Fourteenth Amendment of the Constitution of the United States; second, that the law being applicable only to mines where more than ten men are employed, is discriminatory, and deprives the plaintiff in error of the equal protection of the laws within the inhibition of the same Amendment.

That the Constitution of the United States, in the Fourteenth Amendment thereof, protects the right to make contracts for the sale of labor, and the right to carry on trade or business against hostile state legislation, has been affirmed in decisions of this court, and we have no disposition to question those cases in which the right has been upheld and maintained against such legislation. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Adair* v. *United States*, 208 U. S. 161. But in many cases in this court the right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the State, enacted for the protection of the public health, safety or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract. It would extend this opinion beyond reasonable limits to make reference to all the cases in this court in which quali-

fications of the right of freedom of contract have been applied and enforced. Some of them are collected in *Holden* v. *Hardy*, 169 U. S. 366, in which it was held that the hours of work in mines might be limited.

In *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, it was held that an act of the legislature of Tennessee, requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employés, did not conflict with any provisions of the Constitution of the United States protecting the right of contract.

In *Frisbie* v. *United States*, 157 U. S. 160, the act of Congress prohibiting attorneys from contracting for a larger fee than $10.00 for prosecuting pension claims was held to be a valid exercise of police power.

In *Soon Hing* v. *Crowley*, 113 U. S. 703, a statute of California, making it unlawful for employés to work in laundries between the hours of 10 P. M. and 6 A. M., was sustained.

The statute fixing maximum charges for the storage of grain, and prohibiting contracts for larger amounts, was held valid. *Munn* v. *People of Illinois*, 94 U. S. 113.

In *Patterson* v. *Bark Eudora*, 190 U. S. 169, this court held that an act of Congress making it a misdemeanor for a shipmaster to pay a sailor any part of his wages in advance was valid.

In *Gundling* v. *Chicago*, 177 U. S. 183, this court summarized the doctrine as follows:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonble and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed

without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

In *Jacobson* v. *Massachusetts*, 197 U. S. 11, this court said:

"The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import absolute right in each person to be at all times, and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good."

It is then the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health and welfare of the people.

It is also true that the police power of the State is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself.

The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Mugler* v. *Kansas*, 123 U. S. 623; *Minnesota* v. *Barber*, 136 U. S. 313, 320; *Atkin* v. *Kansas*, 191 U. S. 207, 223.

If the law in controversy has a reasonable relation to the protection of the public health, safety or welfare it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an

unwise exertion of the authority vested in the legislative branch of the Government.

We take it that there is no dispute about the fundamental propositions of law which we have thus far stated; the difficulties and differences of opinion arise in their application to the facts of a given case. Is the act in question an arbitrary interference with the right of contract, and is there no reasonable ground upon which the legislature, acting within its conceded powers, could pass such a law? Looking to the law itself, we find its curtailment of the right of free contract to consist in the requirement that the coal mined shall not be passed over any screen where the miner is employed at quantity rates, whereby any part of the value thereof is taken from it before the same shall have been weighed and credited to the employé sending the same to the surface, and the coal is required to be accounted for according to the legal rate of weights as fixed by the law of Arkansas, and contracts contrary to this provision are invalid. This law does not prevent the operator from screening the coal before it is sent to market; it does not prevent a contract for mining coal by the day, week or month; it does not prevent the operator from rejecting coal improperly or negligently mined and shown to be unduly mingled with dirt or refuse. The objection upon the ground of interference with the right of contract rests upon the inhibition of contracts which prevent the miner employed at quantity rates from contracting for wages upon the basis of screened coal instead of the weight of the coal as originally produced in the mine.

If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail.

While such laws have not been uniformly sustained when

brought before the state courts, the legislatures of a number of the States have deemed them necessary in the public interests. Such laws have been passed in Illinois, West Virginia, Colorado, and perhaps in other States. In Illinois they have been condemned as unconstitutional. *Ramsey* v. *People*, 142 Illinois, 380. The same conclusion has been reached in Colorado, citing and following the Illinois case, *In re House Bill No. 203*, 21 Colorado, 27.

In West Virginia, while at first sustained by a unanimous court, such an act was afterwards, upon rehearing, maintained by a divided court. *Peel Splint Coal Co.* v. *State of West Virginia*, 36 W. Va. 802.

We are not disposed to discuss these state cases. It is enough for our present purpose to say that the legislative bodies of the States referred to, in the exercise of the right of judgment conferred upon them, have deemed such laws to be necessary.

Conditions which may have led to such legislation were the subject of very full investigation by the industrial commission authorized by Congress by the act of June 18, 1898, c. 466, 30 Stat. 476. Volume 12 of the report of that commission is devoted to the subject of "Capital and Labor Employed in the Mining Industry." In that investigation, as the report shows, many witnesses were called and testified concerning the conditions of the mining industry in this country, and a number of them gave their views as to the use of screens as a means of determining the compensation to be paid operatives in coal mines. Differences of opinion were developed in the testimony. Some witnesses favored the "run of the mine" system, by which the coal is weighed and paid for in the form in which it is originally mined; others thought the screens useful in the business, promotive of skilled mining, and that they worked no practical discrimination against the miner. A number of the witnesses expressed opinions, based upon their experience in the mining industry, that disputes concerning the introduction and use of screens had led to frequent and sometimes heated controversies between the operators and the miners. This condition was

testified to have been the result, not only of the introduction of screens as a basis of paying the miners for screened coal only, but after the screens had been introduced differences had arisen because of the disarrangement of the parts of the screen, resulting in weakening it or in increasing the size of the meshes through which the coal passed, thereby preventing a correct measurement of the coal as the basis of paying the miner's wages.

We are unable to say, in the light of the conditions shown in the public inquiry referred to, and in the necessity for such laws, evinced in the enactments of the legislatures of various States, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and the promotion of the harmonious relations of capital and labor engaged in a great industry in the State.

Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have frequently been sustained in the courts, although in compelling certain modes of dealing they interfere with the freedom of contract. Many cases are collected in Mr. Freund's book on "Police Power," § 274, wherein that author refers to laws which have been sustained, regulating the size of loaves of bread when sold in the market; requiring the sale of coal in quantities of 500 pounds or more, by weight; that milk shall be sold in wine measure, and kindred enactments.

Upon this branch of the case it is argued for the validity of this law that its tendency is to require the miner to be honestly paid for the coal actually mined and sold. It is insisted that the miner is deprived of a portion of his just due when paid upon the basis of screened coal, because while the price may be higher, and theoretically he may be compensated for all the coal mined in the price paid him for screened coal, that practically, owing to the manner of the operation of the screen itself, and its different operation when differently adjusted, or when out of order, the miner is deprived of payment for the coal which he has actually mined. It is not denied that the

coal which passes through the screen is sold in the market. It is not for us to say whether these are actual conditions. It is sufficient to say that it was a situation brought to the attention of the legislature, concerning which it was entitled to judge and act for itself in the exercise of its lawful power to pass remedial legislation.

The law is attacked upon the further ground that it denies the equal protection of the law, in that it is applicable only to mines employing ten or more men. This question is closely analogous to one that was before this court in the case of *St. Louis Consolidated Coal Co.* v. *Illinois*, 185 U. S. 203, wherein an inspection law of the State was argued to be clearly unconstitutional by reason of its limitation to mines where more than five men are employed at any one time, and in that case, as in this, it was contended that the classification was arbitrary and unreasonable, that there was no just reason for the discrimination. Of that contention this court said (185 U. S. 207):

"This is a species of classification which the legislature is at liberty to adopt, provided it is not wholly arbitrary or unreasonable, as it was in *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, in which an act defining what should constitute public stock yards and regulating all charges connected therewith was held to be unconstitutional, because it applied only to one particular company, and not to other companies or corporations engaged in a like business in Kansas, and thereby denied to that company the equal protection of the laws. In the case under consideration there is no attempt arbitrarily to select one mine for inspection, but only to assume that mines, which are worked upon so small a scale as to require only five operators, would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a larger scale or at a greater depth from the surface, and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that the cautions necessary in the opera-

tion of coal mines of ordinary magnitude would be required in such cases. There was clearly reasonable foundation for discrimination here."

This language is equally apposite in the present case. There is no attempt at unjust or unreasonable discrimination. The law is alike applicable to all mines in the State employing more than ten men underground. It may be presumed to practically regulate the industry when conducted on any considerable scale. We cannot say that there was no reason for exempting from its provisions mines so small as to be in the experimental or formative state and affecting but few men, and not requiring regulation in the interest of the public health, safety or welfare. We cannot hold, therefore, that this law is so palpably in violation of the constitutional rights involved as to require us, in the exercise of the right of judicial review, to reverse the judgment of the Supreme Court of Arkansas, which has affirmed its validity. The judgment of that court is

Affirmed.

Dissenting: MR. JUSTICE BREWER and MR. JUSTICE PECKHAM.

HARDAWAY *v.* NATIONAL SURETY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 44. Argued December 8, 1908.—Decided January 4, 1909.

One who furnishes money and superintends the completion of work under a government contract is not a subcontractor within the meaning of the act of August 13, 1894, c. 280, 28 Stat. 278, and is not entitled to recover a deficit from the surety; and where there is no liability of the contractor there can be no recovery against the surety on the contractor's bond.

The right of the surety on a bond for performance of a contract given under the act of August 13, 1894, c. 280, 28 Stat. 278, to be subro-

gated to the contractor's claim for balances due from the Government, is superior to that of one advancing money to the contractor on assignment of such claim. *Prairie State Bank* v. *United States*, 164 U. S. 227.

150 Fed. Rep. 465, affirmed.

THE facts are stated in the opinion.

Mr. Temple Bodley and *Mr. John Bryce Baskin*, with whom *Mr. J. Manly Foster* and *Mr. W. B. Oliver* were on the brief, for appellants.

Mr. William W. Watts and *Mr. Henry Fitts*, with whom *Mr. William J. Griffin* was on the brief, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Appeals for the Sixth Circuit affirming a decree of the Circuit Court of the United States for the Western District of Kentucky, whereby the appellants Hardaway and Prowell were denied the right to recover against the appellee, the National Surety Company, as surety for the faithful performance of a certain contract entered into on September 28, 1899, between the United States and a firm of contractors composed of James E. Willard, Charles L. Cornwell and Joseph Coyne, doing business as Willard & Cornwell. The contract was for the construction of a lock and dam No. 4, in the Black Warrior River, near Tuscaloosa, Alabama. Bond was given in accordance with the requirements of the act of Congress approved August 13, 1894, c. 280, 28 Stat. 278, in order to secure the faithful performance of the contract.

The contract has been kept so far as the United States is concerned, and the surety is relieved from obligation in that respect. The contention in this case involves the construction and application of that condition of the bond, which requires

the contractors to "promptly make full payments to all persons supplying them labor or materials in the prosecution of the work, provided for in said contract."

The question for consideration here is, under the circumstances of the case can Hardaway and Prowell recover upon the bond on their claim as for labor done and material furnished within the terms thereof? The record discloses that the original contractors carried on the work until February 5, 1901, when they made an agreement between themselves and Coyne, by which agreement Coyne was to pay the debts of the firm, to make all future purchases in his own name, and to receive all profits from the contract. After February 5, 1901, Coyne carried on the work. The Government made the checks payable to Willard and Cornwell as before, in accordance with the terms of the contract. On June 2, 1903, Coyne having become financially unable to complete the contract, made a contract in writing with Hardaway and Prowell, which we shall hereinafter set out in full, concerning the work.

Owing to freshets and washouts, as is contended by appellants, it became necessary to do over much of the work, and after its completion appellants made a claim for $32,757.34, interest included to March 1, 1906, and included therein $7,556, being fifteen per cent of the cost expended on the contract with Coyne.

On October 24, 1904, the National Surety Company, appellee, filed a bill in the United States court at Louisville, averring the insolvency of the contractors, and that there would be a loss for labor and material which it would be compelled to pay as surety on the bond, asking for an injunction and the appointment of a receiver. On November 8, 1904, an order was made referring the case to a special master, and providing that parties having claims for labor and materials might prove the same with the right to contest them, and to take the proofs thereof as in equity cases. The order provided that appellee, the surety company, should pay into court, in satisfaction of the claims and costs of action, such a

sum as might be required after the Government payments were exhausted.

The claim of Hardaway and Prowell was filed. A special master allowed the claim. Upon error the Circuit Court disallowed the same, and upon appeal to the Circuit Court of Appeals for the Sixth Circuit the decree was affirmed. 150 Fed. Rep. 465; *S. C.*, 80 C. C. A. 283. The case then came here.

The case turns upon the construction of the contract between Coyne and Hardaway and Prowell. The contract reads as follows:

"State of Alabama, Tuscaloosa County:

"This contract, made this 2nd day of June, 1903, by and between B. H. Hardaway and R. P. Prowell, hereinafter called Hardaway & Prowell, as parties of the first part, and Joseph Coyne, as party of the second part, witnesseth:

"That, whereas, Willard & Cornwell, a firm composed of J. E. Willard, C. R. Cornwell and the said Joseph Coyne, did, heretofore, on to-wit, the — day of —, 1899, enter into a contract with the United States for the construction of lock No. 4 in the Black Warrior River above Tuscaloosa, Alabama, and whereas, shortly after the beginning of the work upon said lock the said Joseph Coyne, by an arrangement between him and his copartners, undertook to complete and finish said lock according to the specifications of the contract of said firm with the United States, and in consideration of such an undertaking acquired the beneficial interest of said firm in said contract and was to receive all amounts paid by the United States in consideration of such contract, and whereas, said lock is still uncompleted, and the said Joseph Coyne cannot, on account of his inability to procure the necessary financial aid, and on account of the disorganization of his labor forces and for various and sundry other reasons, complete and finish the said work in accordance with the said contract, and whereas said contract is a valued asset to the said Joseph Coyne if the said work can be prosecuted to its

completion under the terms of said contract, there being held in reserve by the Government under the terms of said contract about $8,300.00, which has already been earned by said Coyne, and whereas by reason of his said inability to finish said work the said contract is about to be forfeited, and the said Coyne is in imminent danger of losing, not only what profits may be made upon the completion of the work, but the entire reserve fund also retained by the Government, and whereas the said Joseph Coyne for the purpose of preventing the forfeiture of said contract, has made overtures to the said Hardaway & Prowell to take up said work and complete it, and the said Hardaway & Prowell have agreed to do so upon the terms and stipulations hereinafter set forth; now, therefore,

"1. The said Hardaway & Prowell do hereby undertake and agree with the said Joseph Coyne to superintend the completion of the said lock and dam No. 4 and to furnish the necessary finances for the completion thereof, and to put in charge of said work a competent superintendent and to properly organize the work for an energetic prosecution thereof to completion, for which services they are to receive an agreed compensation of 15 per cent upon the total cost of completing said contract, which total cost shall be construed to include all amounts necessarily expended and expenses incurred by Hardaway & Prowell in the completion of said work and all amounts necessarily paid and expenses incurred by them to effect a settlement with and an acceptance of said lock and dam by the United States.

"2. The said Joseph Coyne agrees to the above compensation for Hardaway & Prowell and further agrees to turn over to them entire charge of the completion of said work, and not to interfere with them in any way in the prosecution of said work to completion, and further agrees to turn over to the said Hardaway & Prowell the entire outfit of machinery, tools, etc., which he now has at said lock and dam and the quarries where he is getting stones and to give the use of the same to them for the completion of said work free of any charge.

"3. The said Joseph Coyne further agrees to have all checks for each estimate upon said work forwarded by the Government to the said Hardaway & Prowell and to properly endorse such checks so that they may be collected by Hardaway & Prowell.

"4. It is further agreed by all parties hereto that out of the proceeds of the checks referred to in the next foregoing paragraph the obligations shall be paid preferentially in the following order:

"1. The compensation of the said Hardaway & Prowell as herein agreed for their services.

"2. All moneys advanced by Hardaway & Prowell and used in the prosecution of said work.

"3. All debts necessarily incurred by the said Hardaway & Prowell for the prosecution of said work other than debts for labor and material.

"4. All debts incurred by said Hardaway & Prowell for labor and material or moneys advanced by them in payment for labor or material debts.

"5. The said Joseph Coyne, for the completion of said work and for the securing to the said Hardaway & Prowell all amounts that they shall have to pay on whatever account for the completion of said lock and dam and for a settlement with the United States and acceptance of said lock and dam by the proper authorities of the government, does hereby assign and set over to the said Hardaway & Prowell all his interest in the amount, aggregating as aforesaid about $8,300, retained and now held in reserve by the Government under the said contract for the building of said lock and dam, which shall be applied by the said Hardaway & Prowell in the following order:

"1. To the payment of all debts for labor and material incurred in the building of said lock and dam.

"2. Any balance that may be due to said Hardaway & Prowell for their compensation under this contract.

"3. All other necessary debts incurred in the prosecution

of the said work by Hardaway & Prowell and all amounts including expenses which they shall have to pay in order to effect a settlement with the Government and acceptance by it of said lock and dam.

"4. Any balance to be paid to the said Joseph Coyne.

"6. It is understood and agreed by all parties hereto that if the said Joseph Coyne should at any time fail or be unable to turn over to the said Hardaway & Prowell the checks for estimates on said work properly endorsed so that Hardaway & Prowell can collect them or should fail to secure the collection of them by the said Hardaway & Prowell then the said Hardaway & Prowell shall in that event have the option of annulling said contract and stopping work without notice to the said Joseph Coyne, or to any other parties whomsoever, but in said event the said Hardaway & Prowell shall have a claim against the said Joseph Coyne for all moneys furnished by them and expenses incurred by them upon any account whatsoever in the prosecution of said work, and which shall not have been repaid to them, and for all compensation earned under this contract and not paid to them, and such claim shall be due and payable at once upon their termination of the contract.

"In witness whereof the said parties of the first and second parts have hereunder set their hands and seals in duplicate, this the day and year first above written.

"B. H. HARDAWAY.
"R. P. PROWELL.
"Attest: C. B. VERNER. "JOSEPH COYNE."

It is said that the master sustained the claim of Hardaway and Prowell upon authority of the case of *Hill* v. *Surety Co.*, 200 U. S. 197. In that case this court held that the obligation of a bond similar to the one here in suit, when construed in the light of the statute requiring its execution, and looking to the protection of those who supply labor and materials provided for in the original contract, was broad enough to in-

clude laborers who had performed work for a subcontractor who furnished labor or material which the original contractor had obligated himself to furnish. It was held that in such a case the original contractor who employed a subcontractor who bought materials or hired labor with which to carry out and fulfill the engagement of the original contract for the construction of a public building was thereby supplied with materials and labor for the fulfillment of his contract as effectually as if he had directly hired the labor or bought the materials. We are unable to see how that case controls the one at bar; nor can we reach the conclusion that Hardaway and Prowell were subcontractors furnishing labor or materials to the original contractor, or furnishing such labor or materials to subcontractors which enabled the original contract to be fulfilled, thereby bringing themselves within the principles of the *Hill case*. As we read this contract, Hardaway and Prowell, in view of Coyne's financial and other difficulties, undertook to do certain things in relation thereto. They undertook to superintend the completion of the lock and dam, and to that end to furnish the necessary finances for the completion of the work; for this they were to receive an agreed percentage upon the total cost upon the completion of the contract.

Coyne, on his part, agreed that such compensation should be paid, and agreed to turn over the charge of the work to Hardaway and Prowell and not to interfere therewith in any way, and to give them the use of his outfit and tools, etc., and the quarries from which he was taking stone for the construction of the lock and dam. He agreed to have the checks given by the Government, upon estimates, forwarded to Hardaway and Prowell, and to properly indorse such checks so as to make them collectible by them.

The manner in which Hardaway and Prowell should distribute the money received from such checks is specifically provided in paragraph 4 of the contract. By the fifth paragraph Coyne assigned to Hardaway and Prowell for the completion of the work, and as security to Hardaway and Prowell,

for the amount which they should have to pay on all accounts for the completion of the work and for a settlement with the United States and acceptance of said lock and dam by the proper authorities, all of his interest in $8,300 retained and held in reserve by the Government under the contract, which was to be applied by Hardaway and Prowell, 1st, for the payments of debts for labor and materials; 2d, any balances due to Hardaway and Prowell for their compensation under the contract; 3d, all other necessary debts incurred in the prosecution of the work by Hardaway and Prowell and all amounts which they shall be obliged to pay in order to effect a settlement with the Government and acceptance by it of said lock and dam; 4th, any balance to go to Coyne.

The sixth paragraph of the contract made provision for the possibility that Hardaway and Prowell should not receive payment of the checks coming from the Government, in which event they should have the right, at their option, of annulling the contract and stopping the work. In that contingency they should have a claim against Coyne for money furnished by them on account of the prosecution of the work and for all compensation earned under the contract.

Hardaway and Prowell bound themselves to furnish superintendence and to furnish the money to complete the work which Coyne had undertaken to do. These things were all that Hardaway and Prowell undertook to do; they were not subcontractors in our view who undertake to furnish labor and materials upon a contract with the original contractor. The extent of the agreement was to furnish funds to complete the work and to superintend it. For this they were to be paid by the assignment of the reserve funds in the hands of the Government and the checks or payments under the original contract. There was no undertaking on the part of the surety company that the contract should be profitable to its principal or to any other substituted in the contract by assignment or otherwise. The surety did agree by the terms of the bond that the original contractors should make full payment to all per-

sons supplying them with labor and materials in the prosecution of the work. This was for the protection of the subcontractors and others supplying such labor and materials for the fulfillment of the original agreement, as we held in the *Hill case.*

We agree with the Circuit Court of Appeals that Coyne entered into no agreement to pay Hardaway and Prowell beyond the assignment of the checks from the Government and the assignment of the reserved $8,300. This is shown by the terms of the agreement read in the light of the circumstances surrounding the parties at the time the contract was made. Coyne had failed to complete the contract and was financially embarrassed. Hardaway and Prowell looked to the assignment of the reserve fund from Coyne and the payments from the Government for their commissions, not to the personal liability of Coyne. Coyne was to be personally liable only in the event that Hardaway and Prowell should fail to realize on the Government checks, as provided in paragraph 6 of the contract. As the claim of Hardaway and Prowell set up in this case must be worked out against the surety because of the liability of the principal in the bond to them, and as there is no such liability either from Willard and Cornwell or Coyne to them, there can be no recovery against the surety on the bond.

Nor do we think that Hardaway and Prowell can complain of the disposition of the $8,300 (exactly $8,161.75), reserved payments under the contract. This sum was paid into court for work done previous to the making of the contract of June 2, 1903. 80 C. C. A. 291. The Circuit Court of Appeals held that this sum, thus paid into court, should be credited upon the $13,261.76, which the surety company had been directed to pay into court for the satisfaction of labor claims which had been proved and allowed in the case. The right of the surety to be subrogated had attached to the fund and was superior to any rights which Hardaway and Prowell had as assignees of Coyne. *Prairie State Bank* v. *United States,* 164 U. S. 227.

We think this was the correct view. We find no error in the decree of the Circuit Court of Appeals, and the same is

Affirmed.

EDWARD MURPHY, 2d, *v.* JOHN HOFMAN COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 33. Argued December 1, 2, 1908.—Decided January 4, 1909.

Where the bankruptcy court has the actual possession of property, the title to which is in dispute, that property is withdrawn from the jurisdiction of other courts, and, independently of any jurisdiction conferred by statute, the bankruptcy court, as is the case with other Federal and state courts, has ancillary jurisdiction to hear and determine all questions respecting such title; and such jurisdiction cannot be disturbed by the process of any other court. *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38.

Where one who has no other connection with the property is appointed receiver his possession is that of the court and not that of an individual.

The seizure of goods in the possession of a receiver in bankruptcy, under a writ of replevin issued by a state court against the receiver, individually, *held* in this case to be an unlawful invasion of the possession of the bankruptcy court.

THE facts are stated in the opinion.

Mr. Herbert D. Bailey for plaintiff in error:

The bankrupt's actual possession of this property at the inception of the bankruptcy proceedings, and its delivery thereof to the receiver, as a part of its property, rendered it the duty of the receiver not only to take but to hold the property pending an order of the Federal court as to its disposition. *In re Schermerhorn*, 16 Am. B. R. 507; *White* v. *Schloerb*, 178 U. S. 542; *S. C.*, 4 Am. B. R. 178; *Sharpe* v. *Doyle*, 102 U. S.

686, reversing *Doyle* v. *Sharpe*, 74 N. Y. 156; *In re Rochford*, 10 Am. B. R. 608; *Whitney* v. *Wenman*, 198 U. S. 539; *S. C.*, 14 Am. B. R. 45; *In re Leeds*, 12 Am. B. R. 136; Gluck & Becker on Receivers, 389, 390; Alderson on Receivers, 329; *Stanley* v. *Schwalby*, 147 U. S. 508; *United States* v. *Lee*, 106 U. S. 196.

The Federal court having found the property in the possession of the bankrupt, who claimed it, had exclusive jurisdiction, and having by its orders disposed specifically of the property prior to October 11, 1904, on notice to the Hofman Company, its disposition was effectual and conclusive. The state court was without jurisdiction to review, modify or disturb the disposition made by the Federal court. Bankruptcy Act, § 2, (3), (5), (6), (7), (15); Bankruptcy Act, § 1, (7), (8), (9); Federal Constitution, Art. I, § 8; Federal Constitution, Art. III, § 2; *White* v. *Schloerb*, 178 U. S. 542; *Whitney* v. *Wenman*, 198 U. S. 539; *Central Nat. Bank of Boston* v. *Stevens*, 169 U. S. 432; *Peck* v. *Jenness*, 7 How. 612; *Riggs* v. *Johnson*, 6 Wall. 166; *Crescent City Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Railroad Co.* v. *Gomila*, 132 U. S. 478; *Dowell* v. *Applegate*, 152 U. S. 327; *Covell* v. *Heyman*, 111 U. S. 176; *In re Watts*, 190 U. S. 1; *Wiswall* v. *Sampson*, 14 How. 52; *Sharpe* v. *Doyle*, 102 U. S. 686; *City Bank of New Orleans, In re Christy*, 3 How. 292; *Colby* v. *Reed*, 99 U. S. 560.

Mr. John A. Barhite for defendant in error:

No Federal question is involved in this case and no officer of the United States court is interested in the decision.

It was the duty of the bankruptcy court to protect its receiver, and that court would protect its receiver from any interference in the discharge of his duties, but it appeared to that court that the defendant in error was not attempting to interfere with the receiver but was engaged in a controversy with an individual in whose welfare the bankruptcy court had no interest and over whose actions it had no control, and the order vacating the injunction was a plain direction to the re-

ceiver not to attempt to retain the show cases and that if he did attempt to retain them he did so at his own peril.

The claim of the receiver that he was helpless and was the innocent victim of his office, is controverted by the principle laid down in *Dushane* v. *Beall*, 161 U. S. 513, 515. See also *In re Geo. M. Hill Co.*, 123 Fed. Rep. 866.

The state court had jurisdiction of this action and the record shows no question which can be determined by this court.

The bankruptcy act nowhere gives exclusive jurisdiction to the United States courts to determine questions between receivers and trustees in bankruptcy and adverse claimants. The right of the United States court to administer property which comes into its possession, must rest upon the principle where it applies that property once in the possession of a court will be administered by that court and not taken from its possession by some other court. *Cook* v. *Whipple*, 55 N. Y. 150; *Peck* v. *Jenness*, 43 Am. Dec. 573, 581; *State* v. *Trustees*, 65 N. C. 714, 719; *Claflin* v. *Houseman*, 93 U. S. 130; *Eyster* v. *Gaff*, 91 U. S. 521; *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *White* v. *Schloerb*, 178 U. S. 542; *Sharpe* v. *Doyle*, 102 U. S. 686, discussed and said not to support contentions of plaintiff in error.

The trial court made no error, either in the reception or rejection of evidence, which requires the reversal of the judgment.

Upon the trial the plaintiff in error waived any claim which he might have to the property in dispute and the trial court had no other course than to direct a verdict for the plaintiff, the defendant in error.

Mr. Justice Moody delivered the opinion of the court.

This is a writ of error to review a final judgment of the Court of Appeals of the State of New York in an action of replevin. The writ was allowed to the plaintiff in error, Murphy, but denied to the party joined with him, by the Chief Judge of that court while the record was still in its possession.

and before it had been remitted to the Supreme Court, in accordance with the practice of the State. A clear understanding of the questions before this court will be aided by a relation of the facts out of which the litigation arose. Such of them as do not bear upon the Federal questions may either be omitted or stated in a very general way.

The Dodge Dry Goods Company, a corporation, had contracted with the John Hofman Company, the defendant in error, for the construction and installation in the store of the Dodge Company of a lot of show cases. Shortly after the installation of the show cases and before the contract price was paid, proceedings in bankruptcy against the Dodge Company were begun in the District Court of the United States, and, on August 18, 1903, Edward Murphy, 2d, the plaintiff in error, was appointed by that court temporary receiver of the property of the alleged bankrupt. Thereupon the Hofman Company took the position that the show cases had never been accepted by the bankrupt, and that, although they had been used for some time in the business, title to them had not passed from the vendor. Accordingly, the Hofman Company, on August 20, 1903, demanded in writing the possession and delivery of the show cases from "Edward Murphy, 2d, Receiver, etc., of Dodge Dry Goods Company." Murphy declined to deliver up the property, saying that he was in possession as receiver. The order of the District Court appointing the receiver recites the filing of the petition and affidavit, and directs the alleged bankrupt to show cause on the sixth of October, 1903, why a permanent receiver should not be appointed, and then directs that, pending the return of the order, the "alleged bankrupt be, and it hereby is, enjoined and restrained from making any transfer of any of its property and . . . all persons are enjoined and restrained from instituting and from prosecuting any and all suits and proceedings in any court against said alleged bankrupt and against any of its property. . . . that Edward Murphy,

2d, . . . be, and he hereby is, appointed temporary receiver of all the property, real and personal, and rights of action and demands due said alleged bankrupt with power to collect and receive same and continue the business with the present employés." The order further directs that the receiver shall take immediate possession of the property of the bankrupt and carry on the business. On August 21, 1903, Murphy notified the president of the Dodge Company that he had been appointed receiver, and demanded possession of the property of the alleged bankrupt. The keys of the store were given to the receiver, and he took possession of the property in it, including the show cases, and continued the business. At that time the show cases were filled with goods, and they thenceforth were used by the receiver in the conduct of the business. Nothing at the time was said specifically about them, but shortly afterward the president of the Dodge Company informed the receiver that the title to the store was in the Century Mercantile Company, another corporation, and that by the terms of the lease to the Dodge Company the fixtures, including the show cases, became the property of the landlord on the bankruptcy of the tenant. The receiver then entered into negotiations with the counsel of the Century Mercantile Company, and it was agreed that the show cases should be omitted from the receiver's inventory, and the dispute as to the title to them between the receiver and the Century Mercantile Company should be referred to the decision of the bankrupt court. The situation then was this: The receiver was in possession of the stock of goods, engaged in conducting the business, and using the show cases in the business, claiming the right to do so because they were the property of the bankrupt. The receiver had been informed that there were two outstanding conflicting claims to the title of the show cases: first, that of the John Hofman Company, who manufactured and installed them, and claimed that the title had not passed to the bankrupt but remained in the vendor; second, that of the Century Mercantile Company, who claimed that the title had

passed to the bankrupt, and that afterwards, by virtue of the terms of the lease of the store, title had been vested in it. The receiver disputed both claims, and, as we shall see hereafter, the dispute with the Century Mercantile Company was settled by the bankruptcy court in favor of the receiver. The John Hofman Company, however, failed to resort to the bankruptcy court for the adjudication of its claim, and began an action against "Edward Murphy, 2d, and Century Mercantile Company," by the service, on the sixth day of October, 1903, of a summons "to answer the complaint in this action," together with an affidavit in replevin and a requisition to replevy the show cases and a copy of an undertaking from the plaintiff accepted by the sheriff. It will be observed that Murphy was not described in the summons as receiver. On that day the sheriff went to the store, identified the show cases, and said with respect to each one, "I replevy this show case." He was requested by both defendants not to take them away. He did not move them, or lock up the store, or put a keeper in charge, and went away leaving the show cases exactly as they were when he came in. On the ninth of October, 1903, the judge of the bankruptcy court, on the petition of the receiver, enjoined all further proceedings in the action of replevin until the further order of the court; enjoined the sheriff from executing any requisition in replevin of property in the possession of the receiver, and enjoined the sheriff and all other persons from interfering in any manner with the property then in the possession of the receiver. The John Hofman Company applied for an order vacating this injunction. The application remained pending for a year, owing to the illness of the District Judge, and on October 11, 1904, the order of injunction was vacated. Three days later, on October 14, 1904, the sheriff removed the show cases from the store. In the meantime they had been sold at a trustee's sale of the property of the bankrupt.

Thereafter the defendants severally filed answers. Murphy set up in defense that at the time of the service of summons

upon him he was in possession of the property as the receiver of the bankrupt; that he remained in possession as receiver until the adjudication of bankruptcy and the appointment of himself as a trustee, and that as trustee, under the order of the bankruptcy court, he sold the property, and the sale was duly confirmed. The issue made by the pleadings was this: The plaintiff in replevin demanded the property in dispute from Murphy as an individual. Murphy, on the other hand, asserted that he had no concern with the property except in his capacity as receiver; that is to say, as an officer of the court of bankruptcy. The burden rested upon the plaintiff to show, first, that the title had not passed from it to the Dodge Company, a question purely of state cognizance; and, second, that the possession of Murphy of the show cases was not a possession as receiver in bankruptcy, a question ultimately for Federal cognizance. There was a trial before a jury and a verdict for the plaintiff, without damages, which was successively affirmed by the Appellate Division of the Supreme Court and by the Court of Appeals. Neither court rendered an opinion.

Before going further it is well to ascertain the principles of law which are applicable to the situation. The bankrupt act of 1898, as originally enacted, did not confer jurisdiction on the District Courts of the United States over suits brought by trustees in bankruptcy to assert title to property as assets of the bankrupt, or to set aside transfers made by the bankrupt in fraud of the creditors or by way of preference, unless by consent of the defendant. *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *Frank* v. *Vollkommer*, 205 U. S. 521. The act, however, preserves the jurisdiction, otherwise existing by statute, of the courts of the United States, though it is limited to courts where the bankrupt himself could have prosecuted the action. *Bush* v. *Elliott*, 202 U. S. 477. But where the property in dispute is in the actual possession of the court of bankruptcy there comes into play another principle, not peculiar to courts of bankruptcy but applicable to all courts, Federal

or state. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 54. Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, it was held that the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant, and that the receiver had no right to deliver it to him without the order of the court. *Whitney* v. *Wenman*, 198 U. S. 539. On the day the opinion in the *Bardes case* was announced the same justice delivered the opinion of the court in *White* v. *Schloerb*, 178 U. S. 542, a case in which the facts were essentially those of the case at bar. Certain persons, copartners in trade, were adjudicated bankrupts and the case was sent to a referee in bankruptcy. They had a stock of goods in a store, the entrance to which was locked by the referee. Certain other persons claimed title to part of the stock of goods as obtained from them by a fraudulent purchase, which had been rescinded. After the adjudication, these persons brought an action of replevin of the goods against the bankrupt in a state court, which was executed. It was held that replevin would not lie in the state court, and that the District Court had jurisdiction by summary proceedings to compel the return of the property seized. The court said: "The goods were then in the lawful possession of and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in the custody of a court of the United States they

could not be taken out of that custody upon any process from a state court." The last two cases cited proceed upon and establish the principle that when the court of bankruptcy, through the act of its officers, such as referees, receivers or trustees, has taken possession of a *res*, as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of another court. And see *Skilton* v. *Codington*, 185 N. Y. 80, 85, 86, and *Frank* v. *Vollkommer*, 205 U. S. 521, which by implication approve the same principle.

We think this principle was lost sight of in the trial of the case before us. We must assume in favor of the plaintiff in replevin that the replevin was completed on the sixth of October, 1903, when the sheriff identified the goods and, at the request of the defendant, left them in place in the store and delivered to the defendants the undertaking, which apparently was accepted by them as good. If, at this time, the show cases were in the possession of the court of bankruptcy; that is to say, were in the possession of Murphy as the receiver appointed by the court of bankruptcy, then, according to principle and in obedience to the express authority of *White* v. *Schloerb*, *supra*, the action of replevin in the state court cannot be maintained. Upon the undisputed facts, as they appeared at the trial, it is impossible to suppose that Murphy had any possession except as receiver. He had no personal interest in the affairs of the bankrupt, and no relation to its property except that created by his appointment to that office. There is but a single circumstance which points the other way, and to that circumstance reference presently will be made. The demand of the plaintiff in replevin for the delivery of the goods was made upon "Edward Murphy, 2d, Receiver," etc. The plaintiff introduced no evidence tending to show that Murphy had any possession except as receiver. When the evidence for the defendant came to be introduced the nature of Murphy's possession was more fully explained. James E. Dodge, presi-

dent of the Dodge Dry Goods Company, and manager of its business, testified that on the twenty-first day of August, 1903, Murphy called at the store and notified him of his (Murphy's) appointment as receiver, and demanded the possession of the assets of the Dodge Dry Goods Company. He says: "The property that I gave him possession of at that time was merchandise and fixtures in the store, also supplies and book accounts; all the property of the Dodge Dry Goods Company. And all the property that was in possession of the Dodge Dry Goods Company. And among the things I turned over to him were included these show cases that are the subject of this action. There was no exception made of the show cases. . . . I handed him the keys of the store, and told him its contents were the property of the Dodge Dry Goods Company. And these show cases were part of the contents at that time. There was no special mention made of the show cases at that time." Murphy testified that at this interview Dodge turned over to him the keys of the building and showed him the property of the Dodge Dry Goods Company, stock, dry goods and merchandise, complete store equipment, consisting of show cases, counters, etc. The show cases were then on the ground floor, and the goods were in them when they were turned over to him as receiver, and he continued to use the show cases in the performance of his duty as receiver, and claimed them as the property of the bankrupt. The defendant offered in evidence the order of the court of bankruptcy, made August 18, 1903, appointing him as receiver, and offered to show that it was exhibited to the sheriff at the time of the replevin. This order, which hereinbefore has been fully set forth, appointed Murphy "temporary receiver of all the property, real and personal," of the bankrupt, directed him to take immediate possession of all the property and to carry on the business. This evidence was excluded, and we think the exclusion was clearly erroneous.

The plaintiff in replevin lays much stress upon one circumstance, as tending to show that Murphy was not in possession

of the property as receiver, but as bailee of the Century Mercantile Company, and to that circumstance more particular attention must now be given. Murphy testified upon cross-examination that he did not include the show cases in the schedule filed by him as receiver, but this testimony must be considered in connection with the explanation which accompanied it. Dodge originally had owned the store and had leased it to the Dodge Dry Goods Company, of which he was president. The lease contained a provision that upon the bankruptcy of the dry goods company the fixtures, including the show cases, should become the property of the owner of the store. The store subsequently was conveyed to the Century Mercantile Company, of which Dodge was also president. After the stock in trade, including the show cases, had been turned over to Murphy as receiver, Dodge, acting in behalf of the Century Mercantile Company, made a demand upon him for the fixtures and show cases, basing his demand upon the provision in the lease. Just how long after the delivery of possession to Murphy this demand was made is not clear, but it is enough to say that the demand was subsequent to the delivery. Murphy declined to yield to this demand, and agreed with counsel for the Century Mercantile Company that the dispute should be decided by the court of bankruptcy. The defendant offered to show that subsequently the court decreed that the provision in the lease was void, and that the fixtures, including the show cases, were the property of the bankrupt. This evidence was excluded, and, we think, erroneously. It tended, in connection with other evidence, to show the nature of Murphy's possession, and that he was insisting upon his right as receiver, and had not accepted the goods personally as bailee of the Century Mercantile Company. Pending the settlement of the dispute, and for no other reason than that the dispute existed, the show cases were omitted from the inventory. The facts which have been recited deprived this omission of all significance as showing that Murphy had any other possession than as receiver.

At the trial Murphy relied upon his possession as receiver to defeat the action. His answer had set up that defense, and in many ways, which it would be unprofitable to set forth in detail, he sought to avail himself of it. It is enough to say that at the conclusion of the evidence the court was requested to direct a verdict for the defendant Murphy, upon the grounds, among others, "That the plaintiff has not shown itself entitled to possession at the time of the commencement of the action, but has shown that the then present right of possession was in the United States Court," and "the plaintiff has not shown that the property was in the possession of the defendant Murphy, but that it was in the possession of the United States Court," and "this Court had no jurisdiction over the subject-matter of this action when it was commenced." The judge presiding at the trial refused, under exception, to give any of these instructions, and submitted the case to the jury in a charge which made no reference to the rights of Murphy as a receiver, or to the possession of the property by him as an officer of the court of bankruptcy, other than to say "as the case then stood, Mr. Murphy was claiming this property as the receiver of the Dodge Company." The judge instructed the jury that if they should find that the show cases furnished by the Hofman Company had not been accepted by the Dodge Company, then the title failed to pass and the verdict must be for the plaintiff. Thus the whole Federal question, so far as it was a question of fact, was withdrawn from the consideration of the jury. Subsequently, after a colloquy with the defendant's counsel, in which he stated that Murphy made no claim as an individual to the property in dispute, and did not ask its return to him, the judge, against the objection and under the exception of Murphy, peremptorily directed a verdict for the plaintiff. We do not set forth that colloquy in full, although it is much relied upon by the defendant in error. While the statements of counsel were confused, we think that what was said by him amounted to nothing more than an assertion that Murphy had had no relation to the property,

except as receiver, and that his possession as receiver entitled him to claim for the property thus possessed and controlled, an immunity from the process of the state court.

But one other question needs any attention. It has been seen that the injunction against proceedings in the state court in this case, granted by the judge of the bankruptcy court on October 9, 1903, was vacated about a year later. The reason for this does not appear in the record. The Hofman Company, however, relies upon this vacation of the order of injunction as an abandonment by the court of bankruptcy of its possession of the property and a turning over of it to be dealt with by the state court. We cannot give to the order vacating the injunction this meaning. If it has any tendency whatever to show an abandonment of possession, it is fully explained by much evidence of a dealing with the property by the bankruptcy court, some of which was excluded at the trial.

On the whole case, we are of the opinion that the seizure of these goods on a writ of replevin from another court was an unlawful invasion of the possession of the court of bankruptcy, which cannot be justified by the assertion, entirely unsupported by the evidence, that Murphy was then holding the goods, not as an officer of the court, but as an individual.

For this reason the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

PAGE v. ROGERS, TRUSTEE IN BANKRUPTCY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 39. Argued December 3, 4, 1908.—Decided January 4, 1909.

Where two courts have concurred in findings of fact in a suit in equity, this court will accept those findings unless clear error is shown. *Dun* v. *Lumbermen's Credit Association*, 209 U. S. 20.

A partner cannot be considered as solvent individually as distinct from his firm which is insolvent, when he is practically the only partner, and his associate, although nominally a partner, is in fact only an employé; and a preferential payment made from his individual estate may, under such circumstances, be recovered for the benefit of all his creditors.

A deed unrecorded and placed in escrow more than four months before bankruptcy and delivered within that period *held*, under the circumstances of this case, to be a preferential payment within the meaning of the bankruptcy law.

The amount of fees to which counsel for the trustee in bankruptcy is entitled is a matter for the bankruptcy court and in this case this court will not interfere with the amount fixed.

149 Fed. Rep. 194, affirmed on these points.

One compelled to surrender a preferential payment is entitled to prove his claim and receive dividends equally with other creditors, *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356, and where the suit is in the bankruptcy court and it is practicable, as in this case, to ascertain the amount of the dividend to which he will be entitled, it can be fixed and deducted from the amount which he is compelled to surrender.

149 Fed. Rep. 194, reversed solely for this purpose.

THE facts are stated in the opinion.

Mr. Frank Spurlock, with whom *Mr. E. J. Page*, *Mr. Louis L. Waters* and *Mr. Foster V. Brown* were on the brief, for appellants.

Mr. J. B. Sizer, with whom *Mr. George D. Lancaster* and *Mr. Robert Pritchard* were on the brief, for appellee.

MR. JUSTICE MOODY delivered the opinion of the court.

This is an appeal in equity from a decree of the Circuit Court of Appeals for the Sixth Circuit. The suit was begun by the appellee, the trustee of the estate of I. B. Merriam, a bankrupt, against Thomas Merriam, to recover a preference alleged to have been received by the latter in violation of the bankrupt law. During the pendency of the suit the defendant died, and the executors of his will were admitted to defend. The plaintiff had a decree, which was affirmed by the Circuit Court of Appeals. There were findings of fact by the District Court, concurred in by the Circuit Court of Appeals. These findings, together with the undisputed facts, may be condensed and stated in narrative form.

I. B. Merriam had been engaged in business for some years as a wholesale grocer at Chattanooga, Tenn. On the first day of June, 1903, he was considerably indebted and insolvent, and the defendant knew it. Much the larger portion of his indebtedness was to his brother, the defendant, Thomas Merriam, or to persons holding claims which Thomas Merriam had guaranteed by indorsement or otherwise. I. B. Merriam then had no assets of much value, with the exception of an undivided half interest in certain coal lands situated in Tennessee. On that day he conveyed his interest in the coal lands to Thomas Merriam, who agreed to pay therefor $65,000 in money and stock of the par value of $20,000 in the Tennessee Lumber & Coal Company, a corporation, to which Thomas Merriam immediately sold and conveyed the land. The purchase money, after the deduction of $7,400, used for the purpose of extinguishing encumbrances on the land, in pursuance of an agreement made at the time, was mainly devoted to the payment of the debt then due directly from I. B. Merriam to Thomas Merriam, and to the payment of other debts of I. B. Merriam for which Thomas Merriam was liable. At the same time, and as part of the same transaction, Thomas Merriam caused to be advanced to I. B. Merriam $10,000 additional upon the pledge of his stock in the Tennessee Lum-

ber & Coal Company. The net result of the transaction was that I. B. Merriam received, as the consideration for the conveyance of his interest in the coal lands, $75,000 in cash and an equity of redemption of the pledged shares in the corporation. Of this $75,000, $61,000, by agreement, was applied either to the payment of the debt due to Thomas Merriam, or, on his demand, to the payment of debts for which he was liable. At the time of the conveyance and the making of the agreement stated Thomas Merriam had reasonable cause to believe that thereby his brother intended to give him a preference. The purpose and effect of the transfer was to give Thomas Merriam a greater percentage of his debt than could be obtained by other creditors of the same class. Indeed, the purpose and effect of the transfer was to pay Thomas Merriam in full and to exonerate him from all liability as guarantor, and its effect was to leave all other creditors with substantially nothing to meet their claims. Within a very few days after this transaction was completed I. B. Merriam filed a voluntary petition in bankruptcy, and was subsequently adjudicated a bankrupt.

Upon the foregoing statement of facts it is indisputable that Thomas Merriam received a preference to the extent of $61,000, forbidden by the bankrupt law, and that it could be avoided and recovered by the trustee. We do not understand counsel for the defendant as disagreeing with this conclusion. Conceding it, however, counsel urged with great earnestness that the findings of fact in the two courts below were erroneous, and we were invited to consider the evidence again in that view. But the rule is well established that where two courts have concurred in findings of facts in a suit in equity, this court will accept those findings, unless clear error is shown. *Dun* v. *Lumbermen's Credit Association*, 209 U. S. 20.

We are unable to discover any such error. On the contrary, every fact essential to constitute a preference was substantiated by the evidence. That being so we decline to subject to minute scrutiny the language of the court employed in discussing questions of fact. There is no reason for a review of

the evidence in detail. The Circuit Court of Appeals has reviewed it satisfactorily in a convincing opinion, and we do not feel called upon to repeat the discussion.

There, however, should be a brief reference to two contentions of the defendant, that the findings were influenced by erroneous views of the law. It is first said that there was error in law in confounding the individual debts of I. B. Merriam with the partnership debts of I. B. Merriam & Son, with the result that I. B. Merriam was found to be insolvent as an individual, while really he was solvent, as his individual assets exceeded his individual indebtedness. But there was no real partnership. I. B. Merriam & Son was simply the name under which I. B. Merriam conducted the wholesale grocery business. The son was only an employé, receiving a salary, and had no interest whatever in the business. All the assets were owned and all the debts were owed by I. B. Merriam alone.

It is further said that I. B. Merriam agreed in writing, on November 15, 1902, to convey the coal lands to Thomas Merriam in satisfaction of the debts due to him or for which he was liable. It is, therefore, argued that as the conveyance, on June 1, 1903, was in performance of this agreement, which antedated the bankruptcy proceedings by more than four months, it cannot be regarded as a preference.

The facts, however, do not raise the question which was argued. Upon a proper interpretation of the evidence we need not determine whether an insolvent debtor may make an agreement to convey a substantial portion of his assets to a favored creditor, keep that agreement secret for more than four months, and then execute it in fraud of the rights of his other creditors, in favor of a creditor who then has reasonable cause to believe that he is receiving a preference. *In re Broadway Savings Trust Co.*, 152 Fed. Rep. 152, and see *Wilson* v. *Nelson*, 183 U. S. 191.

What actually occurred was that a contract in writing was made in November, 1902, between I. B. Merriam and his co-owner, parties of the first part, and Thomas Merriam and an-

other, parties of the second part, whereby the parties of the first part agreed to sell and the parties of the second part agreed to buy the coal lands for a named price. Nothing whatever in this contract required that I. B. Merriam's share of the consideration should be paid to Thomas Merriam or on debts for which he was liable. Moreover, the contract and a deed which was drawn in pursuance of its terms were not delivered, but were deposited in escrow with a bank in Syracuse, N. Y., and never became operative instruments. Nothing more need be said of them, or of the question supposed to be raised.

When Thomas Merriam came to file his answer in the suit, he alleged, in substance, that several years before the conveyance, which has been referred to, and the adjudication in bankruptcy, which followed, I. B. Merriam had executed and delivered, for an expressed consideration of $35,000, a trust deed of the coal lands, which was intended to be a security to Thomas Merriam for loans which he had made or might make to his brother, up to that amount. This trust deed, as subsequently appeared by the evidence, was executed but not registered. A registration of the deed was not required by the law of the State of Tennessee to make it a valid instrument *inter partes*. The defendant therefore contended that so far as the payments from the purchase money of the coal lands were applied to the indebtedness secured by the trust deed they were payments for the extinguishment of a valid, subsisting lien upon the land, fixed upon it more than four months before bankruptcy, and therefore not a preference. It may be assumed, without decision, that the payment within four months of bankruptcy of a mortgage older than four months, and valid *inter partes*, though unrecorded, cannot be a preference. There is no such case here. The trust deed was not delivered unconditionally and the parties to it intended that it should go into effect as a lien only when it was registered, which was never done. The instrument, though actually written, was never delivered as a present, valid and subsisting obligation. It was executed and held in the possession of

the grantor to be delivered and to become operative as a conveyance at some future time, which never arrived. It was written and held ready for instant use, but never actually used until brought forward to excuse a payment which otherwise would be an unlawful preference. In other words, the paper was not as much as an unrecorded deed; it was not a deed at all. Such in effect was the finding of both courts below and we think it was warranted by the evidence. As has been said, the first reference to this paper was made by the defendant's answer, wherein it was alleged that the paper was a deed executed and delivered. The plaintiff's general replication put in issue at least the existence of the deed and no amendment to the bill was needed.

The alternative ruling that the trust deed was invalid for want of good faith, and because it was agreed to be withheld from record to mislead and defraud creditors, may be disregarded. Therefore we need not consider whether the bill should have been amended to permit an attack on the deed as fraudulent.

What has been said disposes of every question made in the case, except one, which may be considered more advantageously after the form of the decree is noticed. There were two decrees in the cause. Their effect, taken together, as we understand them, is to order the defendant to pay into the court of bankruptcy the $61,000 received as a preference on June 1, 1903, with interest to the date of the rendition of the final decree, making the total amount to be paid $70,891.54. The theory upon which the decree proceeded was, that no greater sum should be required of the defendant than would be needed to meet the amount of the claims proved or provable against the bankrupt and the cost and expenses of the administration of the bankrupt estate, including fees of counsel for the trustee. As this amount exceeded that received by the defendant by way of preference, the decree exacted of him all that he had received. In computing the amount required to meet the expenses of administration a fee of $15,000, of counsel for the

trustee for their services to him in all matters, including this litigation, was included. The defendant complains that this fee is exorbitant. It certainly appears to be large. It seems, however, that the proper place to raise this question would be in the bankruptcy court. In any event, we would be unwilling to reverse the judgment of the lower courts upon this question, in view of the fact that they have a much more intimate acquaintance with the services than we can possibly have.

All that has been said would naturally lead to an affirmance of the decree. Nevertheless, we are of the opinion that it ought to be modified, for a reason not dwelt upon in argument. Now that this litigation has come to an end, and the defendant has been compelled to surrender the preference which he received, he is entitled to prove his claim and to receive a dividend on it upon an equality with other creditors. *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356. In view of the fact that this suit was brought in the bankruptcy court itself, and a final decree is to be entered by the judge of that court, it is entirely practicable to avoid the circuitous proceeding of compelling the defendant to pay into the bankruptcy court the full amount of the preference which he has received, and then to resort to the same court to obtain part of it back by way of dividend. The defendant may be permitted, if he shall be so advised, to prove his claim against the estate of the bankrupt, and the bankrupt court then may settle the amount of the dividend coming to him, and the final decree may direct him to pay over the full amount of his preference, with interest, less the amount of his dividend. Solely for the purpose of accomplishing this result, the final decree in the case is reversed and the case remanded to the District Court to take proceedings in conformity with this opinion.

Decree reversed.

GREEN COUNTY, KENTUCKY, *v.* QUINLAN.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 351. Argued December 17, 18, 1908.—Decided January 4, 1909.

Findings of fact made by the Circuit Court which were not objected to and which accompanied the questions certified by the Circuit Court of Appeals, *held* in this case to be sufficient to justify entering judgment thereon after this court had responded to the questions certified.

The issuing of bonds in payment of a subscription to railroad stock by an officer, charged with the duty of ascertaining whether conditions precedent had been fulfilled, raises a presumption of their fulfillment and of the proper issuing of the bonds upon which a lawful holder of the bonds is entitled to rely until it is overcome by evidence to the contrary. In this case nothing in the findings overcomes such presumption.

In construing written instruments the entire instrument will be considered and not single words or phrases, and the intent reached even if technical meanings be disregarded; and so "on condition" interpreted as meaning a covenant or agreement.

Although county bonds may have been authorized "upon condition" that the railroad company assisted expend the proceeds as specified, if the condition is in fact merely a covenant or agreement, as in this case, the subsequent failure of the corporation to perform cannot be pleaded by the county against a *bona fide* holder for value.

In the absence of clearest proof coupon bonds intended for the market will not be presumed to have been issued under such conditions as would destroy their salability.

157 Fed. Rep. 33, affirmed.

THE facts are stated in the opinion.

Mr. Ernest Macpherson, with whom *Mr. John W. Lewis* was on the brief, for petitioner.

Mr. Edmund F. Trabue and *Mr. George Du Relle*, with whom *Mr. John J. McHenry*, *Mr. John C. Doolan* and *Mr. Attilla Cox, Junior*, were on the brief, for respondent.

MR. JUSTICE MOODY delivered the opinion of the court.

The record and proceedings in this cause are in this court by virtue of a writ of certiorari issued to the Circuit Court of Appeals for the Sixth Circuit. The action was brought in the Circuit Court of the United States by Quinlan against Green County on certain bonds and coupons attached thereto, purporting to have been issued by Green County. The jurisdiction was based upon diversity of citizenship.

The petition alleged that the plaintiff was "the holder and owner" of the bonds named; that the bonds and coupons were duly executed and issued, were due and unpaid, and prayed judgment for their face value with interest.

The defendant filed a plea in abatement to the jurisdiction, alleging, in substance, that the plaintiff was not the real holder and owner of the bonds, and that the jurisdiction of the court was invoked fraudulently. Certain allegations contained in this plea were, on motion, stricken therefrom, and no exception was taken to the order. A reply to the plea was filed, denying its allegations. Thereupon it was agreed that the issues of law and fact should be tried by the court without a jury, and that the plea should be deemed a part of the answer, which was that day filed. In addition to the facts alleged in the plea the answer set up in defense (1) a denial of all the allegations of the petition; (2) that there was no consideration for the bonds; (3) that they were obtained by fraud; (4) that recovery upon some of the coupons was barred by the statute of limitations; (5) that the bonds were issued in payment of a subscription to the stock of the Cumberland & Ohio Railroad upon two conditions, namely, that the railroad should be constructed in a certain designated manner and that the county first should be exonerated from a prior subscription to the bonds of another railroad company, neither of which conditions had been performed. The plaintiff filed a reply, denying the allegations of the answer. There were further pleadings, which are unimportant here. After trial, the court rendered the following judgment:

"This action, by a stipulation in writing, having been heretofore submitted to the judgment of the court without the intervention of a jury, and the court having heard the evidence and the arguments of counsel, and being now sufficiently advised, makes part of this judgment the following: 'Finding of Fact.'

"1. The court finds that the plaintiff is a citizen of the State of New York, and was so when this action was instituted on March 28, 1899, and that the plaintiff was then the *bona fide* holder for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court.

"2. That the Cumberland & Ohio Railroad Company was a corporation organized and existing under the laws of the State of Kentucky, with power to receive a subscription to its capital stock from the defendant, Green County, and said county was authorized conformably to law to make a subscription to said capital stock and to pay for the same in bonds of said county.

"3. That June 17, 1869, there was, as appears from the records thereof, presented to the Green County Court by commissioners of said railroad company the following request:

"'We, the undersigned, commissioners of the Cumberland & Ohio Railroad Company, hereby request that the County Court of Green County submit to a vote of the qualified voters of said county the question, "Whether said Court shall subscribe for and on behalf of said county, and in pursuance of the provisions of the charter of said railroad company, two hundred and fifty thousand dollars to the capital stock of said company, payable in the bonds of said county, having twenty years to run and bearing six per cent interest from date, upon the condition that said company shall locate and construct said railroad through Green County and within one mile of the town of Greensburg in said county, and shall expend the amount so subscribed within the limits of Green County; and also upon the further conditions that said bonds shall not be issued or said county pay any part of either principal or in-

terest on said amount subscribed as aforesaid until said county of Green shall be fully and completely exonerated from the payment of the capital stock subscribed for by the County Court of said county for and on behalf of said county to the Elizabethtown & Tennessee Railroad Company.' "

"4. That on the same day, namely, on June 17th, 1869, the County Judge of Green County, acting alone and as the County Court, entered an order in said Court in the following language:

" 'Present: Thos. R. Barnett, Judge.

" 'Whereas the Commissioners of the Cumberland & Ohio Railroad Company by virtue of the authority delegated to them by the charter of said company, have requested the County Court of Green County to order an election in the said county of Green, and to submit to the qualified voters of said county the question whether said county court shall subscribe for and on behalf of said county, two hundred and fifty thousand dollars to the capital stock of the Cumberland & Ohio Railroad Company and payable in the bonds, of said county, having twenty years to run and bearing six per cent interest from date, and upon condition that said company shall locate and construct said railroad through the said county of Green, and within one mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green County; and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland & Ohio Railroad Company, until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county, and authorized to be subscribed by said Green County Court to the Elizabethtown & Tennessee Railroad or any part of the interest thereon. It is therefore, ordered by the court that an election by the qualified voters of Green County, at the voting places in said county, be held and conducted by the several officers as prescribed by law for holding elections, on the third

day of July, 1869, to vote on the question as to whether or not the said County Court shall, for and on behalf of said county subscribe two hundred and fifty thousand dollars to the capital stock of the said Cumberland & Ohio Railroad conditioned and to be paid, as above stated.'

"5. That at the election held pursuant to said order there were cast in favor of said proposition and subscription a majority of the votes of the qualified voters of said county, and this fact, upon being duly ascertained, was certified by the proper officers as required by law.

"6. That on the third day of June, 1870, the County Judge of said county, acting alone and as the county court of said county, entered an order in said court as follows:

" 'Present: Thomas R. Barnett, Judge.

" 'Whereas, in pursuance of an order of this Court made on the 17th day of June, 1869, an election was held in the said County of Green, on the third day of July, 1869, at the several precincts of said county, and it appearing that a majority of the qualified voters at said election decided that the county of Green should subscribe for two hundred and fifty thousand dollars of the capital stock of the Cumberland & Ohio Railroad Company; now it further appearing that said election was held in conformity with the law, and in accordance with the provisions of the charter of said company, now, therefore, I, Thomas R. Barnett, the presiding judge of the Green County Court, by virtue of the authority in me vested by law, and to carry out the wishes of said voters, do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of said Cumberland & Ohio Railroad Company, for and on behalf of said county of Green, which subscription is to be paid in the bonds of said county as prescribed in said order of submission, and this subscription is made with the conditions set out in the order of this Court, ordering said election and now of record in the office of this county.'

"7. That on the 12th day of October, 1871, the said county Judge of said county, acting alone and as the county court of

said county, entered an order in said court in the following language:

"'Present: Thomas R. Barnett, Judge.

"'On motion of E. H. Hobson, director of the Cumberland & Ohio Railroad, it is ordered that Z. F. Smith, president of the Cumberland & Ohio Railroad, be, and he is hereby authorized to have printed for the county of Green the bonds to the amount of two hundred and fifty thousand dollars, the amount of the subscription of Green County to the said railroad, in the following denominations, to wit, the same to be conditioned as specified in the order submitting the vote to the said county:

125 bonds at	$1,000	$125,000 00
200 bonds at	500	100,000 00
250 bonds at	100	25,000 00
		$250,000 00'

"8. That pursuant to all that was done, as aforesaid, the defendant, Green County, issued and delivered to the said Cumberland & Ohio Railroad Company $250,000 of its bonds of the description aforesaid except that the said conditions were not stated therein, in payment of said subscriptions to said capital stock, and thereupon there was delivered to said county in payment thereof, and said county received, and has ever since held and owned, the certificates of the said railroad company for the 2,500 shares of $100 each of its capital stock so paid for by said bonds.

"9. That the $47,509 of bonds and coupons sued on in this action were part of the bonds thus issued and delivered to said railroad company in payment for said stock.

"10. That while the proposed line of said railroad was located through said county from its northern line to its southern line, and within one mile of Greensburg, yet that only about five miles of said railroad has ever been constructed or attempted to be constructed in said county, the part thus constructed extending from the northermost line of said county

to the town of Greensburg, the county seat; which town is located about fifteen miles from the southernmost line of the county and about as distant from any other line of the county except the northern line.

"11. That only $150,000 of the bonds thus issued, or the proceeds thereof, were expended within the limits of Green county. No other part of said bonds was expended in said county.

"12. That with said $150,000 of said bonds the grading, bridging and tunnelling on the track of said railroad was done and paid for over the five miles aforesaid, but no further, and when this was done, the work on the railroad was suspended for some years. Afterwards the rails and ties and superstructure generally were put upon the track theretofore graded and the railway was completed from the northernmost line of the county to Greensburg, under the terms of its lease, by the Louisville & Nashville Railroad Company at its own expense, and not with any of the bonds issued as aforesaid by the defendant.

"13. That on the 15th day of August, 1872, at a called term of the Green County Court, over which Thomas R. Barnett, County Judge, presided, and no justice of the peace being present, the following order was entered by said Court:

"'Present: Thos. R. Barnett, Judge.

"'Application was this day made to the presiding judge of the County Court of Green county, by the President and Board of Directors of the Cumberland & Ohio Railroad Company to issue the balance of the bonds of said county to the amount of the subscriptions of said county of Green to said Cumberland & Ohio Railroad Company, and the court being sufficiently advised, it is ordered by the court that the balance of said bonds be and they are hereby ordered to be issued, the same to be signed by the judge of said county court of Green county, and countersigned by the clerk of said court, as required by the charter of said company.'

"14. That except as to the number of the bond and the

amount agreed to be paid therein the bonds sued on were each of the following, namely:

"'United States of America,

"'*County of Green, State of Kentucky,* $500.00

"'For the Cumberland & Ohio Railroad.

"'Twenty years after date, the county of Green, in the State of Kentucky, will pay to the holder of this bond the sum of five hundred dollars with interest thereon at the rate of six per cent per annum, payable semiannually upon presentation of the proper coupons hereto attached, the principal and interest being payable at the Bank of America, in the city of New York.

"'In testimony whereof, the judge of said county of Green has hereunto set his hands and affixed the seal of said county, on the first day of April, A. D. 1871, and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached.

"'[Green County Seal.] T. R. BARNETT, *Judge.*

"'D. T. TOWLES, *Clerk.*'

"As appears on the face of each of said bonds there was no recital therein of any of the facts herein found to be true.

"15. That the plaintiff knew when he purchased the bonds sued on that the railroad had not been constructed in Green county otherwise than as herein found to be the fact, namely, from the northern line of said county to the town of Greensburg, but no further.

"16. That in the year 1868, upon a proposition therefor being submitted to the vote of the qualified voters of Green County, the majority of said qualified voters voted in favor of a proposition to subscribe for $300,000 of the capital stock of the Elizabethtown & Tennessee Railroad Company, and upon the said result of the election being properly ascertained and certified the county judge of Green county, sitting alone and as the county court of said county, made and entered of record in said court the following orders:

"'1868. Green County Court, May Called Term, 1868, 20th Day of May.

"'Present: T. R. Barnett, Judge.

"'This day T. R. Barnett, Presiding Judge, and D. T. Towles, Clerk of the Green county court, *this day* produced their certificate in words and figures as follows, viz: We, T. R. Barnett, Presiding Judge, and D. T. Towles, Clerk of the Green county court, duly authorized to compare the Poll Book of Green county, certify that an election held in said county at the various voting places in said county, on the 16th day of May, 1868, on the question whether the county court of Green county shall, for and on behalf of said county, subscribed for three thousand shares in capital stock of Elizabethtown & Tennessee Railroad Co., to be paid for in the bonds of said county, payable in twenty years and bearing six per cent interest payable semi-annually in the city of New York, with interest coupons attached thereto, and that 586 votes were cast for said subscription and 204 against said subscription.

"'May 20th, 1868.

"'T. R. BARNETT.

"'D. T. TOWLES.

"'It is therefore ordered by the court that the said vote be, and is now, entered of record, as follows, to wit: 585 votes cast for said subscription, and 204 votes were cast against said subscription, showing that there is a majority for said subscription of three hundred and eighty-two votes.

"'It is now, therefore, ordered that the clerk of this court, for and on behalf of the county of Green, make said subscription on the terms specified in the order submitting the question to a vote as aforesaid.'

"17. That no formal or express exoneration of said county from the payment of said last named subscription was ever made or attempted, but nothing further has, up to this date, ever been done in respect to it, and neither bonds by the county nor stock by the said last named railroad company have ever

been issued or delivered in execution of said orders or under the terms of said subscription.

"Upon consideration of the facts hereinbefore found to be true, and of the opinion of the Court of Appeals, in the case of J. D. Shortell *v.* Green County, the court, in deference to said opinion, has reached the following

"*Conclusions of Law.*

"1. That the plaintiff is not entitled to recover because the conditions upon which the subscription for the capital stock of the Cumberland & Ohio Railroad Company was made and upon which the bonds sued on were issued have not been performed or complied with, and

"2. That the failure to recite in the bonds any of the facts herein found to be true, or any of the conditions upon which the bonds were issued, is immaterial as against the defense that there was a failure to perform the said conditions.

"*Judgment.*

"In consideration of the premises it is considered and adjudged by the court that the plaintiff's petition be and it is dismissed and that the defendant recover of the plaintiff its costs herein expended, and it may have execution therefor."

The defendant filed no exception or objection to the findings of fact, but the plaintiff excepted to the judgment and sued out a writ of error to the Circuit Court of Appeals, which, after the response by this court to a question certified to it (205 U. S. 410), reversed the judgment of the Circuit Court, with direction to enter a judgment for the plaintiff. The question to be determined is, whether on the findings of fact the Court of Appeals erred in ordering judgment for the plaintiff.

We think, although the defendant contends to the contrary, that the findings of fact, which accompanied the judgment of the Circuit Court, afford ample foundation for a final judgment. They were not objected to by the defendant at the time, and it was content to submit the case for judgment upon

them. Nor has anything been advanced in argument which leads us to doubt their accuracy, or to desire that they should be more complete.

The defendant's counsel has not confined his argument to the questions presented by the record. It seems expedient, therefore, simply to determine the questions deemed to arise on the record, and stop there.

When the case was here before it was decided that the county had the power to issue the bonds, upon the approval of the qualified voters, and that (following the ruling of the highest court of Kentucky in this respect) the voters might impose conditions upon the issue. The approval was given, and the conditions imposed were expressed in the vote, as follows:

" . . . upon condition that said company shall locate and construct said railroad through the said county of Green, and within one mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green County; and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland & Ohio Railroad Company until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said Green County Court to the Elizabethtown & Tennessee Railroad."

Bonds to the amount of $250,000 were issued, and delivered pursuant to the vote, to the Cumberland & Ohio Railroad Company, and some of them have come to be legally owned by the plaintiff. There was consideration for them in 2,500 shares of the stock of the company, which were delivered to the county and have been held by it up to the present time. There is not the slightest evidence of fraud in their issue.

The real defense is that the bonds were void because the conditions expressed in the vote, which are said to be indispensable prerequisites to their validity, have not been fulfilled.

The conditions relied on in defense are two, and they are subject to different considerations.

The condition that the bonds should not be issued until the county had been "exonerated" from a subscription theretofore authorized to be made to the stock of the Elizabethtown & Tennessee Railroad is a condition precedent to the lawful issue of the bonds. As these bonds contained no recital importing that the conditions had been performed, it was open to the county to show, even against a purchaser for value before maturity without notice, that the conditions had not been performed. But the issue of bonds in payment of a subscription to railroad stock by an officer charged with the duty of ascertaining whether the conditions indispensable to the lawful issue had been fulfilled, raises a presumption of their fulfillment prior to the issue. A lawful holder of the bonds is entitled to rely upon this presumption, although he incurs the danger that the presumption will be overcome by evidence. If he wishes absolute security in this respect, he must insist upon a recital. This much was determined by the decision of this court when the case was here before. *Quinlan* v. *Green County*, 205 U. S. 410. That case did not decide that there was a presumption of performance arising out of the length of time, during which no claim was made in respect of the Elizabethtown & Tennessee Railroad subscription, but that there was a presumption of performance before the issue of the bonds. When we come to look at the facts found by the Circuit Court there is nothing to rebut this presumption. On the contrary, everything tends to support it. Even the wide range of the argument for the defendant did not suggest a single fact which could, to the slightest extent, control the presumption. The conclusion follows that the exoneration from the prior subscription had happened before the issue of the bonds to the Cumberland & Ohio Railroad Company. That condition has been performed, and is not available as a defense.

We must next consider the effect of the provision in the vote, that the subscription to the stock payable in bonds shall

be "upon condition that said company shall locate and construct said railroad through the said county of Green, and within one mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green County." If this part of the vote imposes a condition upon the lawful issue of the bonds or upon the obligation of the county to pay them, the defense must prevail, for the condition has not been performed. Only $150,000 have been expended within the limits of the county, and the railroad, though constructed to Greensburg, a distance of five miles, was not carried further, although it was located from north to south through the county, a distance of twenty miles. It is not conclusive that the obligation thus imposed upon the railroad company is called a condition. It frequently has been the case that the word condition has been used in written instruments in a looser and broader sense than the law attaches to it. In ascertaining the true meaning of instruments in writing courts do not confine their attention to single words, phrases, or sentences. The meaning is sought from the whole instrument, viewed in the light of the subject with which it deals. This general rule of interpretation often makes it manifest that that which is called a condition is really but a covenant or agreement, to be performed independently of the counter obligation with which it is associated. When such an intent is discovered the courts have no difficulty in giving it effect, though the result be to disregard the technical meaning of the word condition. *Stanley* v. *Colt*, 5 Wall. 119; *Sohier* v. *Trinity Church*, 109 Massachusetts, 1; *Episcopal City Mission* v. *Appleton*, 117 Massachusetts, 326; *Cassidy* v. *Mason*, 171 Massachusetts, 507; *Clapp* v. *Wilder*, 176 Massachusetts, 332; *Post* v. *Weil*, 115 N. Y. 361; *Clark* v. *Martin*, 49 Pa. St. 289; *Watrous* v. *Allen*, 57 Michigan, 362; *Scoville* v. *McMahon*, 62 Connecticut, 378; *Hartung* v. *Witte*, 59 Wisconsin, 285.

A consideration of the vote of the county leaves no doubt that that part of it which prescribed the nature of the railroad construction was not a condition. It would have been easy

to have postponed the obligation to pay the bonds until the construction had been completed, as desired by the county. Such a provision as that in *Provident Life and Trust Company* v. *Mercer County*, 170 U. S. 594, would have been enough. Indeed, the draftsman need not have looked afield. Nothing need have been done except to use the same language with reference to construction which he used in this vote with reference to exoneration from the prior subscription to the stock of another railroad. There he said that the subscription should be "upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest" until the exoneration had happened. The studied omission of this apt, clear and emphatic language from the part of the vote dealing with the construction of the Cumberland & Ohio Railroad is of controlling significance. If the question rested upon this comparison of language alone, it would be quite enough to warrant the inference that it was not intended that the condition which was imposed in the one case should be equally imposed in the other. This conclusion is confirmed by a consideration of the subject-matter with which the vote dealt. It would have defeated the very purpose for which the bonds were issued if the obligation to pay them had been made conditional upon the completion of the construction desired. The railroad, to whose stock the county was authorized to subscribe, was not constructed, and needed the proceeds of the bonds to complete the work of construction. By accepting bonds upon the terms proposed it came under the obligation to expend the amount subscribed within the limits of the county. As the subscription to the stock was to be paid for by the bonds, the amount subscribed was the amount of the bonds. The bonds which the county was authorized by the legislature to issue were described in the law as "payable to bearer, with coupons attached, bearing any rate of interest not exceeding six per cent per annum, payable semi-annually in the city of New York, payable at such times as they may designate not exceeding thirty years from date." The bonds thus

described were evidently designed for the market. They could pass from hand to hand, since they were payable to bearer. The interest was represented by detachable coupons, and was payable at the chief money center of the country. It is manifest that the bonds were intended to be issued and delivered to the railroad company before the construction began. It would require the very strongest words in the vote to convince us that it was intended to attach to such bonds a condition which would destroy their obligation, if, after a term of years, it should appear that the construction had not been completed in the manner designated. Bonds with such a condition would be unsalable, and it is inconceivable that they could be issued with any expectation that they could be used. We cannot doubt that the county, in its anxiety to secure the building of the railroad, was content to rest upon the agreement of the company to construct it in the manner desired, and that the only technical condition to the validity of the bonds was that which referred to the exoneration from a prior subscription. As it turned out, it would have been very much wiser for the county to have declined to issue the bonds until the construction was completed, or to have taken some security for the performance of the agreement with reference to the construction. But courts cannot make for the parties better agreements than they themselves have been satisfied to make. The records of this court show that prudence has not been a marked characteristic in the issue of municipal bonds in aid of the construction of railroads.

Our conclusion upon the whole case is that, with the exception of the condition which has been performed, the bonds were issued upon a good consideration and unconditionally, and were a valid obligation of the county in whosesoever hands they subsequently lawfully came.

We have examined with attention and respect the case of *Green County* v. *Shortell*, 116 Kentucky, 108, wherein the Court of Appeals of the State arrived at a different conclusion, and regret that we are unable to concur in its reasoning.

The finding of the Circuit Court was that the plaintiff at the time of beginning his action, which was after the bonds were overdue, was the *bona fide* holder for value of the bonds and coupons sued on. In view of the conclusion at which we have arrived it seems unnecessary to dwell upon the exact terms of this finding. In any event, the plaintiff was the legal holder and owner of the bonds. This is not disputed. Assuming that any defense is open of which the holder might have had notice by inspecting the law, vote and the records of the County Court, it would come to nothing, because such an inspection would have shown that no defense to the payment of the bonds existed.

We need not consider what would have been the situation if the bonds were still in the hands of the railroad and it were bringing action upon them, and an attempt had been made to set up against their amount the damages resulting from the railroad's failure to perform the agreement with respect to construction. The bonds here are not in the hands of the railroad nor is any such defense set up. The defense is, that the bonds are null and void, and, as has been shown, that defense is without merit.

It appears that a recovery upon some of the coupons declared upon is barred by the statute of limitations. This is conceded by the plaintiff, who says that the judgment of the Circuit Court of Appeals, in view of the state of the pleadings, does not require that there should be a recovery upon the coupons thus barred. It is better, however, that this question be freed from doubt and the judgment be modified so as to require the Circuit Court to ascertain what coupons are barred by the statute of limitations and to enter judgment for the remainder, and for the principal of the bonds, of course, with interest in both cases. Thus modified, the judgment of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE HARLAN, dissenting.

I quite agree with Judge Lurton of the Circuit Court of Ap-

peals, that common justice requires that there should not be now any judgment upon the merits in these cases. He correctly said that the findings of fact do not adequately cover all the issues, and upon those to which they are responsive they are neither definite nor full enough to justify a judgment in favor of the plaintiff. Without expressing at this time any views upon the merits of these cases, I am of opinion that the judgment in each case should be reversed and the cases remanded with an order for a new trial, when all the facts may be more fully disclosed and sufficient findings made.

GREEN COUNTY, KENTUCKY, *v.* THOMAS' EXECUTOR.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 352. Argued December 18, 1908.—Decided January 4, 1909.

Green County v. *Quinlan, ante*, p. 582, followed as to the liability of a county on bonds issued for railroad assistance.

Where a technical mistake in the petition for writ of error is the result of accident the court is justified in allowing an amendment and denying a motion to dismiss.

Looseness of practice should not be encouraged, and while an appellate court should not enter final judgment for appellant without protecting the rights of the appellee, it is not bound to take notice of questions not set forth in the record, nor raised in the assignments of error, or where the appellant did not save his rights in the court below.

A finding that the plaintiffs below are *bona fide* holders of bonds and entitled to sue in the Circuit Court amounts to a finding that the plaintiffs are joint owners, and is sufficient to support jurisdiction if the aggregate amount exceeds $2,000.

If the defendant obligor owed the amount to the plaintiff at the commencement of the action it is not interested in the division of the verdict.

This court will not open the way to the raising of technical questions, and a plaintiff in error is only entitled to a decision on questions properly brought to its attention.
146 Fed. Rep. 969, affirmed.

THE facts are stated in the opinion.

Mr. Ernest Macpherson, with whom *Mr. John W. Lewis* was on the brief, for petitioner.

Mr. Alexander Pope Humphrey and *Mr. Alexander C. Ayers*, for respondents, submitted.

MR. JUSTICE MOODY delivered the opinion of the court.

This case relates to the same issue of bonds referred to in the one preceding, and is governed by it, unless there is something to prevent in the questions following.

There were several plaintiffs, including three corporations. In the petition they alleged that they were "jointly the owners and holders" of sixty-seven bonds, whose aggregate face value exceeded the jurisdictional amount. Diversity of citizenship was duly alleged. By leave of court, on suggestion of the death of one of the plaintiffs, and that his personal representatives had been discharged, his heirs were made parties plaintiff. No objection was made to this amendment by the defendant at the time. The defendant's answer denied that the plaintiffs were "jointly the owners or holders" of the bonds. Certain interrogatories to each of the plaintiffs were attached to the answer, which prayed that plaintiffs be compelled to answer them on oath. These interrogatories were directed to the subject of the acquisition and ownership of the bonds by the plaintiffs. The answers disclosed that the bonds in suit were taken from the Cumberland & Ohio Railroad Company by the Indianapolis Rolling Mill Company in payment for iron to be used in building the railroad through Green County, were by the mill company turned over to its stockholders (who were

the plaintiffs, or represented by them) as dividends, and that they, fifteen years before, agreed to become joint owners and holders of all the bonds in certain named proportions. And it was stated that each plaintiff owned an undivided interest in all the bonds and coupons in suit. The defendant then suggested the death of two of the plaintiffs, but no action appears to have been taken thereon by the court.

The defendant was permitted to file an amended answer, which alleged that, after the distribution of the bonds by way of dividends, each distributee owned a separate and distinct interest which were joined together to give the court jurisdiction, which, in the case of certain plaintiffs, it would otherwise lack on account of the insufficient value of their respective interests, and concluded by averring that the court was without jurisdiction.

The defendant moved the court for a rule on the plaintiffs to furnish dates of the deaths of the parties plaintiff named in the pleadings, who had died since the institution of the action, and to show cause why the action should not be dismissed for failure to revive within the time prescribed by law. This motion was denied and defendant excepted.

On the twenty-second day of March, 1905, the defendant moved the court to dismiss the action on the ground of misjoinder of plaintiffs, and for want of jurisdiction of such of the plaintiffs whose claims were separately less than $2,000. On the same day the parties stipulated that the issues of fact might be tried and determined by the court without the intervention of a jury.

On the first day of June, 1905, the Circuit Court ordered judgment for the defendant, with the same findings of fact and conclusions of law which were made in the preceding case. The plaintiffs, each and all, excepted to the judgment and to each part of it, and filed a petition for a writ of error to the Circuit Court of Appeals, with assignment of errors. The defendant did not object or except to the findings of fact, or request any rulings of law, or file any writ of error or assignment

of errors, or any bill of exceptions, or take any other step whatever which would carry to the appellate court any questions of law different from those contained in the plaintiffs' assignment of errors. Throughout the record, up to this point, the defendant appears to have been content to raise questions of law without attempting in any form to save any of its rights upon the resulting rulings of the court.

On the first day of May, 1906, the plaintiffs in error moved the Court of Appeals to amend the writ of error by striking out certain persons named therein as plaintiffs and by inserting the names of certain other persons. On the same day the defendant in error moved the court to dismiss the writ of error because some of the plaintiffs against whom judgment had been rendered in the court below had failed to prosecute the writ of error without a summons and severance, and because certain persons who were never parties to the action were named in the writ of error. These cross-motions seem to have raised the same questions. It appeared that owing to illness of counsel for the plaintiffs in error the petition for a writ did not set forth accurately the parties plaintiff. The error was a pure accident, and we think the court below was entirely justified in allowing the amendment and in denying the cross-motion to dismiss. Section 1005, Revised Statutes.

The Court of Appeals reversed the judgment of the Circuit Court, and ordered, as will hereafter more specifically appear, that court to enter a judgment for the plaintiffs. The case is here upon a writ of certiorari. It has been argued by the defendant, apparently upon the theory that all questions of law which were raised by it or were remotely suggested in the record, were open for consideration in the appellate court. But we ought not to encourage such looseness of practice. Some of the questions raised by the defendant were passed on adversely to it in the Circuit Court of Appeals, and we do not intend to intimate any doubt of the correctness of the decision of that court. The writ of error sued out by the plaintiffs, and the assignment of errors which accompanied it, set forth all the

questions regarding the action of the court below, of which the appellate court was bound to take notice. *The Maria Martin*, 12 Wall. 31, 40; *Bolles* v. *Outing Company*, 175 U. S. 262. Neither that court nor this ought to be expected to search through a confused record for the purpose of finding errors, where the party complaining has not taken the pains, at the time the alleged errors were committed, to save its rights in some form known to the law. It would be, of course, entirely unfair to enter final judgment in favor of the party appellant, unless the court can see that the findings of the court below are full and adequate and protect every substantial right of the party in whose favor the judgment originally was entered. But we think that the findings did this. The first finding of the court was that the plaintiffs at the date of the beginning of the suit were "the *bona fide* holders for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this Court." This is a finding which, among other things, supports the jurisdiction of the court, and could proceed only upon the theory that the plaintiffs were the joint owners and holders of the bonds and coupons sued on. If they were, the court had jurisdiction under the rule stated in *Clay* v. *Field*, 138 U. S. 464, 479.

The defendant owes the amount of these bonds, and at the beginning of this action owed it to the plaintiffs. It has no interest or concern in the proper division of the amount due on the bonds among those who are entitled to share the proceeds of the verdict. We are not disposed to open the way to the defendant to raise technical questions to embarrass the progress and delay the final ending of this action. The defendant is entitled to a decision upon the questions which it has properly brought to this court, and no others.

The judgment of the Court of Appeals was "that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed with costs and cause remanded with directions to the said Circuit Court that upon the suggestion on the record of the deaths of such of the original plaintiffs as have

died pending the suit and striking out the names of their personal representatives, it enter judgment for the plaintiffs as they then appear of record for the amount of the principal of the bonds in suit with interest thereon from the date when their latest coupons severally become due and for the coupons in suit with interest on each from the time when they severally fell due." We have no doubt of the correctness of this judgment or that it will protect every substantial right which the defendant has, and it is, therefore,

Affirmed.

MR. JUSTICE HARLAN'S dissent in *Green County* v. *Quinlan*, *ante*, pp. 582, 597, applies also to this case.

SOUTHERN REALTY INVESTMENT COMPANY *v.* WALKER.

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

No. 43. Argued December 7, 8, 1908.—Decided January 4, 1909.

A corporation organized by citizens of one State in another State simply for the purpose of bringing suits on causes of action against citizens of the former State in the Federal courts where jurisdiction would not otherwise exist, is a sham and, under § 5 of the act of March 3, 1875, c. 137, 18 Stat. 470, a suit brought by such a corporation does not really and substantially involve a dispute within the jurisdiction of the Circuit Court and should be dismissed, as soon as such facts have been ascertained.

THE facts are stated in the opinion.

Mr. Alexander C. King for plaintiff in error.

Mr. Olin J. Wimberly for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action of ejectment was brought in the Circuit Court of the United States for the Southern District of Georgia to recover a tract of land in that State. The plaintiff, the Southern Realty Investment Company, sued as a corporation of South Dakota, while the defendant is a citizen of Georgia.

The articles of incorporation filed by the company in South Dakota stated that the purpose for which the corporation was formed was to buy, sell or lease real estate; open up farm lands and operate farms; carry on any business which may be deemed advantageous in connection with farming operations; borrow and lend money on such security as may be deemed advisable; make and furnish abstracts of title to lands; guaranty titles of lands; buy, sell, or discount notes, accounts, mortgages, bonds, judgments, executions and commercial paper of any kind; issue bonds and secure the same by mortgage or conveyance of property, real or personal, and sell, pledge or hypothecate such bonds; derive compensation and profit from such transactions; and generally to do any and everything needful to the carrying on of such business transactions.

The case was tried on a plea to the jurisdiction of the Circuit Court of the United States.

In that plea it was averred that although the petition alleged diversity of citizenship, the suit was not, in fact, one of that character, but one in which the parties have been improperly made for the purpose only of creating a case of which the Circuit Court of the United States could take cognizance; that the Southern Realty Investment Company was incorporated and organized, under the laws of South Dakota, at the instance of two named Georgia lawyers, in order that it might, under their direction, prosecute suits in the United States court that did not really and substantially involve disputes or controversies within its jurisdiction, but controversies really and substantially between citizens of Georgia; that the only business the company has is to prosecute suits in the United States courts,

in its name, for those attorneys and other citizens of Georgia to recover lands and mesne profits, of which suits those courts cannot properly take cognizance; and that the present suit against citizens of Georgia has been brought, in the name of the South Dakota corporation, for the use and benefit of certain other citizens of Georgia (the real and substantial plaintiffs in interest), for the purpose of conferring an apparent jurisdiction on the Circuit Court of the United States. The defendant's prayer was that the court should take no further cognizance of the action, but should dismiss it as one not really and substantially involving a dispute or controversy properly within the jurisdiction of the court, and one in which the parties to the suit had been improperly and collusively made for the purpose of creating a case cognizable in said court.

The plea to the jurisdiction was based on the act of Congress of March 3d, 1875, c. 137, determining the jurisdiction of the Circuit Court of the United States and regulating the removal of causes from state courts. By that act (§ 5) it was provided, among other things, that if at any time after a suit is commenced in a Circuit Court of the United States it shall appear to the satisfaction of the court "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require," etc. 18 Stat. 470, 472.

At the trial of the plea to the jurisdiction the plaintiff submitted various requests for instructions to the jury, but each of those requests was denied, the plaintiff duly excepting to the action of the court. One of the requests in effect called for a peremptory finding for the plaintiff; for, the court was asked to say to the jury that no fact was disclosed that authorized the jury to find that the suit was not one of which the Circuit Court

of the United States could take cognizance. The court charged the jury, and to one part of the charge the defendant took an exception.

The verdict of the jury sustained the plea and thereupon the court dismissed the suit as one that did not really and substantially involve a dispute or controversy within the jurisdiction of the court, and as one that was collusive within the meaning of the act of Congress.

A bill of exceptions was taken which embodied all the evidence introduced by each side at the trial.

We will not extend this opinion by setting out the evidence at large. Except in its special facts and circumstances this case does not differ from cases heretofore determined under the Judiciary Act of 1875. There was evidence leading to the conclusion that the Southern Realty Investment Company was brought into existence as a corporation only that its *name* might be used in having controversies that were really between citizens of Georgia determined in the Federal rather than in the state court. It did not have, nor was it expected to have, as a corporation, any will of its own or any real interest in the property that stood or was placed in its name. It was completely dominated by the two Georgia attorneys who secured its incorporation under the laws of South Dakota through the agency of a South Dakota lawyer, who, in a letter to one of the Georgia attorneys, claimed that his office had within three years secured nine hundred and eighty-five (985) charters under the laws of that State for non-residents, and part of whose business was to "furnish" South Dakota incorporators, when necessary. In short, the plaintiff company was and is merely the agent of the Georgia attorneys, who brought it into existence as a corporation that individual citizens of Georgia, having controversies with other individual citizens of that State might, in their discretion, have the use of its corporate name in order to create cases apparently within the jurisdiction of the Federal court. It had, it is true, a president and a board of directors—all of whom were citizens of Georgia—two of the five directors being

the Georgia attorneys, and one being the female stenographer of such attorneys—but the president and a majority of the directors were the holders each of only one share of donated stock and recognized it to be their duty to represent the Georgia attorneys and to obey, as they did obey, their will implicitly. The company, in respect of all its business, was the agent of those attorneys to do their bidding. Its president testified that he did not know for what purpose the company was really organized, or that it had ever done any business except "as to the bringing of these suits," or that it had any money. Its place of business in Georgia was in the office of the Georgia attorneys. Its pretended place of business in South Dakota was in what is called a domiciliary office, maintained by the attorney in that State who procured its charter. In the latter office there could have been found, no doubt, a desk and a chair or two, but no business. The company's president never knew of its doing any business in South Dakota. As a corporation the Southern Realty Investment Company must be deemed a mere sham. It has, in fact, no property or money really its own and it was not intended by those who organized it that it should become the real owner of any property of its own in South Dakota or elsewhere. It is, as already stated, simply a corporation whose name may be used by individuals when they desire for their personal benefit to create a case technically cognizable in the Federal court. Those individuals, using the name of a corporation for the benefit of themselves and their clients, citizens of Georgia, seem to be the real parties in interest in every transaction carried on in the name of the corporation.

The present case is controlled by the decisions of this court in *Williams* v. *Nottawa*, 104 U. S. 209, 211; *Morris* v. *Gilmer*, 129 U. S. 315, 328; *Lehigh Mining & Mfg. Co.* v. *Kelley*, 160 U. S. 329, 336 *et seq.*, and *Miller & Lux* v. *East Side Canal & Irrigation Co.*, 211 U. S. 293. The case is one in which it was the duty of the court, under the act of 1875, not to proceed. No error of law was committed at the trial to the substantial prejudice of the plaintiff. The charge to the jury fairly covered the issue

made by the plea, and was not liable to any valid objection. The judgment must be affirmed.

It is so ordered.

EL PASO AND SOUTHWESTERN RAILROAD COMPANY *v.* VIZARD.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 31. Argued November 30, December 1, 1908.—Decided January 4, 1909.

In this case *held* that the court below correctly charged the jury as to the law governing the duty of the master to furnish a safe place, machinery and tools, and the duty of the employé to take reasonable care of himself, and the judgment in favor of the employé affirmed.

DEFENDANT in error, plaintiff below, was a brakeman in the employ of the railroad company, plaintiff in error, and on February 22, 1904, was injured while in the performance of his duties as brakeman. He brought suit for $25,000 in the District Court of El Paso County, Texas, charging negligence on the part of the company. Subsequently he amended his petition by adding the allegation that the car, in getting on to which he was injured, was used in interstate shipment, and that the cause of the injury was a lack of hand holds and grab irons required by the safety appliance statute of the United States. Thereupon the railroad company removed the case to the Circuit Court of the United States for the Western District of Texas. A trial was had in April, 1906, which resulted in a judgment for $6,000. This judgment was affirmed by the Court of Appeals, and from that court brought here on error.

Mr. J. F. Woodson, with whom *Mr. Millard Patterson* was on the brief, for plaintiff in error:

If the water car was equipped with hand holds and a stirrup

on the front right hand corner for plaintiff's use, and he ignored the same and attempted to mount the car as he says he did, he was guilty of negligence or assumed the risk, and could not recover. *American Linseed Oil Co.* v. *Hines*, 141 Fed. Rep. 45, 50; *Gilbert* v. *Burlington, C. R. & N. Ry. Co.*, 128 Fed. Rep. 529, 539; *Morris* v. *Duluth S. S. & A. R. R. Co.*, 108 Fed. Rep. 747, 750; *Dawson* v. *C., R. I. & P. Ry. Co.*, 114 Fed. Rep. 870, 872; *Weed* v. *C., St. P., M. & O. Ry. Co.*, 99 N. W. Rep. 828; *Montgomery* v. *C. G. W. Ry. Co.*, 83 S. W. Rep. 66, 67; *B. & P. R. R. Co.* v. *Jones*, 95 U. S. 439, 443; *Suttle* v. *Choctaw, C. & G. R. R. Co.*, 144 Fed. Rep. 668, 669; Wood on Master & Servant, § 402.

An employé ignoring devices and appliances provided for his use and undertaking to do his work by an unnecessarily dangerous way, if injured, is guilty of contributory negligence.

A servant cannot recover of the master for injuries resulting from the use of appliances for a purpose for which they are not intended by the master, and for which it is not necessary that they should be used, however defective the appliances may be, and in undertaking to use an appliance for a purpose for which it is not intended by the master, the servant takes upon himself the risks incident to such use.

Mr. W. H. Robeson, with whom *Mr. George E. Wallace* was on the brief, for defendant in error:

The court properly left the question of defendant's negligence, and plaintiff's contributory negligence, to the jury. *Railway Co.* v. *Cox*, 145 U. S. 593; *Jones* v. *Railway Co.*, 128 U. S. 443; *Dunlap* v. *Railway Co.*, 139 U. S. 649; *Tolson Case*, 139 U. S. 551; *Railway Co.* v. *Adams*, 94 Texas, 106; *Balhoff* v. *Railway*, 65 N. W. Rep. 593; *Donahu* v. *Railway*, 176 Massachusetts, 251.

Where the plaintiff's injury was caused by an act on his part which the law regards as negligence *per se*, he cannot excuse his contributory negligence by proof of the custom on the part of others to do the same act in the same way. But where an act is not negligence *per se*, the plaintiff, to rebut a charge of

contributory negligence, may introduce evidence of general custom among persons experienced in the performance of the same act, under similar circumstances to perform it as he did. 29 Am. & Eng. Ency. of Law, 418; *Choctaw Railway Co.* v. *Tennessee*, 191 U. S. 328; *Railway* v. *Waller*, 65 S. W. Rep. 212; *Railway Co.* v. *Beam*, 50 S. W. Rep. 411; *Railway Co.* v. *Puente*, 70 S. W. Rep. 362; *Railway Co.* v. *Clark* (Ky.), 55 S. W. Rep. 699; *Railway Co.* v. *Zink* (Pa.), 17 Atl. Rep. 614; *Railway Co.* v. *Milliken* (Ky.), 51 S. W. Rep. 796; *Martin* v. *Railway Co.* (Ky.), 26 S. W. Rep. 801; *Railway Co.* v. *Hobbs* (Ind.), 29 N. E. Rep. 934; *Railway Co.* v. *Ice Co.*, 49 App. Div. 485; *S. C.*, 63 N. Y. Supp. 535; *Curtis* v. *Railway Co.* (Wis.), 70 N. W. Rep. 665; *Refley* v. *Railway Co.* (Minn.), 75 N. W. Rep. 704; *Railway Co.* v. *Engleham*, 62 S. W. Rep. 561; *Flanders* v. *Railway Co.*, 53 N. W. Rep. 544.

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

The circumstances of the injury, generally speaking, were these: The freight train on which plaintiff was acting as brakeman was directed to stop at Osborne and pick up a water car. This water car was a flat car with a tank on it—a temporary water car. It had an iron hand rail on each side and upright posts, or standards, through which, near the top, the rail extended, on each end of which was supposed to be a nut to hold the rail in position. After the water car and another car on the siding had been coupled to the train the conductor gave the signal to pull out, and as it drew near the switch the water car passed the plaintiff, then standing on the ground. He put his foot on the journal box, reached up and caught hold of the rail near the rear end of the car. It slipped out of the standard, and he fell and was injured. It appears that there was no nut at that end of the hand rail, and the weight of the plaintiff pulled the rail out from the standard. One witness, who examined the car just before as well as after the injury, said that the end of

the hand rail, where the nut ought to have been, was rusty, as though none had been there for some time. Another witness supported him as to the rusty condition of the end of the rail immediately after the accident. There was testimony that plaintiff followed a common way of getting on to such a water car. Indeed, on an open, moving car, a hand rail running through standards on the side and within easy reach, would naturally suggest doing just what the plaintiff did. It certainly could not be declared, as matter of law, negligence. On the part of the defendant there was testimony that this car had a hand hold on the standard at the front end of the car, such as is required by the statute of the United States, that the company had an experienced inspector, who stated that he had inspected the car the day before the injury, found one nut gone and replaced it, and that the car otherwise was in good condition.

This outline of the testimony is all that is sufficient, although there was quite a volume on both sides of the matters referred to. The court charged the jury as to the law governing the case, both in respect to the duty of the master to furnish a safe place, machinery and tools, and the duty resting upon the employé of taking reasonable care of himself, following in the instructions the rules so often stated by this court. *Hough* v. *Railway Company*, 100 U. S. 213; *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642; *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S. 368, 386; *Union Pacific Railway* v. *Daniels*, 152 U. S. 684; *Northern Pacific Railroad* v. *Babcock*, 154 U. S. 190. Without reviewing the various instructions in detail, it is enough to say that they clearly presented the matters in dispute and stated the law applicable thereto correctly. The verdict of the jury, approved as it was by the trial and appellate courts, settles the disputed questions of fact.

Under these circumstances it does not seem necessary to notice in detail the several objections pointed out in the very elaborate argument of counsel for the railroad company. A careful examination discloses no error in the proceedings. The

plaintiff was injured, and the questions of his care and the company's negligence were fully and fairly submitted to the jury.

The judgment of the Court of Appeals is

Affirmed.

MISSOURI PACIFIC RAILWAY COMPANY *v.* LARABEE FLOUR MILLS COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 16. Argued November 11, 12, 1908.—Decided January 11, 1909.

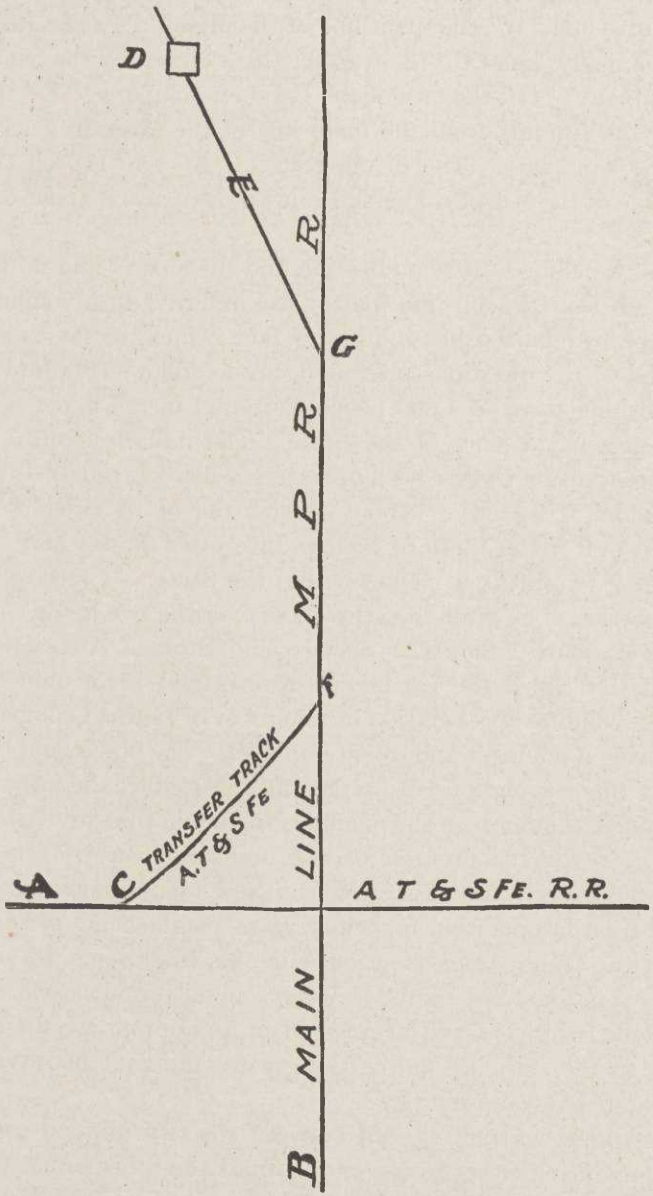
No one can be compelled to engage in the business of a common carrier, but if he does so, he becomes subject to the duties imposed on common carriers.

Even in the absence of legislative enactment or special contract a common carrier is bound to treat all shippers alike and can be compelled to perform this common-law duty by mandamus or other proper writ.

Notwithstanding the creation of the Interstate Commerce Commission, and the delegation to it by Congress of the control of certain matters, a State may, in the absence of express action by Congress or by such commission, regulate for the benefit of its citizens local matters indirectly affecting interstate commerce.

Where there has been no action by Congress or the Interstate Commerce Commission a state court may by mandamus compel a railroad company doing interstate business to afford equal local switching service to its shippers, notwithstanding the cars in regard to which the service is claimed are eventually to be engaged in interstate commerce. *McNeill* v. *Southern Railway Co.*, 202 U. S. 543, distinguished.

On September 15, 1906, the Larabee Flour Mills Company (hereinafter called the mill company) filed its application in the Supreme Court of Kansas for an alternative writ of mandamus, compelling the Missouri Pacific Railway Company (hereinafter called the Missouri Pacific) to restore, resume and make transfer of cars between the lines of the Atchison, Topeka and Santa Fe Railway Company (hereinafter called the Santa Fe) and the mill and elevators of the plaintiff, situated in the town of Stafford. The following diagram shows the location of the mill and railroad tracks:


D
R
G
M P R
TRANSFER TRACK
A.T & S FE
A
C
LINE
A T & S FE. R.R.
B
MAIN

Line "A" represents the main line of the Santa Fe Railway Company; line "B" the main line of the Missouri Pacific Railway Company; line "C" the transfer track owned by the Santa Fe Company; "D" the mill of the Larabee company; "E" the spur track running from the main line of the Missouri Pacific Railway Company. The distance from "F" to "G" on the main line of the Missouri Pacific Railway Company is about one mile.

Upon the filing of this application and the answer and return of the Missouri Pacific the matter was referred to a commissioner, who reported his findings of fact, which, so far as are material to the questions presented, are as follows: Stafford is a flourishing town of 1,600 people, situated in the midst of a wheat-growing district of the State. The mill company has for more than four years been operating a flouring mill of 1,000 barrels daily capacity. About three-fifths of its product is shipped out of the State of Kansas into other States and the remaining two-fifths to points within the State. It receives a large portion of its grain in carload lots over the two roads.

The Missouri Valley Car Service and Storage Association (hereinafter called the car service association) is an unincorporated voluntary association of a number of railroad companies, having a manager and other employés. The object and the duty of this association is to represent and protect the interest and enforce the rights of the members thereof in the interchange of freight cars, the prompt loading, unloading and return of cars interchanged, or delivered to shippers, for traffic purposes. It had been in operation for many years, commencing prior to any of the transactions mentioned in this litigation. Its objects, operations and methods were generally understood by commercial shippers and acquiesced in as appropriate for securing to the shipping public the greatest amount of service over the roads composing it.

No express contract existed between the two railroad companies requiring either to use or to permit the other to use the transfer track, or requiring either to place empty or loaded cars

thereon to be taken away or returned by the other. Whenever the Santa Fe placed its empty cars for the mill company on the transfer track, the Missouri Pacific, upon notice thereof, hauled and delivered them at the mill on the siding connecting it with the Missouri Pacific. The Santa Fe and the Missouri Pacific both held themselves out as ready to do such and like transferring, and continued to do so after the controversy arose in this case for all industries located on the Missouri Pacific at Stafford, making carload shipments in or out over the Santa Fe, except the mill company. A controversy arose between the Missouri Pacific and the mill company as to two charges for demurrage; one for demurrage between December 12, 1905, and April 26, 1906, and the other between July 24 and August 14, 1906. Payment of both was demanded by the car service association. One of them, the mill company, offered to pay; the other it refused, on the ground that the delay and detention were not caused by its fault but by the defective, insufficient and inadequate service of the Missouri Pacific in placing the cars for unloading and reloading. For a failure to pay both these charges the Missouri Pacific, by the direction of the car service association, ceased and refused to make further delivery to the mill company of empty cars placed on the transfer track for the use of the mill company by the Santa Fe, in consequence of which the mill company, when desiring to ship any of its products from Stafford by the Santa Fe, was compelled to haul the same in wagons from its mill to the station of the Santa Fe and there load into cars. This entailed upon the mill company great inconvenience and additional expense in the management of its business. The refusal of the Missouri Pacific was based solely upon the ground above stated, and not upon a claim that the compensation paid for the service was unsatisfactory, or that the service constituted a part of interstate commerce, or that the Missouri Pacific did not undertake to perform services of such character.

The commissioner also found that the detention of the cars on account of which the demurrage charge was refused payment

by the mill company was caused as much by the defective motive power and insufficient train service of the Missouri Pacific as from any fault or omission on the part of the mill company.

The case coming on for hearing before the Supreme Court of the State a peremptory writ of mandamus was ordered, commanding the Missouri Pacific to immediately resume the transfer and return of cars loaded and unloaded from the line of the Santa Fe to and from the mill and elevator at the station and city of Stafford, upon the request and demand of the mill company, and upon payment of the theretofore customary charges.

Mr. Balie P. Waggener for plaintiff in error:

The referee finds that the mill company ships from its mill over these two roads substantially its entire product, three-fifths of which is so shipped out of the State of Kansas, and into other States, etc. The same was interstate commerce, and beyond and not within the regulatory power of the State or the state court.

In the performance of this service for the Santa Fe company, the Missouri Pacific Railway Company was acting as a connecting carrier, or as the agent of the Santa Fe company. In no sense was it the agent of the mill company, performing for it a local service. As disclosed by the admissions of the mill company in its application for the writ, the empty cars were furnished by the Santa Fe company to the mill, to be there loaded, and three-fifths of all such cars so loaded were shipped from the mill out of the State. There was here no separation in fact between that which was wholly interstate and that which was wholly intrastate. *Johnson* v. *So. Pac. Co.*, 192 U. S. 21, 22; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 562; *Central Stock Yards* v. *L. & N. R. R. Co.*, 92 U. S. 570; *Rhodes* v. *Iowa*, 170 U. S. 412.

The shipments in question were under the exclusive control of the provisions and requirements of the Interstate Commerce Act. *Railway Co.* v. *I. C. C.*, 162 U. S. 940; *United States* v. *Terminal Co.*, 144 U. S. 863; *United States* v. *C. & N. W. R. R. Co.*,

157 Fed. Rep. 323, and cases there cited; *Johnson* v. *Southern Pac. Ry.*, 196 U. S. 22.

The railroad tracks, spurs, switches, terminals, depots and yards of the Santa Fe and Missouri Pacific companies at Stafford were instrumentalities of interstate commerce, and as such the regulation and control thereof vested exclusively in the Interstate Commerce Commission. The judgment of the state court is necessarily a regulation, not only of interstate commerce, but the instrumentalities of interstate commerce, within the meaning of the Federal Constitution. *Railway Co.* v. *I. C. C.*, 162 U. S. 211; Hepburn Act, §§ 1, 23 &c.; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Hall* v. *De Cuir*, 95 U. S. 489; *Lottery Cases*, 188 U. S. 346, 375; *Dining Car Case*, 196 U. S. 21, 22; *Welton* v. *The State*, 91 U. S. 280; *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S. 9.

The whole subject-matter is fully covered by and included in the legislation of Congress, in its attempt to make laws "necessary and proper for carrying into execution" the express power "to regulate commerce with foreign nations, and among the several States, etc." These powers, having been "delegated to the United States by the Constitution," are exclusive of the States. In every conceivable way has Congress, by supplemental legislation, broadened and extended the scope and purpose of the original act to regulate commerce, and this court has given its approval of such legislation in the case of *Schlemmer* v. *Railway Co.*, 205 U. S. 1, and *Johnson* v. *Southern Pac. Ry. Co.*, 196 U. S. 1. See also *I. C. C.* v. *C. G. W. Ry. Co.*, 209 U. S. 108, 123.

Mr. Joseph G. Waters and *Mr. Charles Blood Smith*, with whom *Mr. W. H. Rossington*, *Mr. Clad Hamilton*, *Mr. John F. Switzer* and *Mr. John C. Waters* were on the brief, for defendant in error:

The findings show that the service affected by the state court's judgment is purely local and intrastate. The placing of empty cars at the mill for loading by the milling company

and the returning the same, when loaded, to the Santa Fe switch is purely a local facility whereby haulage between the two railroads is obviated.

Although a railroad company may be largely engaged in interstate commerce, it is amenable to state regulation and taxation as to any of its service which is wholly performed within the State and not as a part of interstate commerce. *Penna. R. R. Co.* v. *Knight*, 192 U. S. 21; *Coe* v. *Errol*, 116 U. S. 517; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 84; *I. C. C.* v. *D., M. & G. H. Ry. Co.*, 167 U. S. 633; *G., C. & S. F. R. R. Co.* v. *Texas*, 204 U. S. 403.

The judgment of the state court is not a regulation of interstate commerce within the meaning of the Federal Constitution. *W. & M. & P. R. R. Co.* v. *Jacobson*, 179 U. S. 287; *Hopkins* v. *United States*, 171 U. S. 578.

The Hepburn Act does not operate to withdraw all interstate railroads from state control, and if such were its effect it would be in conflict with numerous decisions of this court. *Gibbons* v. *Ogden*, 9 Wheat. 194, 195; *Passenger Cases*, 7 How. 400; *Sinnott* v. *Davenport*, 22 How. 243; *Trade Mark Cases*, 100 U. S. 82; *Wabash Ry. Co.* v. *Illinois*, 118 U. S. 565; *Hall* v. *De Cuir*, 95 U. S. 485; *Railway Co.* v. *Mississippi*, 133 U. S. 587; *Plessy* v. *Ferguson*, 163 U. S. 537; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 209 *et seq.*; *The Daniel Ball*, 10 Wall. 564.

No argument in favor of the theory of exclusive Federal control can be predicated upon the theory of inferred powers under the Constitution and outside of the express and enumerated powers of the Constitution. This is a government of enumerated powers. It is true as a general proposition that all means necessary to the carrying out of these enumerated powers exist in Congress within the fair implication of the powers granted, but such implications may not be used, however apparently needful and expedient they may seem to be, to annul a plain reservation from or limitation upon the exercise of such enumerated powers. See discussion of these questions

in *Kansas* v. *Colorado*, 206 U. S. 80, 93, and *Fairbank* v. *United States*, 181 U. S. 283.

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

All questions arising under the constitution and laws of the State of Kansas are settled adversely to the plaintiff in error by the decision of the Supreme Court of the State. *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, and cases cited in the opinion. This brings within a narrow range the controversy which this court is called upon to decide.

Coming directly to that, counsel for plaintiff in error contend that no duty was imposed on the railroad company by act of the legislature or mandate of commission or other administrative board. Conceding this, it is also true that the Missouri Pacific was a common carrier, and as such was engaged in the work of transferring cars from the Santa Fe track to the mill company, and after this controversy arose continued like transfer for all industries located on the Missouri Pacific at Stafford, except the mill company. While no one can be compelled to engage in the business of a common carrier, yet when he does so certain duties are imposed which can be enforced by mandamus or other suitable remedy. The Missouri Pacific engaged in the business of transferring cars from the Santa Fe track to industries located at Stafford, and continued to do so for all parties except the mill company. So long as it engaged in such transfer it was bound to treat all industries at Stafford alike, and could not refuse to do for one that which it was doing for others. No legislative enactment, no special mandate from any commission, or other administrative board was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers. Whenever one engages in that business the obligation of equal service to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by

the courts. Neither is there any significance in the absence of a special contract between the Missouri Pacific and the mill company. It appears that the practice theretofore had been for the Missouri Pacific to charge the Santa Fe for the transfer, that the latter collected the total freight and paid the Missouri Pacific its switching charges. There is no suggestion that the amount of this charge was changed in favor of any other shipper, and so long as that was so it was the charge which the Missouri Pacific was entitled to make for cars transferred at the instance of the mill company. If in the future a change is made in behalf of shippers generally, undoubtedly that change can be made operative in respect to the mill company. Indeed, all these questions are disposed of by one well-established proposition, and that is that a party engaging in the business of a common carrier is bound to treat all shippers alike and can be compelled to do so by mandamus or other proper writ.

But the main contention on the part of the Missouri Pacific runs along an entirely different line. It is that the Missouri Pacific and the Santa Fe are common carriers, engaged in interstate commerce, and as such are subject to the control of Congress, and, therefore, in these respects not amenable to the power of the State. It appears from the findings that about three-fifths of the flour of the mill company is shipped out of the State, while the other two-fifths is shipped to points within the State. In addition, the hauling of the empty cars from the Santa Fe track to the mill was, if commerce at all, commerce within the State.

The roads are, therefore, engaged in both interstate commerce and that within the State. In the former they are subject to the regulation of Congress; in the latter to that of the State, and to enforce the proper relation between Congress and the State the full control of each over the commerce subject to its dominion must be preserved. *Fairbank* v. *United States*, 181 U. S. 283. How the separateness of control is to be accomplished it is unnecessary to determine. Its existence is recognized in the

first section of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as well as in that of June 29, 1906, c. 3591, 34 Stat. 584, for each provides:

"That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

This case does not rest upon any distinction between interstate commerce and that wholly within the State. It is the contention of counsel for the mill company that it comes within the oft-repeated rule that the State, in the absence of express action by Congress, may regulate many matters which indirectly affect interstate commerce, but which are for the comfort and convenience of its citizens. Of the existence of such a rule there can be no question. It is settled and illustrated by many cases.

Thus in *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299, it was held that a regulation of pilots and pilotage was a regulation of commerce within the grant of the power to Congress, but further that (p. 319):

"The mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of Congressional regulations. *Sturges* v. *Crowninshield*, 4 Wheat. 193; *Houston* v. *Moore*, 5 Wheat. 1; *Wilson* v. *Blackbird Creek Company*, 2 Pet. 251."

In *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 514, is a collection by Mr. Justice Brown, speaking for this court, of a number of these cases. We quote from the opinion (pp. 516–517):

"Few classes of cases have become more common of recent years than those wherein the police power of the State over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding

the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employés, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good.

"We have recently applied this doctrine to state laws requiring locomotive engineers to be examined and licensed by the state authorities (*Smith* v. *Alabama*, 124 U. S. 465); requiring such engineers to be examined from time to time with respect to their ability to distinguish colors (*Nashville &c. Railway* v. *Alabama*, 128 U. S. 96); requiring telegraph companies to receive dispatches and to transmit and deliver them with due diligence, as applied to messages from outside the State (*Western Union Tel. Co.* v. *James*, 162 U. S. 650); forbidding the running of freight trains on Sunday (*Hennington* v. *Georgia*, 163 U. S. 299); requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations (*Railway Company* v. *Fuller*, 17 Wall. 560); forbidding the consolidation of parallel or competing lines of railway (*Louisville & Nashville R. R.* v. *Kentucky*, 161 U. S. 677); regulating the heating of passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto (*N. Y., N. H. &c. R. R.* v. *New York*, 165 U. S. 628); providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made (*Chicago, Milwaukee &c. Ry.* v. *Solan*, 169 U. S. 133); and declaring that when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent (*Richmond & Allegheny Rail-*

road v. *Patterson Tobacco Company*, 169 U. S. 311). In none of these cases was it thought that the regulations were unreasonable or operated in any just sense as a restriction upon interstate commerce."

See also *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613, 626; *Wisconsin &c. Railroad Company* v. *Jacobson*, 179 U. S. 287; *Reid* v. *Colorado*, 187 U. S. 137.

On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the State in these incidental matters. A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the State. It is not contended that the commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the State in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the commission the control of the State over these incidental matters remains undisturbed. But it is further contended that this is

not a mere incidental matter, indirectly affecting interstate commerce, but directly a part of such commerce, and therefore beyond the power of the State to control, and in support of that, *McNeill* v. *Southern Railway Company*, 202 U. S. 543, is referred to. There are many points of resemblance between that case and this, but there is this substantial distinction: In that was presented and determined solely the power of a state commission to make orders respecting the delivery of cars engaged in interstate commerce beyond the right of way of the carrier and to a private siding—an order which affected the movement of the cars prior to the completion of the transportation, while here is presented, as heretofore indicated, the question of the power of the State to prevent discrimination between shippers, and the common law duty resting upon a carrier was enforced. This common-law duty the State, in a case like the present, may, at least in the absence of Congressional action, compel a carrier to discharge.

We see no error in the ruling of the Supreme Court of Kansas, and its judgment is

Affirmed.

Mr. Justice Holmes. I concur in the judgment on the ground that the cars had not yet been appropriated to interstate commerce, and so were subject to state control. For this reason I have not found it necessary to make up my mind on the considerations that will be urged by Mr. Justice Moody, although I am inclined to agree with his views.

Mr. Justice Moody, dissenting.

I find myself unable to agree in the reasoning by which the judgment of the state court is affirmed. Upon the peculiar facts of this case, it is possible to say that the cars, whose transfer was directed, did not become the subjects of interstate commerce until they had been selected as such after their delivery upon the tracks of the Santa Fe Railroad. If the decision were put upon that ground, I should be silent.

But it is assumed that three-fifths of them were interstate shipments, and with respect to such shipments, I am constrained to believe that the judgment of the court below exceeded the power of the State. The division of the governmental power over commerce made by the Constitution, by which the control of interstate commerce is vested in the Nation and the control of intrastate commerce is vested in the States, together with the fact that both kinds of commerce are often conducted by the same persons and corporations through the same agencies gives rise to highly perplexing questions in practice. The regulation of carriers and other instrumentalities of commerce is constantly undertaken both by the Nation and the States, and the extent and limit of the respective powers vested in each government, as far as possible, ought to be accurately ascertained and declared. This is demanded imperatively by the orderly conduct of the vast transportation agencies which are engaged in both kinds of commerce. They ought not to be left uncertain as to the power to which they are responsible.

I venture to think that the weight of authority establishes the following principles: The commerce clause of the Constitution vests the power to regulate interstate commerce exclusively in the Congress and leaves the power to regulate intrastate commerce exclusively in the States. Both powers being exclusive, neither can be directly exercised except by the government in which it is vested. Though the State may not directly control interstate commerce, it may often indirectly affect that commerce by the exercise of other governmental powers with which it is undoubtedly clothed. And this indirect effect may be allowed to operate until the Congress enacts legislation conflicting with it, to which it must yield as the paramount power. *Gibbons* v. *Ogden*, 9 Wheat. 1, 204; *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328, 334; *Asbell* v. *Kansas*, 209 U. S. 251.

In the case at bar, upon the facts as they are assumed to exist, it seems to me that the judgment of the court below

directly regulated interstate commerce. If this is so, it is unimportant that the Congress has been silent. A power clearly withdrawn from the State and vested in the Nation, can no longer be exercised by the States, even though the Congress is silent. Where the Congress fails to act, the subject enjoys freedom from direct control.

The principles which I have stated have been recently applied by this court in the case of *McNeill* v. *Southern Railway Company*, 202 U. S. 543. I cannot escape from the conviction that that case requires a reversal of the judgment of the court below, so far as it assumes to direct the conduct of interstate commerce. In that case the place of business of a private corporation was reached by a spur track connecting with the main track of the railroad. It had been the custom of the railroad to deliver cars consigned to this corporation from the main track to the spur track. In consequence of a dispute concerning demurrage, the railroad refused to continue thus to deliver cars. The State Commission made an order requiring the railroad to deliver certain cars engaged in interstate commerce upon the spur track on payment of freight charges. The order was held to be a regulation of such commerce, and repugnant to the commerce clause of the Constitution. In that case the regulation affected the last stages of the interstate journey. In this case it affects the first stages of the interstate journey. But in each case the commerce which was regulated was interstate. In that case the order was issued by a Commission and in this case by a court. But nothing turns upon that distinction, for by whatever state agency the power is exercised it is void, because it exceeds the authority which may rightfully be conferred by the State upon any agency.

I am not ready to assent to the proposition that although the Congress has vested in the Interstate Commerce Commission the authority to deal with the exact situation presented to us, that fact is immaterial, because the Commission has taken no action. If the Commission has the authority to deal with a question of this kind, those who have grievances ought to

resort to that body for relief. It is a very great hardship to subject the carriers to possibly conflicting regulations and leave them uncertain which government may rightfully assert its controlling authority. So it was said in the *McNeill case* that the order there "asserted a power concerning a subject directly covered by the act of Congress to regulate commerce, and the amendments to that act, which forbid and provide remedies to prevent unjust discriminations and the subjecting to undue disadvantages by carriers engaged in interstate commerce." This statement was made as an additional reason for holding the state action invalid, and seems in conflict with the holding in this case.

I am authorized to state that MR. JUSTICE WHITE joins in this opinion.

MORGAN *v.* ADAMS.

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

No. 50. Argued December 9, 10, 1908.—Decided January 11, 1909.

Although the estate may amount to more than $5,000, if the aggregate interest of plaintiffs in error is less than that amount, and the balance of the estate goes to defendants in error, the necessary amount in controversy does not exist to give this court jurisdiction of an appeal from a judgment of the Court of Appeals of the District of Columbia setting aside a will. *Overby* v. *Gordon*, 177 U. S. 214, distinguished. Writ of error to review 29 App. D. C. 198, dismissed.

THE facts are stated in the opinion.

Mr. E. Hilton Jackson for plaintiffs in error.

Mr. J. J. Darlington and *Mr. S. Herbert Giesy* for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This writ of error brings up for review the judgment of the Court of Appeals of the District of Columbia, confirming the judgment of the Probate Court, entered upon a verdict of a jury upon issues framed under a caveat filed against a paper writing alleged to be the last will and testament of Julia M. Adams. The will was presented for probate by Decatur Morgan, who was named therein as executor, and who, with his wife, Jennie G. Morgan, were the principal legatees therein. Defendants in error, who were respectively nephews and nieces of the deceased, filed a caveat against the probate of the will, alleging the incapacity of the deceased to make a will, and also alleging undue influence and fraud and coercion exercised upon her by the Morgans and other persons. An answer was filed denying the allegations of the caveat, and the following issues were framed for submission to the jury: (1) Was the written paper propounded as the last will and testament of the deceased executed in due form of law? (2) Was the testatrix, at the time of executing the will, of sound and disposing mind? (3) Was it procured by the undue influence of Decatur Morgan or Jennie G. Morgan, or other person or persons? (4) Was it procured by fraud or coercion of either of the Morgans, or other person or persons?

A jury was impannelled to try the issues, and the questions in the case turn upon certain instructions given by the court upon the second and third issues. The other two, that is, the first and fourth issues, were withdrawn by defendants in error. The verdict of the jury was adverse to the plaintiffs in error on the two issues submitted. Judgment was in due course entered, denying the probate of the will, which judgment was affirmed by the Court of Appeals. 29 App. D. C. 198.

A question is presented as to the right of plaintiffs in error to bring the case to this court. Defendants in error contend the amount in dispute is less than the necessary amount to confer jurisdiction. The total value of the estate is $7,394.50, only

$4,144.50 of which are bequeathed to the Morgans, the balance of the estate goes to defendants in error, except $250.00 bequeathed to the Epiphany Church. The matter in dispute, it is hence contended, is nearly $1,000 less than the jurisdictional amount.

A similar question came up in *Overby* v. *Gordon*, 177 U. S. 214. The case was a contest of a will. The plaintiffs in error in this court offered its probate on the ground that the testator was a resident of Georgia when he made the will, not of the District of Columbia, and that his personal estate passed under the laws of Georgia to plaintiffs in error, who were next of kin of the testator. They were unsuccessful in the court below and then brought the case here, and a motion was made to dismiss, because the interests of plaintiffs in error were several and each interest less than five thousand dollars, and that, therefore, the matter in dispute was less than that sum and this court had no jurisdiction. The motion was denied, this court answering that the value of the estate was the matter in dispute. This, however, was put upon the ground that the question in the case was whether an estate valued at nine thousand dollars should pass, as provided in the alleged will, which, in effect, excluded the next of kin, or in the mode provided by the law of the domicil of the decedent for the transmission of an intestate estate. The purpose of the case therefore, was, it was said, not to seek an allotment to them of their interests, but an adjudication that the alleged will was invalid, and that that contention was advanced by virtue of a claim of common title in the next of kin of the decedent in the *corpus* of the estate derived from the alleged law of the domicil of the deceased. In other words, it was held in such case that where parties seek a recovery under the same title and for a common and undivided interest, the sum sought to be recovered, not the share of each individual claimant, constitutes the matter in dispute. And for this see *Shields* v. *Thomas*, 17 How. 3, and *New Orleans & Pacific Railway* v. *Parker*, 143 U. S. 42, 51, 52.

The case at bar is distinctly different. The legacies to the

plaintiffs in error, of course, depend upon the validity of the will. That constituted their common title, but the sum of their interest is only $4,144.50, which is less than the amount necessary to give jurisdiction to this court, nor would the necessary amount be reached if the legacy to the Epiphany Church be added.

Writ of error dismissed.

[End of Volume 211.]

[Per curiam opinions, decisions on petitions for certiorari and list of cases disposed of without consideration by the court will appear in a subsequent volume.]

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Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stat., § 720, no matter what may be the character of the body in which they take place. *Ib.*

3. *Legislative action not res judicata in subsequent litigation.*

The making of a rate by a legislative body, after hearing the interested parties, is not *res judicata* upon the validity of the rate when questioned by those parties in a suit in a court. Litigation does not arise until after legislation; nor can a State make such legislative action *res judicata* in subsequent litigation. *Ib.*

4. *Interference by courts with legislative power in regulation of railroads.*

By §§ 833–871 of chap. 66 of the Rev. Laws of Hawaii, the legislature having vested the regulation of the railway company thereby incorporated in certain administrative officers, it is beyond the power of the courts to independently regulate the schedule of running cars by decree in a suit; and so held without deciding as to the power of the courts to review the action of the administrative officers charged by the legislature with establishing regulations. *Honolulu Rapid Transit Co.* v. *Hawaii*, 282.

5. *Observance of boundaries.*

The boundaries between the legislative and judicial fields should be carefully observed. *Ib.*

See CONSTITUTIONAL LAW, 8;
RAILROADS, 2;
STATES, 10.

JUDICIAL NOTICE.

See COURTS, 1;
PRACTICE AND PROCEDURE, 12.

JURISDICTION.

A. OF THIS COURT.

1. *Who may invoke.*

The jurisdiction of this court can only be invoked by a party having a personal interest in the litigation. (*Smith* v. *Indiana*, 191 U. S. 138.) *McCandless* v. *Pratt*, 437.

2. *To review judgments of District Court sitting as court of claims—Act of March 3, 1891, construed.*

The act of March 3, 1891, 26 Stat. 826, deals with general, and not special, jurisdiction, and nothing in §§ 5, 6 or 14 extended the right of review of judgments of the District Court sitting as a court of claims under the act of March 3, 1887, c. 539, 24 Stat. 505, and a writ of error will not lie to review a judgment in favor of the Government on a claim of less than $3,000. *Reid* v. *United States*, 529.

3. *Of direct appeal from Circuit Court—Sufficiency of Federal question involved.*

Where the constitutionality of a state statute, as construed by the highest court of the State, is admitted, and only its applicability to the facts is denied, no question as to the construction or application of the Federal Constitution is involved, and a direct appeal to this court from the Circuit Court will not lie under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 826. *Knop* v. *Monongahela Coal Co.*, 485.

4. *To review judgments of territorial courts.*

The power of this court to review the judgments of courts of the Territories depends upon acts of Congress and cannot be extended by territorial legislation. *Cotton* v. *Hawaii*, 162.

5. *Appeal from territorial court—Finality of judgment.*

An appeal from a judgment of the Supreme Court of Hawaii dismissed because not final. (*Cotton* v. *Hawaii, ante*, p. 162.) *Hutchins* v. *Bierce*, 429.

6. *Of appeals from Supreme Court of Hawaii under acts of* 1900 *and* 1905.

The elementary rule, that the power of this court to review judgments under § 709, Rev. Stat., and under statutes relating to review of judgments from territorial courts extends only to final judgments, also governs appeals from the Supreme Court of Hawaii under § 86

LIENS.

Equitable; creation of attorney's lien for contingent fee.

An express executory agreement in writing whereby the contracting party sufficiently indicates an intent to make some identified property security for a debt or other obligation, creates an equitable lien on such property; and in this case an agreement by contestants to pay counsel a contingent fee if the propounding of a will is prevented, created a lien on the distributive shares in the estate to which those contestants became entitled on a settlement of the matter effected by the successful services of the counsel so employed. *Ingersoll* v. *Coram*, 335.

See BANKRUPTCY, 3;
COURTS, 4, 5;
JURISDICTION, B 3, 12, 13.

LOCAL LAW.

Arkansas. Coal Miners' Wages Act (see Constitutional Law, 15). *McLean* v. *Arkansas*, 539.

Connecticut. Fraudulent conveyances. Sections 4868, 4869, Gen. Laws, as amended by ch. 72 of Pub. Acts, 1903 (see Constitutional Law, 12). *Lemieux* v. *Young*, 489.

District of Columbia. Rule as to assumption of risk (see Master and Servant, 1). *Butler* v. *Frazee*, 459.

Hawaii. Laws of Hawaii, § 2118, attachment of seamen's wages (see Maritime Law, 1). *Wilder* v. *Inter-Island Navigation Co.*, 239. Testamentary trusts (see Trusts, 2). *Fitchie* v. *Brown*, 321. Final judgments (see Jurisdiction, A 7). *Cotton* v. *Hawaii*, 162. Rev. Laws of Hawaii, ch. 66, §§ 833–871, railroad regulation (see Judicial and Legislative Functions, 4). *Honolulu Rapid Transit Co.* v. *Hawaii*, 282.

Kentucky. Statutes of 1904, § 1, prohibiting coeducation of whites and negroes (see Statutes, 2). *Berea College* v. *Kentucky*, 45.

Louisiana. Preference given by member of copartnership (see Bankruptcy, 4). *Miller* v. *New Orleans Fertilizer Co.*, 496.

New York. Forest, Fish and Game Law (see Constitutional Law, 11). *Silz* v. *Hesterberg*, 31; (see States, 1) *Ib.* Taxation (see Constitutional Law, 21). *Paddell* v. *City of New York*, 446. Inheritance tax law of 1887, Laws of 1887, ch. 713 (see Constitutional Law, 14). *Beers* v. *Glynn*, 477.

Generally. *See* LEGISLATION.

MANDAMUS.

Acts of public officials reviewable by.

While acts of public officials which require the exercise of discretion may not be subject to review in the courts, if such acts are purely ministerial or are undertaken without authority the courts have jurisdiction, and mandamus is the proper remedy. *Garfield* v. *Goldsby*, 249; *Garfield* v. *Allison*, 264.

See COMMON CARRIERS, 2;
INTERSTATE COMMERCE, 2.

MARITIME LAW.

1. *Seamen's wages; attachment or arrestment—Section* 4536, *Rev. Stat., and* § 2118, *Laws of Hawaii, construed.*

Section 4536, Rev. Stat., providing that seamen's wages shall not be subject to attachment or arrestment, is to be construed in the light of other provisions of the same title and is to be liberally interpreted with a view to protect the seamen; and, as so construed, that section prevents the seizure of wages not only by attachment before, but execution after, judgment, and such wages cannot be seized under § 2118 of the Laws of Hawaii. *Wilder* v. *Inter-Island Navigation Co.*, 239.

2. *As to effect of act of* 1874 *to repeal* § 4536, *Rev. Stat.*

Quære and not decided whether the act of June 9, 1874, c. 259, 18 Stat. 64, repealed § 4536, Rev. Stat., so far as vessels engaged in the coastwise trade are concerned. *Ib.*

MASTER AND SERVANT.

1. *Assumption of risk—Common-law rule in force in District of Columbia.*

The common-law rule of assumption of known risk by the employé has never been modified by statute in the District of Columbia, and even if hardship results the court must enforce the rule. *Butler* v. *Frazee*, 459.

2. *Assumption of risk by employé.*

One understanding the condition of machinery and dangers arising therefrom, or who is capable of so doing, and voluntarily, in the course of employment, exposes himself thereto, assumes the risk thereof and if injury results cannot recover against his employer. *Ib.*

3. *Assumption of risk; when question of law for court.*

Although the plaintiff, if of full age and understanding, may testify to the contrary, where the elements and combination out of which the

PORTO RICO.

Status as Territory.

Porto Rico, although not a Territory incorporated into the United States, is a completely organized Territory. *Kopel* v. *Bingham*, 468.

See EXTRADITION, 2, 3.

POWERS OF CONGRESS.

See CONGRESS, POWERS OF.

PRACTICE AND PROCEDURE.

1. *Where Circuit Court was without jurisdiction of case appealed.*

On appeal from the Circuit Court where that court was without jurisdiction of the suit either on the ground of diversity of citizenship or that it was one arising under the Constitution and laws of the United States, the practice is to reverse the judgment and remit the case to the Circuit Court with instructions to dismiss the suit for want of jurisdiction. *Louisville & Nashville R. R.* v. *Mottley*, 149.

2. *Raising question of jurisdiction of Circuit Courts.*

The jurisdiction of the Circuit Court is defined and limited by statute; and, even if not questioned by either party, this court will, of its own motion, see to it that such jurisdiction is not exceeded. *Ib.*

3. *Assertion of Federal right for purpose of review of judgment by this court.*

The claim that a charter granted by the Republic of Hawaii has become a statute of the United States because ratified by act of Congress, must be asserted before assignment of error in this court in order to give this court jurisdiction to review on the ground that the construction of, or a right claimed under, a law of the United States is involved. *Honolulu Transit Co.* v. *Wilder*, 144.

4. *Record in this court; sufficiency for purpose of review of judgment.*

Where the record does not show that any Federal question was raised or suggested before the assignment of error in this court, a judgment of the Supreme Court of Hawaii cannot be reviewed by this court under § 86 of the act of April 30, 1900, c. 339, 31 Stat. 141. *Ib.*

5. *Judgment of state court, resting on sufficient non-Federal grounds, not disturbed.*

This court will not disturb the judgment of a state court resting on

PREFERENCES.

PUBLIC LANDS.

1. *Policy of Government toward settlers.*

The policy of the Federal Government toward *bona fide* settlers upon the public lands is liberal and the law deals tenderly with them. *Brandon* v. *Ard*, 11.

2. *Homesteads; effect of error of public official.*

A homesteader who has done all that the law requires will not lose his rights on account of error of, or unauthorized action by, a public official. (*Ard* v. *Brandon*, 156 U. S. 537.) *Ib.*

3. *Homesteads—Lands open for settlement—Effect of error of public official on rights of settlers.*

Lands within indemnity limits of a railroad grant are not open for settlement under homestead laws until the map of definite location has been filed and their selection to supply deficiencies in place limits has been approved by the Secretary of the Interior; and their prior withdrawal by the Secretary from sale and settlement is unauthorized and does not affect the rights of *bona fide* settlers. So *held* as to grants under the act of March 3, 1863, c. 98, 12 Stat. 772. *Ib.*

4. *Lands granted by act of March* 3, 1863.

The act of March 3, 1863, c. 98, 12 Stat. 772, did not actually grant

PUBLIC OFFICERS.

RAILROADS.

RAILROAD LAND GRANTS.

See PUBLIC LANDS, 3, 4, 5, 6.

RAILROAD RATES.

1. *Remedy against enforcement by state railroad commission of confiscatory rates.*

Where a state railroad commission, which is granted power by the state constitution to make and enforce rates, enacts and attempts to enforce rates which are so low as to be confiscatory, the proper remedy is by bill in equity to enjoin such enforcement, and such a suit against the members of the commission will not be bad as one against the State, but it should not be commenced until the rate has been fixed by the body having the last word. *Prentis* v. *Atlantic Coast Line*, 210.

2. *Remedies—Exercise of right of appeal to highest court of State should precede resort to Federal court.*

While a party does not lose his right to complain of action under an unconstitutional law by not using diligence to prevent its enactment, on a question of railroad rates, when an appeal to the Supreme Court of the State from an order of the State Corporation Commission fixing such rates is given by the state constitution, it is proper that dissatisfied railroads should take this matter to the Supreme Court of their State before bringing a bill in the Circuit Court of the United States. Under the circumstances of this case action on a bill was suspended to await the result of such an appeal. *Ib.*

See CONSTITUTIONAL LAW, 18;
JUDICIAL AND LEGISLATIVE FUNCTIONS, 3.

RATE REGULATION.

See CONSTITUTIONAL LAW, 8;
MUNICIPAL CORPORATIONS, 1.

RATES.

See CONSTITUTIONAL LAW, 4, 18, 23; JUDICIAL AND LEGISLATIVE FUNCTIONS, 3; RAILROAD RATES; STATES, 6, 7, 8, 9.

RECEIVERS.

See BANKRUPTCY, 8, 9.

REMEDIES.

Habeas corpus or writ of error as proper remedy of one convicted by court exceeding its jurisdiction.

While a court of competent jurisdiction may discharge a prisoner held

SOVEREIGNTY.

See ACTIONS, 1.

STARE DECISIS.

See PRACTICE AND PROCEDURE, 6.

STATES.

1. *Police power; validity of New York Forest, Fish and Game Law—Effect of Lacey Act of* 1900.

Independently of the Lacey Act of May 25, 1900, c. 553, 31 Stat. 187, relating to transportation of game in interstate commerce, the provisions of the New York Forest, Fish and Game Law prohibiting possession of game in closed season is a valid exercise of the police power of the State; and *quære*, but not decided, whether the New York law is not also validated by such act of Congress. *Silz* v. *Hesterberg*, 31.

2. *Police power in respect of game.*

It is within the police power of a State to prohibit possession of game during the closed season even if brought from without the State. *Ib.*

3. *Police power of legislature.*

Subject to constitutional limitations, the legislature of a State may pass measures for the protection of the people in the exercise of the police power and is the judge of their necessity and expediency. *Ib.*

4. *Police power to destroy unwholesome food-stuff.*

The right of the State under the police power to destroy food that is unfit for human consumption is not taken away because some value may remain in it for other purposes, when it is kept to be sold at some time as food. (*Reduction Company* v. *Sanitary Works*, 199 U. S. 306; *Gardner* v. *Michigan*, 199 U. S. 325.) *North American Storage Co.* v. *Chicago*, 306.

5. *Municipal ordinance as act of State.*

A municipal ordinance properly adopted under a power granted by the state legislature is to be regarded as an act of the State within the Fourteenth Amendment. *Ib.*

6. *Limitation of power of municipality, under grant from State, to fix and determine rates.*

A power given by the State to one of its municipalities to "fix and determine rates," does not authorize that municipality to abandon the power, and to irrevocably establish rates for the entire period of a franchise. *Home Telephone Co.* v. *Los Angeles*, 265.

FEDERAL AND STATE COURTS.

STATUTES.

A. CONSTRUCTION OF.

TRUSTS.