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UNITED STATES REPORTS

VOLUME 214

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1908

CHARLES HENRY BUTLER

REPORTER

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1909

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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,[2] Attorney General.
GEORGE WOODWARD WICKERSHAM,[3] Attorney General.
HENRY MARTYN HOYT,[2] Solicitor General.
LLOYD WHEATON BOWERS,[4] Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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

[2] Resigned in March, 1909.

[3] Of New York; appointed March 5, 1909

[4] Of Illinois; appointed April 1, 1909.

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.

PROPERTY OF UNITED STATES SENATE COMMITTEE COPY

COMPTON *v.* STATE OF ALABAMA.

ERROR TO THE SUPREME COURT OF ALABAMA.

No. 175. Argued April 20, 1909.—Decided May 17, 1909.

Unless the State demanding the return of an alleged fugitive from justice furnishes a copy of an indictment against the accused or an affidavit before a magistrate as provided by § 5278, Rev. Stat., the executive of the State upon whom the demand is made, may decline to honor the requisition; and, in the absence of such indictment or affidavit, no authority is conferred upon him by § 5278, Rev. Stat., to issue his warrant of arrest for a crime committed in another State.

An affidavit before a notary public is sufficient under § 5278, Rev. Stat., upon which to base a demand for return of a fugitive from justice if such officer is, as he is regarded in Georgia, a magistrate under the law of the State.

Where the papers upon which the requisition for the return of an alleged fugitive from justice is based are regarded as sufficient by the executive authorities of both the States making, and honoring, the demand, the judiciary should not interfere on *habeas corpus* and discharge the prisoner upon technical grounds unless it is clear that the action plainly contravenes the law.

152 Alabama, 68, affirmed.

THE facts are stated in the opinion.

Mr. John M. Chilton for plaintiff in error:

The Federal statute recognizes the existence of a pending prosecution in the demanding State, in one of two forms: First, an "indictment found"; and next, a preliminary prosecution pending before a magistrate.

Assuming for argument, that an information may take the place of an indictment, we have here neither an information nor an indictment, though the Solicitor General certifies that two copies of an indictment accompanied his demand upon the Governor for extradition. Having no indictment or information, there must appear some proceeding pending before a "magistrate." This affidavit does not disclose one. A notary public is a mere commercial officer who may administer affidavits but has no authority to issue process of arrest or to make a warrant returnable before any other officer.

But while it may have warranted an information, it did not follow that one would be filed or should be filed. Whereas, in an indictment or warrant on preliminary examination it does follow that the defendant shall be arrested, tried and convicted, committed or discharged. A preliminary affidavit, in short, is a prosecution commenced before some magistrate, while the affidavit here is not a prosecution commenced, but is only authority for the commencement of a prosecution, if it reaches that dignity.

A mere affidavit before a notary public, returnable before no officer and which had not been acted upon in the procurement or filing of an indictment or information and upon which no information or indictment follows as of course, cannot be treated as an "affidavit made before a Magistrate"; and no other authority is needed to the proposition than the plain word of § 5278, Rev. Stat.

In re Waller, 36 Fed. Rep. 681, is not an authority here. In that case, the City Court of Milwaukee had jurisdiction of particular offenses that could be exercised on affidavit made before the court, and it was held that under those circumstances

the court acquired jurisdiction; that "before" meant "in the presence of."

Mr. Alexander M. Garber, Attorney General of the State of Alabama, and *Mr. Thomas W. Martin* for defendant in error:

The provision in § 5278, Rev. Stat., for the production before the Governor of the asylum State, of a copy of the indictment found, or the affidavit made before a "magistrate" of the demanding State means nothing more than that it shall be made reasonably to appear by affidavit that the prosecution has been begun. Assuming that the letters "N. P." affixed to the signature of the officer before whom the affidavit was made indicated that he was a notary public, the certificate of the clerk of the Superior Court of Atlanta, under his seal of office, to the effect that the affidavit had been filed in his office, within itself shows, and certainly when taken in connection with the provisions of § 11 of the act creating the Criminal Court of Atlanta, distinctly shows that the prosecution was begun pursuant to the rules of law provided for that court. The act simply provided for the making of the affidavit as the initial step in the beginning of the prosecution—not before any particular officer, but before anyone authorized to administer oaths, upon which affidavit an information might be filed and trial had.

The Constitution of the United States does not prescribe the form in which the charge must be made; and while the statutes speak of an indictment found or an affidavit made before a magistrate, it cannot be intended to exclude a case where the charge is in the form of a criminal information, as in this State all offenses are triable by information filed by the District Attorney of the proper county, and it will be presumed that the demanding State has authorized prosecution by information. *Hooper's Case*, 52 Wisconsin, 699.

When prosecution by information has been adopted by a State making demand for requisition, it must be considered *prima facie* evidence of the crime charged against the accused

under the laws of that State. *In re VanSciever*, 42 Nebraska, 772; *State* v. *Richardson*, 34 Minnesota, 115; *State* v. *Hufford*, 28 Iowa, 391; *Compton* v. *State*, 152 Alabama, 68.

MR. JUSTICE HARLAN delivered the opinion of the court.

By an affidavit, proper in form and substantially sufficient in its statement of facts, made before a notary public of Fulton County, Georgia, Compton, the plaintiff in error, was charged with having committed the offense of being a common cheat and swindler. The Solicitor of the Criminal Court of Atlanta officially notified the Governor that the accused had been so charged and had fled to Alabama, and a requisition on the Governor of Alabama was asked for the extradition of Compton to the end that he might be brought back to Georgia to be tried according to law for the offense charged.

The Governor of Georgia thereupon made a requisition on the Governor of Alabama who, having received the requisition, issued his warrant for the arrest of Compton, if to be found in Alabama, and his delivery into the custody of the agent of Georgia. Having been arrested under that warrant by a sheriff, the accused sued out a writ of *habeas corpus* before the judge of the City Court of Montgomery, Alabama, and sought discharge from custody upon the ground that he was illegally restrained of his liberty. The return by the sheriff to the writ justified the detention of Compton under the requisition of the Governor of Georgia and the warrant of arrest issued by the Governor of Alabama.

Upon the hearing of the case before the judge of the Montgomery City Court the accused demurred to the return, and the demurrer having been overruled, he was ordered into the custody of the agent of Georgia for extradition pursuant to law. From that order Compton prosecuted an appeal to the Supreme Court of Alabama, and that court affirmed the order of the Montgomery City Court.

It is contended that the affidavit upon which the Governor of Georgia based his requisition, although certified by him to

be authentic, was not in compliance with the Revised Statutes of the United States; that the proceedings in Georgia were not sufficient to authorize the Governor of Alabama to issue his warrant of arrest; and that the proceedings on the hearing of the petition for *habeas corpus* did not show that there had been an indictment against Compton or such an affidavit before a magistrate of Georgia charging the accused with crime, as is required by the statutes of the United States.

In our judgment the only material question not substantially covered by the former decisions of this court is that raised by the objection that the affidavit in Georgia on which the Governor of that State based his requisition was made before a notary public and not before a "magistrate," as required by the Revised Statutes of the United States enacted in the execution of the constitutional provision relating to fugitives from justice. This specific objection was raised by the assignments of error for the Supreme Court of the State, but that court did not seem to have regarded it as of sufficient gravity to be specially noticed in its opinion. But as the objection is covered by the assignment of errors for this court, and as it asserts a right under the laws of the United States, we deem it appropriate to meet and dispose of it.

The proceedings against Compton were had under § 5278 of the Revised Statutes, 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 said 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 commited treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which said 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. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory."

Undoubtedly, the statute does not make it the duty of a Governor to issue a warrant for the arrest of an alleged fugitive from justice, unless the executive of the demanding State produces to him either a copy of an indictment against the accused in the demanding State or an affidavit before a *magistrate* of such State charging the fugitive with the commission of crime in the State making the demand. It is, we think, equally clear that the executive of the State in which the fugitive is at the time may decline to honor the requisition of the Governor of the demanding State if the latter fails to furnish a copy of an indictment against the accused, or of any affidavit before a magistrate. But has the executive of the State, upon whom the demand is made for the arrest and extradition of the fugitive, the power to issue his warrant of arrest for a crime committed in another State, unless he is furnished with a copy of the required indictment or affidavit? We are of opinion that he has not, so far as any authority in respect to fugitives from justice has been conferred upon him *by the statute of the United States*. The statute, we think, makes it essential to the right to arrest the alleged fugitive under a warrant of the executive of the State where the alleged fugitive is found that such executive be furnished, before issuing his warrant, with a copy of an indictment or an affidavit before a magistrate in the demanding State, and charging the fugitive with crime committed by him in such State. It is therefore material under this interpretation to inquire whether the affidavit, made the basis in this case of the requisition by the Governor of Georgia, and which is certified to be authentic, was such an affidavit as the Revised Statutes of the United States required (in the

absence of an indictment) to be produced to the Governor of Alabama as the basis of any warrant of arrest that he might issue.

The record shows that the affidavit, a copy of which accompanied the requisition of the Governor of Georgia, was made, as we have already said, before a notary public. Was that sufficient under § 5278 of the Revised Statutes requiring an affidavit to be made before a "magistrate," that is, before one who could properly be deemed a magistrate within the meaning of the law of the State under whose authority he acts as notary public, and in which his duties are discharged? In a general sense a magistrate is a public civil officer, possessing such power, legislative, executive or judicial, as the government appointing him may ordain. In a narrow sense, a magistrate is regarded—perhaps, commonly regarded—as an inferior judical officer, such as a justice of the peace. 2 Bouvier Law Dic. 92. But the appellation of magistrate "is not confined to justices of the peace, and other persons, *ejusdem generis*, who exercise general judicial powers; but it includes others whose duties are strictly executive." Anderson's Dictionary of Law, 643, 644. In *Gordon* v. *Hobart*, 2 Sumner, 401, 405, the question was whether an alderman of Philadelphia, who was invested by law with all the powers and authority of a justice of the peace, was not to be deemed in the strictest sense a magistrate, within the meaning of a statute relating to the acknowledgment of deeds "before a justice of the peace or magistrate." Mr. Justice Story said that the alderman was to be deemed a magistrate within the statute referred to; "for," said he, "I know of no other definition of the term 'magistrate' than that he is a person clothed with power as a public civil officer"—citing 1 Black. Com. 146.

Could a notary public be deemed a magistrate in Georgia? If so, § 5278 of the Revised Statutes was satisfied; for, that statute must be held to mean that a person may be regarded as a magistrate, before whom the required affidavit can be made, if he is so regarded under the law of the State where the

alleged crime was committed. Upon looking into the Code of Georgia we find that provision is made for the appointment of notaries public by the judges of the Superior Courts, on the recommendation of the grand juries of the several counties. Their term of office is four years, and they are commissioned by the Governor, and are "*ex officio* justices of the peace, and shall be removable on conviction for malpractice in office." 2 Code of Georgia, § 4052, p. 982. They are designated as commissioned notaries public. And it is further provided that "Justices, and Notaries Public who are *ex officio* justices of the peace shall keep separate dockets of all civil and criminal causes disposed of by them," and "lay their dockets before the grand juries of their respective counties on the first day of each term of the Superior Court for inspection." *Ib.* 1895, p. 93.

In view of these provisions of the Code of Georgia, we hold that the notary public, before whom the affidavit in that State was made, may be regarded as a magistrate within the meaning of § 5278 of the Revised Statutes of the United States. Such, it must be assumed, was the view of the Governor of Alabama when issuing his warrant of arrest under the authority of that statute. When it appears, as it does here, that the affidavit in question was regarded by the executive authority of the respective States concerned as a sufficient basis, in law, for their acting—the one in making a requisition, the other in issuing a warrant for the arrest of the alleged fugitive—the judiciary should not interfere, on *habeas corpus*, and discharge the accused, upon technical grounds, and unless it be clear that what was done was in plain contravention of law.

No question other than the one herein disposed of is of such importance or difficulty as to require notice at our hands, and we adjudge that as the Supreme Court of Alabama did not by its final order deny any right secured to the plaintiff in error by the Constitution or laws of the United States, its judgment must be affirmed.

It is so ordered.

In re MARY HATCH RIGGS.

APPLICATION AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS OF CLARENCE B. RIGGS, DECEASED, IN BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, FOR A WRIT OF MANDAMUS AGAINST THE HONORABLES GEORGE C. HOLT AND CHARLES M. HOUGH, JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, AND AGAINST THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 11, Original. Argued April 12, 1909.—Decided May 17, 1909.

Mandamus is not a proper substitute for a writ of error.

Where the bankruptcy court in adjudicating a corporation a bankrupt is called upon to decide, and does decide, a question of fact, or of mixed law and fact, that adjudication cannot be reviewed by proceedings in mandamus. *Re Pollitz*, 206 U. S. 323; *Re Winn*, 213 U. S. 458.

Where the evidence sustaining an application for an adjudication in bankruptcy is not disclosed this court will not assume that it was not sufficient.

Mandamus to the bankruptcy court to dismiss proceedings in bankruptcy against a corporation because the petition failed to show that the principal business of the bankrupt was trading, printing, publishing, mining, manufacturing or a mercantile pursuit, refused.

THE facts are stated in the opinion.

Mr. Benjamin S. Catchings for petitioner:

The District Court is without jurisdiction over the Tunnel Company. That company was not a corporation principally engaged in trading, printing, publishing, mining, manufacturing or a mercantile pursuit, and this was apparent upon the face of the petition in bankruptcy.

The statute is strictly construed and jurisdiction thereunder is derived from the statute only. *New York* v. *New Jersey Ice Lines*, 147 Fed. Rep. 214.

The classes of corporations enumerated in § 46 as subject to the act, are to be strictly construed and include only corporations clearly within the enumeration. *Chicago Joplin Lead & Zinc Co.*, 104 Fed. Rep. 67; *Butt* v. *C. F. McNichol Const. Co.*, 140 Fed. Rep. 840; Hughes on Fed. Pro., p. 86. Building companies and contracting companies are not within § 4*b* of the statute, and the filing of such a petition did not bring the Tunnel Company within the limited jurisdiction of the District Court, and all action thereon was void. *In re Kingston Realty Co.*, 160 Fed. Rep. 445; *Haul & Kaul Co.* v. *Friday*, 3d Circuit Court of Appeals, Dec. 27, 1907; *In re Mannering* v. *Evans*, 156 Fed. Rep. 109; *In re Elmira Steel Co.*, 109 Fed. Rep. 456.

Prior to the adjudication, the record affirmatively showed that the court was without jurisdiction, and the adjudication and all proceedings thereon were void. *In re Hill Co.*, 148 Fed. Rep. 832; *In re Portland Cement Co.*, 156 Fed. Rep. 83, 85; Remington on Bankruptcy, pp. 51, 84.

If the District Court has jurisdiction the bankruptcy act is unconstitutional in that it deprives the unliquidated tort creditor of property without due process of law.

Under § 63*a* judgments arising *ex delicto* obtained prior to the adjudication in bankruptcy are provable in bankruptcy.

In New York tort creditors having unliquidated claims may attach the property of a corporation. Code of Civ. Pro., § 635. The liability to the tort claimant accrues upon the injury, not upon its determination. Such claims, though not reduced to judgment, are a class of property, especially in death cases, as is that of complainant Riggs. In death by wrongful act the statute prescribes how such property is to be distributed when recovered. In this case the entire property of the Tunnel Company was seized in bankruptcy without notice to tort creditors, an adjudication was made within one week in a summary

manner and the tort creditors are held to have no standing in bankruptcy and are prohibited from asserting any rights or claim to the property in the possession of a "Court of Equity." Such practices, if proper under the statute, do not amount to due process of law and the act is unconstitutional. *Mason* v. *Eldred*, 6 Wall. 237; *In re New York Tunnel Co.*, 166 Fed. Rep. 284.

Complainant is without relief other than by this petition, and this court has jurisdiction thereof.

The complainant has not been guilty of laches and has exhausted every possible remedy without relief. This proceeding is justified by the practice of this court. *Ex parte Bradley*, 7 Wall. 364; *Virginia* v. *Rives*, 100 U. S. 313; *Virginia* v. *Paul*, 148 U. S. 107; *Kentucky* v. *Powers*, 201 U. S. 1; *Ex parte Wisner*, 203 U. S. 449; Pomeroy's Principles of Equity, § 109.

Mr. Charles K. Beekman for respondents:

Mandamus will not lie where its purpose is to perform the office of appeal or writ of error, even if no appeal or writ of error is allowed by law. *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372; *In re Pollitz*, 206 U. S. 323; *Ex parte Newman*, 14 Wall 152; *Ex parte Nebraska*, 209 U. S. 436; *In re Key*, 189 U. S. 84.

An adjudication of bankruptcy cannot be attacked collaterally, and petitioner is not entitled to have the adjudication set aside. *Chapman* v. *Brewer*, 114 U. S. 158 at 169; *Edelstein* v. *United States*, 149 Fed. Rep. 636; *In re American Brewing Co.*, 112 Fed. Rep. 752; *In re Worsham*, 142 Fed. Rep. 121; *In re Columbia Real Estate Co.*, 101 Fed. Rep. 965; *In re First National Bank*, 152 Fed. Rep. 70. See also *Evers* v. *Watson*, 156 U. S. 527, 533; *In re Penn.*, 4 Benedict, 99; *Riverdale Mills* v. *Manufacturing Co.*, 198 U. S. 188; *Des Moines Nav. Co.* v. *Iowa H. Co.*, 123 U. S. 552, 558; *Skillern's Ex.* v. *May's Ex.*, 6 Cranch, 267; approved in *Evers* v. *Watson*, 156 U. S. 527, 533; and in *Riverdale Mills* v. *Manufacturing Co.*, 198 U. S. 188, 197; *John Hancock Ins. Co.* v. *Manning*, 7 Fed. Rep. 299.

Allowing this writ would be equivalent to directing the District Court to reverse its own ruling, and also that of the Circuit Court of Appeals, and, in effect, to grant a mandamus to compel a court and the judges thereof to decide a matter in a particular way. Mandamus will not lie for such purpose. *In re Rice*, 155 U. S. 396; *In re Morrison*, 147 U. S. 14; *In re Pollitz*, 206 U. S. 323; *In re Burdett*, 127 U. S. 771.

Original jurisdiction having been acquired by the District Court, mandamus will not lie.

Only parties to the bankruptcy proceedings, such as creditors or the alleged bankrupt, can take advantage of the defects in pleadings, and then only by prompt and proper application. § 18. The petitioner is not even a creditor within the meaning of the bankruptcy act. *In Matter of N. Y. Tunnel Co.*, 159 Fed. Rep. 688; *In re Columbia Real Estate Co.*, 112 Fed. Rep. 643. See also *In re Altonwood Park*, 160 Fed. Rep. 448; *National Bank* v. *Klug*, 186 U. S. 202; *In re Urban & Title Co.*, 132 Fed. Rep. 140; *In re Worsham*, 142 Fed. Rep. 121; *In re Mason*, 99 Fed. Rep. 256; *Roche* v. *Fox*, Fed. Cas., No. 11,974; *S. C.*, 16 N. B. R. 461; *In re Plymouth Cordage Co.*, 135 Fed. Rep. 1000; *In re Brett*, 130 Fed. Rep. 981; *Loeser* v. *Savings Bank & Trust Co.*, 163 Fed. Rep. 212; *Re First Nat. Bank*, 152 Fed. Rep. 64; *Re Columbia Real Estate Co.*, 4 Am. B. R. 411.

The petitioner's application for leave to intervene and plead or to set aside the adjudication was addressed to the discretion of the court, and the exercise of this discretion will not be disturbed by mandamus. *Ex parte Taylor*, 14 How. 3; *In re Haberman Mfg. Co.*, 147 U. S. 525; *Ex parte Railway Co.*, 101 U. S. 711 and cases there cited.

Mr. Justice BREWER delivered the opinion of the court.

This is an application by the petitioner for mandamus against Judges Holt and Hough of the District Court of the United States for the Southern District of New York and the

District Court of that district, commanding them and each of them to dismiss all proceedings in bankruptcy against the New York Tunnel Company, or, in the alternative, to reopen the adjudication in bankruptcy and allow the petitioner or any party in interest to appear and be heard in opposition to the petition and adjudication thereof; or, in still further alternative, forbidding them from taking any further proceedings in the matter of the tunnel company, its property, assets and effects.

The facts, briefly stated, are that the tunnel company was engaged in constructing a tunnel from New York to Brooklyn, to be used for the purpose of a railroad between the boroughs of Manhattan and Brooklyn. On May 23, 1907, certain creditors of the tunnel company filed a petition in bankruptcy in the District Court of the Southern District of New York, upon which petition, on May 29, 1907, Judge Holt entered an order adjudicating it a bankrupt, and appointing a receiver. By direction of the bankruptcy court the receiver proceeded with the construction of the tunnel, and successfully completed the work. At the time of the petition in bankruptcy this applicant had an action pending in the State court to recover damages on account of the death of her husband, resulting, as charged, from the negligence of the tunnel company. On May 31, 1907, Judge Holt issued an order to show cause why that action should not be restrained, and proof of the claim be made before a special master. An order of restraint was granted upon this application, which was afterwards set aside by the Court of Appeals, and the applicant, on May 25, 1908, reduced her claim to judgment.

It is contended by the applicant that although the petition in bankruptcy alleged that the tunnel company was "engaged in the business of building and contracting," it failed to show that the principal business of the company was "trading, printing, publishing, mining, manufacturing or a mercantile pursuit," that being the language of the bankruptcy act of 1898, as amended.

We have recently given full consideration to the circumstances under which mandamus will be issued by this court to restrain the action of inferior tribunals. *In re Winn*, 213 U. S. 458. Hence we deem it unnecessary to go into other details of the proceedings in the bankruptcy or the state courts, nor to consider the many questions fully and elaborately presented in briefs and argued by counsel. Obviously, this application is largely in the nature of a writ of error to review the action of the District Court of the Southern District of New York and its judges, and a writ of mandamus is no proper substitute for a writ of error.

The allegation in the petition in bankruptcy is general in its terms that the tunnel company is engaged in the business of building and contracting, but it fails to disclose the particular kind of work for which it is contracting or which it is engaged in building. It might be inferred from the work which it was shown it was doing in this particular case, as well as from its name, that its principal business was that of contracting for the construction of tunnels, but that would be only an inference and not conclusive. Its principal business may have been that of manufacturing and contracting for such manufacturing, and this particular work only a small part of that which it was generally engaged in. What evidence was presented to the District Court to sustain the application for an adjudication in bankruptcy is not disclosed. We may not assume that it was insufficient or that it failed to make certain or probable that the principal business of the company was that of manufacturing and contracting for such manufacturing. We do not deem it necessary to decide the question which is argued by counsel, whether the adjudication of the bankruptcy court can be challenged collaterally or whether indeed this is only a collateral attack. *Manson* v. *Williams*, 213 U. S. 453. We rest our conclusion upon the proposition that the District Court in adjudicating the tunnel company a bankrupt was called upon to decide, and did decide, a question of fact or of mixed law and fact, and that such adjudication cannot be re-

viewed by proceedings in mandamus. *In re Pollitz*, 206 U. S. 323, 331; *In re Winn*, 213 U. S. 458.

The rule is discharged and the writ of mandamus denied.

WHITCOMB *v.* WHITE.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 185. Argued April 28, 29, 1909.—Decided May 17, 1909.

Where a decision of the Land Department rests on the priority of equitable rights of a contestant it is conclusive upon the courts so far as it involves questions of fact; and on a mixed question of law and fact it is conclusive unless the court can so separate the question that the mistake of law is clearly apparent.

Where the controversy in the Land Department involves the question of whether the first occupant occupied the land for homestead or town-site entry, and there is evidence to support the Secretary's finding, that finding is conclusive on the courts even though the evidence be conflicting.

13 Idaho, 490, affirmed.

THIS was an action brought by John E. White and Roberta B. White, his wife, in the District Court of the First Judicial District of the State of Idaho, in and for the county of Kootenai, to recover the possession of the "northwest quarter of the southwest quarter and lots five (5), six (6) and seven (7), of section two (2), township fifty-five (55) north of range two (2), east Boise meridian."

The defendants' answer was in the nature of a cross bill in equity, admitting that the legal title to the premises was in the plaintiffs, and seeking to charge them as holders of that title in trust for the use and benefit of the defendants. A trial before the court without a jury resulted in a judgment for the plaintiffs for the recovery of possession and damages

for the detention. On appeal to the Supreme Court of the State the award of damages was set aside but the judgment for the recovery of possession was affirmed. Thereupon the case was brought here on error.

The plaintiffs' title was a patent from the United States to plaintiff John E. White based upon a homestead entry. The defendants claimed to have been occupants of the premises as a townsite, and that therefore the land was not subject to entry as a homestead. The application for the homestead entry was formally made at the land office a few hours before that of the probate judge of the county, acting under the statutes as trustee for the occupants of the townsite. A contest was had in the local land office, which resulted in a finding in favor of the plaintiff John E. White. This decision was sustained by the Commissioner of the General Land Office and affirmed by the Secretary of the Interior.

Mr. Albert Allen, for plaintiffs in error.

Mr. George H. Lamar, with whom *Mr. H. M. Stephens* was on the brief, for defendants in error.

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

The decision of the Land Department was not rested solely upon the fact that White's formal application was filed a few hours before that of the trustee for the occupants of the townsite, but rather chiefly upon the priority of the former's equitable rights. So far as such decision involves questions of fact it is conclusive upon the courts. *Johnson* v. *Towsley,* 13 Wall. 72, 86; *Shepley* v. *Cowan,* 91 U. S. 330, 340; *Marquez* v. *Frisbie,* 101 U. S. 473, 476; *Quinby* v. *Conlan,* 104 U. S. 420, 425, 426; *Burfenning* v. *C., St. P., M. & O. Ry.,* 163 U. S. 321, 323; *De Cambra* v. *Rogers,* 189 U. S. 119, 120.

And this rule is applied in cases where there is a mixed

question of law and fact, unless the court is able to so separate the question as to see clearly what and where the mistake of law is. As said by Mr. Justice Miller in *Marquez* v. *Frisbie*, *supra*, p. 476:

"This means, and it is, a sound principle, that where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive." *Quinby* v. *Conlan*, *supra*, 426.

Further, the thirty-eighth and thirty-ninth findings of the trial court, which were not disturbed by the Supreme Court in its opinion, were:

"38. That the officers of the Interior Department did not exclude any testimony, and there was in said Land Office and said department a full, fair and complete hearing.

"39. That the officers of said Interior Department, of said Land Office, or any or either of them, were not guilty of any fraud or any unlawful conduct."

Clearly the findings of the Land Department cannot be disregarded, especially since they are reinforced by the judgment of the State courts. This court ought not to reverse such judgment except upon the clearest and most convincing evidence of mistake or injustice.

These are among the matters shown by the testimony and upon which the decisions of the Land Department and the State court were based: While the entire quarter-section was public land, and before settlement by any individual, the Northern Pacific constructed its road, crossing Clark's Fork of the Columbia River near the tract. At that time the public surveys had not been extended over this region; indeed, were not so extended until 1893, and the approved plat of the township was not filed in the local land office until November 27, 1895, the day the formal applications of these parties were made. Between 1884 and 1890 some four or five persons settled on the tract, who, with others, at the time of the application for the townsite entry, in 1895, claimed to be then oc-

cupying it for the purposes of trade and business, and to have established a town, which they called Clark's Fork. The right of way of the Northern Pacific was 400 feet in width (13 Stat. 365), and, at first, the houses were upon this right of way, the settlers believing that it was only 200 feet in width. The original occupants were not seeking to establish a town, but to enter the land as a homestead. The first attempt to obtain title to the tract in controversy under the town-site laws was made on October 29, 1895, when a petition signed by ten persons was filed with the probate judge of the county, asking him to secure the tract as a town site. 28 L. D. 412, 415. In 1890 the plaintiff White was the station agent of the Northern Pacific at that place, and in 1891 settled upon the land, making his home outside the right of way, and intending to enter it as a homestead. There was talk between him and some of the other occupants in reference to an apportionment of the quarter-section between them, but no agreement was reached. In other words, the occupation at first was with no thought of a town, but by parties contemplating securing homes under the homestead law. After it had been ascertained that the railroad right of way was 400 feet in width, and in 1893, the settlers were notified by the railroad company of its title. Thereupon some leased from the company while others moved their houses off the company's ground. Under those circumstances questions of fact arose as to the first occupant, and for what purpose he occupied it. In deciding the contest the Secretary of the Interior held (28 L. D. 412, 421):

"In the case at bar, at the time of the survey in the field, White was the only settler on this subdivision except Whitcomb, the other parties at that time being located on the right of way, and as to them White's right, as a prior settler, attached to the entire tract from such time. Any right Whitcomb may have had as a homestead settler by reason of his settlement before survey in the field is lost by his failure to assert the same under the homestead law.

"The evidence shows that after the survey in the field

White made claim to the entire tract and exercised rights of ownership over the same. It was necessary for him to adjust his settlement claim to the lines of the public survey, and in so doing to include the legal subdivision on which his improvements were placed."

Notwithstanding some conflict in the testimony, there was abundant to support the findings of the Secretary of the Interior, and, as heretofore stated, such findings of facts are to be regarded as conclusive in any controversy in the courts.

There was no error in the decision of the Supreme Court of Idaho, and its judgment is

Affirmed.

SMITHSONIAN INSTITUTION *v.* ST. JOHN, EXECUTOR OF WALLACE C. ANDREWS, DECEASED.

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

No. 613. Argued April 5, 6, 1909.—Decided May 17, 1909.

Quære: Where a petition to the highest court of the State for rehearing asserts that a Federal question had been set up in the brief and arguments is simply denied with the statement that no Federal question had been raised in that court, whether this court has jurisdiction to review the judgment on writ of error.

This court cannot decline jurisdiction when it is plain that the fair result of a decision of the state court is to deny a constitutional right. *Rogers* v. *Alabama*, 192 U. S. 226.

It is as obligatory upon the courts of a State to give the same full force and effect to the constitution of another State as it must give to its judicial proceedings. *Chicago & Alton Railroad* v. *Wiggins Ferry Co.*, 119 U. S. 615.

The mere construction, even if erroneous, by a state court of the statute or, as in this case, of a provision of the constitution of another State does not deny to it the full faith and credit demanded by the Federal Constitution.

The decision of the Court of Appeals of New York that a statute of Ohio authorizing the formation of corporations general in terms, but applicable to a special situation, did not contravene the prohibition of the constitution of Ohio against the general assembly passing any special act conferring corporate powers, and that a corporation organized under such a statute could take as legatee, *held*, not to question the validity of the constitutional provision and, even if erroneous, such decision did not repudiate the obligations of the full faith and credit clause of the Federal Constitution and is not reviewable by this court under § 709, Rev. Stat.[1]

Writ of error to review 191 N. Y. 254, 192 N. Y. 382, 583, dismissed.

THIS is in effect a controversy between the Smithsonian Institution of Washington, D. C., and the Andrews Institute for Girls, a corporation of the State of Ohio, concerning a will made by Wallace C. Andrews, a resident of the city, county and State of New York, who died in that city on April 7, 1899. Both Mr. Andrews and his wife perished on that day in a fire in their dwelling house in New York city. Whether husband or wife died first, is not known. She was twelve years younger than he. They had no children. The will was executed on November 12, 1891. After some special gifts, which need not be noticed, the will provides:

"Fourth: Upon the death of my said wife, I devise and bequeath to the corporation hereinafter directed to be formed, all the excess and residue of my estate over the sum of five hundred thousand dollars specified in the third paragraph hereof.

"Fifth: I direct my executor and executrix as soon as practicable after my decease and during the lives of my said wife and her said brother or the life of the longest liver of them, to

[1] In this case the New York court held: Whether an act general in form is a mere device to evade a wholesome constitutional provision [against special acts conferring corporate powers] is largely dependent upon the special circumstances. If the act relates to persons and things as a class, and is neither local nor temporary, the mere fact that its practical effect is special and private does not necessarily prove that it violates constitutional provisions against special legislation.

procure under the laws of the State of Ohio, an incorporation to be formed with proper powers, for the purpose of establishing an institution on the farm known as the Williams Farm, formerly owned by me and now owned by my wife, fronting on Erie street, in the town of Willoughby, Lake county, Ohio, or if said farm be for any cause not available, then on other suitable premises in the said town of Willoughby, for the free education of girls and for their support in proper cases during education, with a special view toward rendering them self-supporting.

"Said institution shall contain, among others, a Sewing Department, Cooking Department, Designing Department and Departments of Phonography and Typewriting and other useful work that would afford the pupils employment in life, including such new discoveries and inventions as may be made from time to time tending to enlarge the opportunities for useful and honorable employment for women, and such as will aid them in obtaining honorable and independent positions in life. Such school to be open only to girls between the ages of ten and sixteen, both inclusive.

"Not exceeding one-tenth of the sum devoted to the said institution by the fourth paragraph hereof may be used for the erection of suitable buildings therefor on the said farm, or in the contingency above specified, for the purchase of suitable premises in said town and the erection of such buildings thereon, and the income of the remaining nine-tenths shall be devoted to the support and maintenance of said institution.

"If, when the said sum shall be received by the said corporation, the one-tenth thereof shall not, in the judgment of the directors, be sufficient for such erection or such purchase and erection as the case may be, the whole sum may, in their discretion, be allowed to accumulate until the one-tenth thereof with its accumulation shall be so sufficient, when such one-tenth may be used therefor, while the income of the remaining nine-tenths of said sum and accumulations shall be devoted to the support and maintenance of said institution.

"The charter of the said corporation shall also provide, if and so far as may be consistent with law and practicable, for the management of the said corporation by a board of five directors, to consist of the Governor for the time being of the State of Ohio, the Member of Congress for the time being for the Congressional district embracing said Town of Willoughby, the Treasurer for the time being of said County of Lake, the Mayor for the time being of Willoughby, and the said Gamaliel C. St. John, and for the choice of a resident of Willoughby by the said Governor as successor to the said St. John as often as the fifth place shall become or be vacant.

"Sixth: If my said wife shall die before me, then the dispositions provided for in the third and fourth paragraphs hereof shall take effect upon my death.

"Seventh: I direct my said executor and executrix as soon as they may deem advisable, but within two years after my decease, to sell all my real estate and invest the proceeds in interest paying securities, and as to all my estate I give them and my trustees power to invest and re-invest the same or any part thereof, having regard both to income and safety.

"Eighth: In case my intention with respect to the said institution for girls shall because of illegality fail, or become impossible of realization, I then devise and bequeath the sum intended for it to the Smithsonian Institution at Washington, District of Columbia, to be devoted to the purposes for which it was established.

"Ninth: I appoint my said wife executrix and my said brother-in-law executor of this my will, and neither as such nor as trustees shall they be required to give security. All the powers herein granted to them may be exercised by the survivor of them and unless limited to their lives, by their successor or successors in the administration of my estate."

Mrs. Andrews, dying at the same time her husband did, his brother-in-law, Mr. St. John, duly qualified as executor and trustee under the will. Thereafter he commenced this suit in the Supreme Court of New York County, seeking a con-

struction of the will and a determination of the rights of the Andrews Institute for Girls, the Smithsonian Institution and the heirs at law and next of kin of the deceased. The Andrews Institute for Girls, the Smithsonian Institution, Chief Justice Melville W. Fuller as Chancellor thereof, the Attorney-General of the State of New York, and the heirs and next of kin of the deceased, were made parties defendant. At a hearing in a special term of the Supreme Court of the county of New York it was held that "the defendant, the Andrews Institute for Girls, is entitled to the residuary estate of the said Wallace C. Andrews, deceased, together with the income thereof which has accrued since the death of said deceased, after paying the expenses of administration," and also that the defendant, the Smithsonian Institution, has no interest in the estate of the said Wallace C. Andrews, deceased. This decision was sustained by the Appellate Division of the First Department, and thereafter with a slight modification by the Court of Appeals of the State, which remitted the record of the Supreme Court of New York city, where the final judgment was entered. Thereupon that judgment was brought here on a writ of error by the Smithsonian Institution and its Chancellor.

The defendants filed a motion to dismiss, which was postponed until the final hearing and, the case is now before us on such final hearing and motion to dismiss.

Mr. Frank W. Hackett and *Mr. Edmund Wetmore* for plaintiffs in error:

The Federal question herein was properly and seasonably raised.

That a state court holds that the Federal question was not raised is not conclusive. This court will look into the record and judge for itself what was the fact. It may find that the state court has ignored a claim of constitutional right. Such action is the equivalent of denying the Federal right. *Des Moines Nav. Co.* v. *Homestead Co.*, 123 U. S. 552; *Chapman* v. *Goodnow*, 123 U. S. 540; *Rogers* v. *Alabama*, 192 U. S. 230.

Our affidavit forming a part of the papers upon which the Court of Appeals deliberated sets forth in detail the circumstances of our claiming the right in our brief as well as upon the oral argument. There can be no question that the character of the constitutional right asserted was brought to the knowledge of the court and it is obvious that the court denied it. Although the court says that no Federal question was raised, it is apparent that this can be nothing more than the expression of a view entertained by the court of the facts as they had occurred. It is enough to say that even had the court failed to perceive the true character of our claim at the hearing, it was later fully explained in our affidavit, so that there would appear to be no justification for the conclusion announced by the court as to the fact of our raising a Federal question.

This court must judge for itself of the true nature and effect of the order relied upon. *Great West. Tel. Co.* v. *Purdy*, 162 U. S. 335.

A right may be specially set up and claimed, though not in terms stated to be a right claimed under the Constitution. *Tilt* v. *Kelsey*, 207 U. S. 51.

Where the Federal question is raised for the first time in the Supreme Court of a State and that court takes no notice of it, in its opinion, if this court sees that the question was in fact raised, it will take jurisdiction. *Arrowsmith* v. *Harmoning*, 118 U. S. 194.

The settled practice of this court is to look into the record in order to ascertain whether in fact there was presented to the State court a claim of a constitutional right. *McCullough* v. *Virginia*, 172 U. S. 117.

The benefit of claiming the protection of the Constitution is not dependent upon an adherence to technical form. It is sufficient if it appear from the record that the right was especially set up or claimed in such a manner as to bring it to the attention of the court. *Chicago & Burlington R. R.* v. *Chicago*, 166 U. S. 231; *Mo., Kan. &c. Ry. Co.* v. *Elliott*, 184 U. S. 534.

The New York Court of Appeals denied a right claimed by

the Smithsonian Institution under the Constitution of the United States. It gave no faith and credit to the prohibition in the Ohio constitution against passing special acts conferring corporate powers.

Had the Court of Appeals heeded that prohibition it must necessarily have found that the gift to the Andrews Institute had failed for illegality and by the operation of the alternative bequest, went to the Smithsonian Institution.

That court sustained the constitutionality of the act of 1902 against the objection of plaintiffs in error that it fixed an arbitrary standard in order to suit this Andrews will. The Federal question was raised upon a further and different point as follows:

The testator required certain restrictions to go into the charter. Plaintiffs in error contended that the Andrews Institute as now incorporated is not the incorporation the testator intended, because these restrictions are not in the charter. Anticipating a holding that the effect of copying the will into the articles was to give efficacy to such restrictions, plaintiffs in error contended that if the court should so hold it would convert the act into a special act conferring corporate powers. The court did so hold without paying attention to the Ohio constitution and thus denied full faith and credit to that constitution.

Mr. James W. Hawes, Mr. Virgil P. Kline and *Mr. Harold Nathan* for defendants in error. *Mr. Hawes* for defendant in error St. John:

Where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has also been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this Court will not review the judgment. *Jenkins* v. *Loewenthal*, 110 U. S. 222; *Crescent City Co.* v. *Butcher's Union*, 120 U. S. 141, 156, 157; *Eustis* v. *Bolles*, 150 U. S. 361;

Hammond v. *Conn. Life Ins. Co.*, 150 U. S. 633; *Mo. Pac. Ry. Co.* v. *Fitzgerald*, 160 U. S. 556; *Harrison* v. *Morton*, 171 U. S. 38; *Leathe* v. *Thomas*, 207 U. S. 93; *Arkansas So. R. R. Co.* v. *German Bank*, 207 U. S. 270; *Vandalia R. R. Co.* v. *South Bend*, 207 U. S. 359; *Elder* v. *Wood*, 208 U. S. 226, 233.

Assuming that a Federal question was involved in this case, no Federal question was raised by plaintiffs in error prior to their motion for a reargument; and as the Federal question was not considered and acted upon by the Court of Appeals upon that motion, the raising of the Federal question came too late. *McMillan* v. *Ferrum Mining Co.*, 197 U. S. 343; *Disconto Gesellschaft* v. *Umbreit*, 208 U. S. 570; *Paraiso* v. *United States*, 207 U. S. 368; *Harding* v. *Illinois*, 196 U. S. 78, 84.

No Federal question is involved in this case.

The courts of New York nowhere denied or questioned the validity of the constitutional provision of Ohio, but recognized its existence and force in their opinions, admitted it in evidence and expressly found it as a matter of fact.

It is only when the power to enact a statute, as it is by its terms or is made to read by construction, is fairly open to denial and denied, that the validity of such statute is drawn in question. *Balt. & Pot. R. R. Co.* v. *Hopkins*, 130 U. S. 210, 224; *United States* v. *Lynch*, 137 U. S., 280, 285.

When in the courts of a State the validity of a statute of another State is not drawn in question, but only its construction, no Federal question arises. *Allen* v. *Alleghany Co.*, 196 U. S. 458; *Glenn* v. *Garth*, 147 U. S. 360. See also: *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491; *Hamblin* v. *Western Land Co.*, 147 U. S. 531; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336; *Sawyer* v. *Piper*, 189 U. S. 154; *Lloyd* v. *Matthews*, 155 U. S. 222, 228.

In addition to the above, the following separate briefs were filed herein: By *Mr. Harold Nathan* in behalf of defendants in error Norman C. Andrews *et al.;* by *Mr. Henry M. Earle* in behalf of defendant in error Edith A. Logan; by *Mr. Virgil P.*

Kline, Mr. Henry Wollman and *Mr. Sheldon H. Tolles* on behalf of the Andrews Institute for Girls; and by *Mr. William S. Jackson,* Attorney-General of the State of New York. *Mr. Edward R. O'Malley,* who succeeded *Mr. Jackson* as Attorney-General of the State of New York, also filed a brief herein.

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

It is difficult to spell out from the record in this case the decision of any question arising under the Constitution and laws of the United States. Neither in the pleadings nor in the opinions is there a direct reference to any special provision of the Federal Constitution. It is true that after the decision by the Court of Appeals an affidavit was filed by one of the counsel for plaintiffs in error in support of a petition for a rehearing, stating that in the brief, as well as upon the oral argument in that court, a Federal question (describing it) had been presented and discussed, which petition was denied by the Court of Appeals in these words:

"Ordered, that the said motion be and the same hereby is denied, with ten dollars costs, no Federal question having been raised in this court."

It is unnecessary to determine whether this of itself is sufficient to give jurisdiction to this court. The language of the Court of Appeals may be construed as denying that any such matter was brought to its attention as stated in the affidavit, or as holding that it presented no Federal question. *Mallett* v. *North Carolina,* 181 U. S. 589; *M., K. & T. Ry. Co.* v. *Elliott,* 184 U. S. 530; *Leigh* v. *Green,* 193 U. S. 79; *McKay* v. *Kalyton,* 204 U. S. 458.

Counsel further contend that there was necessarily involved in the decision of the case the determination of a question arising under the Constitution and laws of the United States, and that hence this court has jurisdiction of this writ of error, even if the question was not formally referred to by counsel

or the state courts. *Chapman* v. *Goodnow*, 123 U. S. 540–548; *Navigation Company* v. *Homestead Company*, 123 U. S. 552; *McCullough* v. *Virginia*, 172 U. S. 102, 117; *M., K. & T. Ry. Co.* v. *Elliott*, 184 U. S. 530, 534; *Rogers* v. *Alabama*, 192 U. S. 226, 230, in which last case it is said:

"It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights. . . . There can be no doubt that if full faith and credit were denied to a judgment rendered in another State upon a suggestion of want of jurisdiction, without evidence to warrant the finding, this court would enforce the constitutional requirement. See *German Savings Society* v. *Dormitzer*, *ante*, p. 125."

The question upon which counsel rely arises upon Article IV, § 1, of the Federal Constitution, which reads:

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

It is not pretended that any judgment of the State of Ohio was disregarded by the courts of New York, but it is contended that full force and effect was not given to the constitution of the State of Ohio. This duty is as obligatory as the similar duty in respect to the judicial proceedings of that State. *Town of South Ottawa* v. *Perkins*, 94 U. S. 260, 268; *Chicago & Alton Railroad Company* v. *Wiggins Ferry Company*, 119 U. S. 615, 622, in which Mr. Chief Justice Waite said:

"Without doubt the constitutional requirement, art. IV, sec. 1, that 'full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State,' implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home. This is clearly the logical result of the principles announced as early as 1813 in *Mills*

v. *Duryee*, 7 Cranch, 481, and steadily adhered to ever since." *Hancock National Bank* v. *Farnum*, 176 U. S. 640, 642.

On the other hand, it is settled that the mere construction by a state court of the statute of another State, without questioning its validity, does not deny to it the full faith and credit demanded by the constitutional provision. *Glenn* v. *Garth*, 147 U. S. 360; *Lloyd* v. *Matthews*, 155 U. S. 222; *Banholzer* v. *New York Life Insurance Company*, 178 U. S. 402; *Johnson* v. *New York Life Insurance Company*, 187 U. S. 491; *Finney* v. *Guy*, 189 U. S. 335; *Allen* v. *Alleghany Company*, 196 U. S. 458.

In the light of these decisions we pass to consider the particular question presented. Sections 1 and 2 of article 13 of the Ohio constitution read:

"SEC. 1. The general assembly shall pass no special act conferring corporate powers.

"SEC. 2. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

By § 3235, 2 Bates's Ann. Ohio Statutes (6th ed.), p. 1836, it is provided: "Corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves, except for carrying on professional business;" and immediately following this section are those naming the conditions and methods of incorporation. After the death of the testator, and on March 19, 1902, the general assembly of the State of Ohio passed an act (Laws 1902, p. 61), the first section of which is as follows:

"SEC. 1. Whenever, by the last will and testament of any person which has heretofore been, or shall hereafter be, duly admitted to probate in this State or elsewhere, any decedent has devised or bequeathed, or may devise or bequeath, his or her property, or any portion thereof, for charitable uses within this State, or for the establishment and maintenance of any industrial or educational school or institution to be located at any place within this State; and whenever, in any

such will and testament it has been, or may be, provided that the executor or executors thereof shall organize a corporation under the laws of this State for the purpose of receiving the property so devised or bequeathed, and carrying out the charitable purposes in such will expressed, or establishing and maintaining the institution or school therein provided for, and such will further provides for the management of such corporation by a board of trustees or directors, consisting, in part, of officials of this State, of the county in which such charities are to be administered or such institution or school located, the officials of any municipal incorporation in said county, and the member of Congress for the district of which said county forms a part, or any of such officials, and names any other person or persons to be associated with said officials or any of them, and provides for the appointment of a successor or successors to the person or persons so appointed to act with such officials in any manner specified in said will, such executor or executors, or his or their successors in office, and the persons hereinafter named, may constitute themselves a body corporate, with the general powers of benevolent incorporations."

The second section requires that a copy of the will or testament, for the carrying out of the provisions of which the corporation is organized, shall be set forth in the articles of incorporation. Thereafter the Andrews Institute for Girls was incorporated, containing, as required by § 2, the will of the testator. Now it is contended by counsel for the plaintiffs in error that this act was a special act conferring corporate powers, and that therefore it and the incorporation made under it was in conflict with the constitution of Ohio. It is not suggested that there has been any decision of the courts of Ohio in reference to the validity of the act or subsequent incorporation of the Andrews Institute, but it is insisted that it is so obvious that the act is a special act conferring corporate powers, inasmuch as the terms of the will of an individual are the basis of the act and the incorporation that the courts of

New York could not have given force and effect to the prohibitions of the constitution of Ohio. Nevertheless, whether rightly or wrongly, the New York courts held that there was no violation of the constitution of Ohio, the Court of Appeals saying in its opinion:

"At the death of the testator the general statutes of Ohio provided that corporations might be formed for any purpose for which individuals might lawfully associate themselves, except for carrying on professional business. 2 Bates's Ann. Ohio Statutes (6th ed.), p. 1836.

"Subsequent to the death of the testator and in March, 1902, an act was passed by the general assembly of the State of Ohio entitled 'An act to provide for the administration of charitable trusts in certain cases.' If we assume that such act was passed to aid in the incorporation of the Andrews Institute for Girls, it is not necessarily unconstitutional for that reason. It is not an uncommon thing in any State for questions to arise making it desirable or perhaps necessary for further general legislation to enable persons interested to carry out desired and desirable measures. The fact that such further general statute is passed to aid a particular person for the time being does not make the act a special, as distinguished from a general one. Whether an act, general in form, is a mere device to evade a wholesome constitutional provision is largely dependent upon the special circumstances of each case. If the act relates to persons, places and things as a class, and is neither local nor temporary, the mere fact that its practical effect is special and private does not necessarily prove that it violates constitutional provisions against special legislation. *Matter of N. Y. El. R. R. Co.*, 70 N. Y. 327–344; *In the Matter of Church*, 92 N. Y. 1; *Matter of Henneberger*, 155 N. Y. 420, 426; *People* v. *Dunn*, 157 N. Y. 528; *Kittinger* v. *Buffalo Traction Co.*, 160 N. Y. 377; *People ex rel. Clauson* v. *Newburgh & S. Plank Road Co.*, 86 N. Y. 1; *Matter of N. Y. & L. I. Bridge Co.*, 148 N. Y. 540; *Waterloo W. M. Co.* v. *Shanahan*, 128 N. Y. 341; *Ferguson* v. *Ross*, 126 N. Y.

459; *Sun P. & Pub. Association* v. *Mayor &c. of N. Y.*, 152 N. Y. 257.

"The act so passed by the general assembly of the State of Ohio in 1902 would not seem to be in violation of the constitution of that State. *Platt* v. *Craig*, 66 Ohio St. 75; *State ex rel.* v. *Spellmire*, 67 Ohio St. 77; *Gentsch* v. *State of Ohio*, 71 Ohio St. 151; *Cinn. Street R. R. Co.* v. *Horstman*, 72 Ohio St. 93; *State of Ohio* v. *Sherman*, 22 Ohio St. 411.

"Subsequent to the death of the testator, and on the 8th day of May, 1902, 'The Andrews Institute for Girls' was incorporated pursuant to the laws of the State of Ohio 'for the purpose of receiving the property devised and bequeathed in and by the wills of Wallace C. Andrews and Margaret M. St. John Andrews, late of the city and State of New York, to the corporation therein directed to be formed and for the purpose of carrying out the charitable purposes in such wills expressed, and of establishing and maintaining the institution therein provided for.'

"The articles of incorporation include a complete copy of the will of the testator and also of the will and codicil of Margaret M. St. John Andrews. They also provide that the corporation shall be located in the town of Willoughby, Ohio, and name as members of the corporation the persons proposed in the will of said testator, together with two other persons in the State of Ohio, which persons so named constitute the board of directors for the administration and management of the property and trust or other funds of the corporation, and for the control and management of said institution. Said act of the general assembly of the State of Ohio among other things provides: 'The attorney-general of the State of Ohio shall in his official capacity have power to bring proceedings in any court of record and enforce any such devise or bequest whenever he deems such action necessary for the protection and carrying out of the purposes named in said last will and testament without waiting for the organization of such corporation.' "

That there is some foundation for the conclusion reached by the Court of Appeals is obvious from the opinions of the Supreme Court of Ohio, cited in the foregoing quotation. It is unnecessary to hold that there was no error in the ruling of the Court of Appeals. It is enough for the purposes of this case to hold that that court did not question the validity of any provision of the constitution of the State of Ohio, and did not sustain any act or incorporation which it held to be in conflict with such provision. At most, there was simply a matter of error and not a repudiation of the obligations of the Federal Constitution.

We do not see that any provision of the Federal Constitution has been violated, and the writ of error is

Dismissed.

THE CHIEF JUSTICE did not hear the arguments and took no part in the decision of this case.

MERCHANTS NATIONAL BANK OF BALTIMORE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 20. Argued March 12, 15, 1909.—Decided May 17, 1909.

Where two sections of the Revised Statutes when taken together are not free from ambiguity and cannot be harmoniously applied, recourse may be had to legislation prior to the Revised Statutes from which the provisions of those sections were drawn in order to arrive at the correct meaning. *Hamilton* v. *Rathbone*, 175 U. S. 418, and *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, distinguished.

Sections 5214 and 3411, Rev. Stat., cannot be so construed together, and effect given to both, as to leave a national bank liable to the duty imposed by § 5214 and yet entitle it to the exemption provided by § 3411 under the contingency stated therein.

The provisions in § 3411, Rev. Stat., exempting banks from taxation

on circulation, does not relate to national banks but to state banks only.

One of the public policies of the National Bank Act was to secure the public credit and encourage the issue of notes to circulate as currency founded upon United States bonds, and § 3411 will not be construed as intending to exempt those national banks that allowed their circulation to fall below five per cent of their capital from the taxation provided by § 5214 to create a fund to bear the burden common to all national banks for engraving and printing the notes.

A uniform construction ever since its enactment for a long period, in this case over thirty-five years, engenders doubt of a new and different construction.

42 Ct. Cl. 6, affirmed.

THE facts are stated in the opinion.

Mr. James H. Hayden and *Mr. R. E. Lee Marshall*, with whom *Mr. J. Hanson Thomas* was on the brief, for appellant:

The sections of the Revised Statutes drawn in question are without inconsistencies or ambiguities. They must be enforced in accordance with their terms. Resort to the acts of Congress, in which they had their origin, for purposes of interpretation, is not permissible.

The Revised Statutes must be treated as a legislative declaration by Congress of what the statute law of the United States was on December 1, 1873, on the subjects they embrace, and when the meaning of the language employed is plain the court cannot look to the statutes which have been revised to see if Congress erred in that revision. *United States* v. *Bowen*, 100 U. S. 509; *Arthur* v. *Dodge*, 101 U. S. 34; *Victor* v. *Arthur*, 104 U. S. 498; *Myer* v. *Car Co.*, 102 U. S. 1; *Cambria Iron Co.* v. *Washburn*, 118 U. S. 57; Rose's Notes on the U. S. Reports, 860, 861; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 30; *Hamilton* v. *Rathbone*, 175 U. S. 418; *Cheney* v. *State*, 74 N. E. Rep. 892, 893.

The words and context of the Revised Statutes in question are fairly susceptible of but one meaning, namely, that the liability of national banks to taxation under § 5214, is limited

by § 3411. They should be administered accordingly. But, whether taken by themselves or construed in connection with the antecedent legislation, the intention of Congress to extend the exemption prescribed by § 3411 to national bank circulation is equally clear.

It must be presumed that when the Revised Statutes were enacted Congress was apprised, not only of the scope and meaning of the previous law, which it carried into the Revised Statutes, but also of the policy and intent thereof and of the reasons which originally led to the passage of the same. Congress must be presumed, therefore, to have known the reason and theory which had led to the enactment of the five per cent exemption of banking circulation from taxation, the specific conditions which it was designed to meet, and the kind of circulation to which it originally referred, and, further, to have known that mainly, if not entirely, as a result of the previous legislation in question, national bank circulation had superseded state bank circulation and had become the recognized form of currency of the country. With full knowledge of these facts Congress deliberately enacted, under § 3411, the provisions of the previous law, and exempted the outstanding circulation of any bank from taxation when the same was reduced to an amount not exceeding five per cent of its capital, as the percentage of bank notes likely to be lost or destroyed in circulation is at least as great in the case of national banks as of state banks, and theoretically the principle of the exemption is equally as appropriate to the one kind of circulation as to the other.

The construction placed by the court below upon § 3411, is not tenable, for the reason that it would render § 3416 nugatory. The result of such a construction would be an unjust discrimination against the circulation of national banks.

Upon any principle of construction the Court of Claims erred in restricting the general language of § 3411 to the particular case of national banks succeeding state banks by conversion, and rightly construed, § 3411, as it stood in the orig-

inal law, extended to any and all state banks an exemption from taxation upon their circulation when the same was reduced to an amount not exceeding five per cent of the capital, and the exemption aforesaid proceeded upon the assumption that five per cent of outstanding circulation was lost or destroyed.

When, therefore, Congress carried this general principle of tax exemption into the Revised Statutes, and in express terms provided that the benefits of the principle should be extended to national banks, it thereby intended to apply to the circulation of national banks the same principle which it had theretofore applied to the circulation of state banks. Any other construction would involve a direct discrimination in that regard against national banks.

Mr. Assistant Attorney General John Q. Thompson and *Mr. Philip M. Ashford* for The United States:

It is the primary duty and object of the court to ascertain the intention and purpose of the legislative body in the enactment of any legislation which may come before the court for construction and interpretation. If such intention and purpose are clearly set forth in the act, then the statute is said to interpret itself, and needs no interpretation or construction by the court. But if the intention of Congress is not clearly expressed, and doubt exists as to the construction intended to be given by the law-making power, then it becomes the province of the court to ascertain the objects and purposes which the legislation was intended to subserve. *Smythe* v. *Fiske*, 23 Wall. 374, 380; *Hamilton* v. *Rathbone*, 175 U. S. 419, 421.

Therefore, it is the province of the court, if necessary, to examine the title of the chapter containing the sections under consideration, and resort may be had to the history of the original act to the extent that the court may refer to the journals of the legislative body for the purpose of ascertaining the circumstances and conditions which gave rise to the enactment. And this may be done where the ambiguity refers, not merely to

the meaning of particular words, but to such ambiguity or doubtful meaning as may arise in respect to the general scope and meaning of the statute when all of its provisions are considered. Endlich on Interpretation of Statutes, § 86, p. 115; *United States* v. *Moore*, 95 U. S. 760; *United States* v. *Union Pacific R. R.*, 91 U. S. 72; *Kohlsaat* v. *Murphy*, 96 U. S. 153, 160; *Platt* v. *Union Pacific R. R.*, 99 U. S. 48, 63, 64; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550; *Hamilton* v. *Rathbone*, 175 U. S. 414, 419.

Considering the object and purposes for which § 5214 was originally enacted, it is apparent that Congress has made no exceptions to the application of said section, or attempted by any legislation to exempt any national bank or association from paying the tax therein provided.

A review of the legislation of Congress with respect to state and national bank circulations, and such cases as *Twin City* v. *Nebeker*, 167 U. S. 196, 203; *Veazie Bank* v. *Fenno*, 8 Wall. 533, 549; *National Bank* v. *United States*, 101 U. S. 1, 6, clearly show that it was the legislative intent in the enactment of §§ 6 and 14 of the act of June 30, 1864, now §§ 3410, 3411, 3412 and 3416, Rev. Stat., so far as they relate to the subject under discussion, to exempt from taxation on circulation only the five per cent of state bank notes which might be outstanding. This being so, it follows that appellant was bound to pay the tax on its own notes without regard to the percentage of its capital stock represented thereby.

For forty years the treasury department officials have given to the sections in question the construction for which we here contend. Until about the time the appellant made application to the Treasurer for the refund of the duties or taxes paid, the national banks universally acquiesced in that construction. Such long-continued interpretation and practice by the treasury officials must have very great weight with the court in determining the construction or application of the sections in question. *United States* v. *Finnell*, 185 U. S. 236, 244, and cases cited.

MR. JUSTICE WHITE delivered the opinion of the court.

Organized as a state bank in 1834, the appellant was converted, in June, 1865, into a national banking association. For nearly thirty years after its organization as a national bank, that is, up to July 1, 1904, the bank was assessed for and paid the duty of one-half of one per cent upon the average amount of its notes in circulation, in conformity with § 5214, Rev. Stat. Availing itself of the right conferred by § 5218, Rev. Stat., copied in the margin,[1] the bank made application to be refunded the sum of $4,713.01, on the ground that in making certain of the half-yearly payments under § 5214 there had been a miscalculation, and besides, because of an error of law, some of the half-yearly payments had been exacted when the bank was exempt. We put aside so much of the claim as was based upon mere errors of calculation, as no contention on that subject is here presented.

The alleged error of law or asserted right to exemption rests upon the assumption that by the operation of § 3411, Rev. Stat., the bank was not liable to pay the half-yearly duty on its outstanding circulation whenever the amount of its circulation fell below five per cent of its capital, a contingency, which it was insisted, had arisen during certain of the half-yearly periods between January, 1888, and July, 1904. The request to be refunded having been rejected by the Treasurer of the United States, this suit was commenced and this appeal was taken from a judgment in favor of the United States. 42 Ct. Cls. 6.

In the argument for the bank it is stated that all the errors relied upon are embraced in the following propositions:

[1] SEC. 5218. In all cases where an association has paid or may pay in excess of what may be or has been found due from it, on account of the duty required to be paid to the Treasurer of the United States, the association may state an account therefor, which, on being certified by the Treasurer of the United States and found correct by the First Comptroller of the Treasurer, shall be refunded in the ordinary manner by warrant on the Treasury.

"1. The said court erred in holding and deciding that the claimant, being a national bank, was not exempt from taxation on its notes in circulation during the half-yearly periods when the average amount of its said notes was less than five per centum of its chartered capital.

"2. The said court erred in holding and deciding that § 3411, Revised Statutes, relates solely to the taxation of the outstanding circulating notes of state banks which had ceased to exist or had been converted into national banks, and did not limit the claimant's liability to taxation on its own outstanding circulation."

Without presently determining whether the right to be refunded, even if otherwise well founded, was without merit because of the voluntary nature of the payments or the effect of the statute of limitations, we come to consider the merits of the contention. It depends upon whether § 5214, Rev. Stat., is limited and controlled by the provisions of § 3411, Rev. Stat. The two sections are as follows:

"SEC. 5214. In lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, a duty of one-half of one per centum each half-year upon the average amount of its notes in circulation, and a duty of one-quarter of one per centum each half-year upon the average amount of its deposits, and a duty of one-quarter of one per centum each half-year on the average amount of its capital stock, beyond the amount invested in United States bonds."

"SEC. 3411. Whenever the outstanding circulation of any bank, association, corporation, company, or person is reduced to an amount not exceeding five per centum of the chartered or declared capital existing at the time the same was issued, said circulation shall be free from taxation; and whenever any bank which has ceased to issue notes for circulation deposits in the Treasury of the United States, in lawful money, the amount of its outstanding circulation, to be redeemed at par, under such regulations as the Secretary of the Treasury shall

prescribe, it shall be exempt from any tax upon such circulation."

It is insisted that the sections, considered as applicable to the same subject, are harmonious, and that giving effect to both, while leaving a national banking association liable to the duty imposed by § 5214, will yet entitle it to the exemption provided in § 3411 when the contingency stated in that section has come to pass. And as this result, it is argued, is clear and free from all doubt, considering the text of the two sections, recourse may not be had to legislation prior to the Revised Statutes, from which the provisions of the sections were drawn, in order to arrive at their correct meaning. Reference to such prior legislation, it is insisted, cannot be resorted to for the purpose of creating a doubt, but only to solve one otherwise arising from the text, citing *Hamilton* v. *Rathbone*, 175 U. S. 418; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 36, and cases cited.

Accurately considering the text of the two sections and the context of the respective titles of the Revised Statutes in which they are found, we think the contention that the sections are free from ambiguity and may be harmoniously applied without the necessity of construction, is without merit. It is conceded that for the more than thirty-five years since the enactment of the Revised Statutes, in the administration of the national-bank act, national banking associations have been required to and have without question paid the half-yearly duty on circulation, wholly irrespective of the exemption provided in § 3411, a condition which clearly suffices, to say the least, to engender doubt as to the correctness of the belated contention now urged. Besides, the sections are in different titles of the Revised Statutes, the one (§ 3411) Internal Revenue, the other (§ 5214) National Banks. While § 5214 and the other sections contained in the title in which it is found leave no doubt that § 5214 was intended to deal with the outstanding circulation of national banks, not only the text of § 3411, but the other sections of the chapter under the general

title Internal Revenue in which it is found, cause it to be questionable whether that section is at all concerned with the subject of the circulating notes of a national banking association. As suggesting doubt and ambiguity concerning the contention that national banking associations are embraced within the enumeration of banks and bankers made in § 3411, whose outstanding circulation would become "free from taxation" in the specified contingency, it is to be observed that the enumeration conforms generally to that made in other sections of the chapter, which other enumerations clearly relate only to state banks and private bankers. Indeed, this is strengthened by the fact that in the Revised Statutes associations organized under the national-bank act are distinctively characterized as national banking associations, and that their designation by that call is explicitly made use of in various sections of the chapter in which § 3411 appears. In view (*a*) of the distinct provisions as to the circulating notes of national banks, found in the appropriate title of the Revised Statutes, (*b*) of the general subject to which the chapter in which § 3411 is contained relates, and (*c*) that in that chapter, when it was deemed essential to legislate concerning national banking associations, they were specially designated by that appellation, it would seem to result that it cannot possibly be said that § 3411 clearly has relation to the outstanding circulation of national banking associations. Moreover, the assumption that, considering the text of the two sections and treating them as relating to the same subject, they are each susceptible of being fully enforced, is a mistaken one. The duty upon the outstanding circulation imposed by § 5214 is assessed half-yearly, not upon the amount outstanding at any particular time, but upon the average for the six months. Section 3411, however, provides that the outstanding circulation to which it refers "shall be free from taxation whenever such outstanding circulation is reduced to an amount not exceeding five per centum of the chartered or declared capital existing at the time the same was issued," a provision which clearly contemplates a positive and perma-

nent exemption to arise from the reduction to the limit specified and wholly incompatible with the system of average provided in § 5214. This results because by that system of average, even although the sum of the outstanding circulation of a national banking association might, on a particular day or days of a half-yearly period, fall below five per centum of its capital, yet the duty to be paid would attach wholly without reference to that condition, and be determined by the average for the six months. Besides, when there is taken into account the plain meaning of the concluding portion of § 3411, concerning a deposit with the Treasurer of the United States of money to meet outstanding circulation of the banks embraced within that section, it becomes manifest that the circulation referred to in § 3411 cannot be the circulation of a national banking association referred to in § 5214, since the method of deposit of money to secure the payment of outstanding circulation provided by § 3411 is absolutely in conflict with the methods provided for securing and redeeming outstanding circulation of national banking associations, as expressly provided in the sections of the Revised Statutes concerning national banking associations, which sections are cognate to and inseparably connected with the provisions of § 5214. And, beyond all this, it is apparent that to treat the outstanding circulation referred to in § 3411 as embracing the outstanding circulation of national banking associations, contemplated by § 5214, would require it to be held that the very purpose intended to be accomplished by the national-bank act was frustrated by the exemption accorded by § 3411. It has long been settled that one of the public policies embodied in the national-bank act was to secure the public credit and encourage the issue of notes to circulate as currency, founded upon the security of the bonds of the United States, a purpose which would be directly discouraged by exempting a national banking association which reduced its circulation below five per centum of its capital from the payment of a duty thereon, and yet enforcing the payment of such duty against a national bank which had not reduced its out-

standing circulation to the limit stated. In addition, as the half-yearly duty provided by § 5214 was intended, among other things at least, to create a general fund for paying the cost of engraving and printing the circulating notes of national banking associations (*Twin City Bank* v. *Nebeker*, 167 U. S. 196), § 3411 could not be construed as now claimed without giving rise to the assumption that it was without reason intended to exempt national banking associations which might choose to allow their circulation to fall below five per centum from a burden which, in the nature of things, was common to all such banks.

But, in effect, it is argued, conceding that all the ambiguities just stated arise from treating the two sections as relating to the same subject, and from seeking to harmoniously enforce them on that hypothesis, yet there is no warrant for considering the genesis of the provisions in order to dispel the apparent conflict between them, because of the express terms of § 3417, Rev. Stat., found in the same chapter which embraces § 3411. The section relied upon is in the margin.[1] It will be observed that it is expressly declared therein that the provisions of the chapter in which the section is contained shall "not apply to associations which are taxed under and by virtue of title National Banks." This declaration, however, is limited by the words "except as contained in sections," which are enumerated, one of them being § 3411. From this it is argued that, whatever may otherwise be the conflict between § 5214 and § 3411, construed together, as § 3417 causes § 3411 to be broadly applicable to national banking associations, that section must

[1] SEC. 3417. The provisions of this chapter, relating to the tax on the deposits, capital, and circulation of banks, and to their returns, except as contained in sections thirty-four hundred and ten, thirty-four hundred and eleven, thirty-four hundred and twelve (thirty-four hundred and thirteen), and thirty-four hundred and sixteen, and such parts of sections thirty-four hundred and fourteen, and thirty-four hundred and fifteen as relate to the tax of ten per centum on certain notes, shall not apply to associations which are taxed under and by virtue of Title "National Banks."

be treated as limiting and controlling the provisions of § 5214. But § 3417, unless it be treated as surplusage, implies that § 3411 might not in and of itself be broadly applicable to national banking associations. While there is no doubt that the result of § 3417 is to cause § 3411 to be applicable to national banks, the doubt and ambiguity which must arise from the attempt to make that provision broadly applicable so as to cause it to be controlling upon § 5214 is in nowise removed by § 3417. In other words, giving full effect to § 3417 requires us yet to determine the nature and extent of the application of the provisions of § 3411 to national banking associations, a determination, as we have seen, essential in order to reconcile the confusion and contradiction which otherwise would prevail from the co-association of the provisions without limitation or interpretation.

A consideration of the origin of the provisions at once demonstrates the unsoundness of the contention relied upon, establishes the correctness of the administrative construction which has prevailed from the beginning, and dispels the confusion and contradiction which necessarily results from the interpretation contended for. We need not specifically trace and develop the origin of the provisions, since it is expressly conceded in the argument for the appellant that "the provisions of the acts of Congress . . . which are carried into the Revised Statutes as §§ 3407–3417 did not, *when and as originally passed*, relate to national banks or to the circulation of national banks, but related to state and private banks. . . ." So, also, it is conceded that, wholly irrespective of the provisions of the national-bank act of 1864, there was imposed by acts of Congress relating to internal revenue burdens of taxation so heavy upon the circulation of state banks and private bankers, as, by their necessary operation, caused the retirement of such circulation as far as possible. Nor need we refer specially to the origin of § 3411, since it is conceded that the provision was enacted originally in order not to compel the payment by state banks of a tax on circulation when such

circulation no longer existed, upon the assumption that if ninety-five per cent had been retired the remainder was no longer in existence, or, at all events, was not within the power of the bank to retire. It is also unquestioned that where a state bank had become converted into a national bank, or where a national bank had assumed the liabilities of a state bank, the national bank was liable, in addition to the duty on its own circulation, to the payment of the internal revenue tax upon the outstanding circulation of the state bank absorbed by it or the liabilities of which had been assumed, and that as to such circulation national banks were given the benefit of the presumption of loss or destruction or possible retirement when all but five per cent of the circulation of the state bank had been actually retired. The concrete result of the provisions just stated and of the antecedent legislation are aptly portrayed in the reënactment in § 14 of the act of July 13, 1866 (14 Stat. 98, 146–147, c. 184), of previous provisions on the subject, said § 14 reading as follows:

"That the capital of any state bank or banking association which has ceased or shall cease to exist, or which has been or shall be converted into a national bank, shall be assumed to be the capital as it existed immediately before such bank ceased to exist or was converted as aforesaid; and whenever the outstanding circulation of any bank, association, corporation, company, or person shall be reduced to an amount not exceeding five per centum of the chartered or declared capital existing at the time the same was issued, said circulation shall be free from taxation; and whenever any bank which has ceased to issue notes for circulation shall deposit in the Treasury of the United States, in lawful money, the amount of its outstanding circulation, to be redeemed at par, under such regulations as the Secretary of the Treasury shall prescribe, it shall be exempt from any tax upon such circulation; and whenever any state bank or banking association has been converted into a national banking association, and such national banking association has assumed the liabilities of such state bank or

banking association, including the redemption of its bills, by any agreement or understanding whatever with the representatives of such state bank or banking association, such national banking association shall be held to make the required return and payment on the circulation outstanding, so long as such circulation shall exceed five per centum of the capital before such conversion of such state bank or banking association."

It is apparent that these provisions were in substance adopted in the Revised Statutes and now constitute §§ 3410, 3411 and 3416, and that as illumined by the history which we have given it clearly results that the provision of § 3417, expressly making § 3411 applicable to national banking associations, caused that section to apply not in the broad sense now claimed, but that it was expressly made applicable in order, beyond peradventure, to give to national banks, as representing state banks, the benefit of the presumption of loss or inability to retire the circulation of the state bank when such circulation had been reduced by ninety-five per centum of the volume thereof.

It is strenuously argued that to thus construe the provisions in question will destroy the effect of the revision by causing one or more of the sections contained in the revision to become redundant or superfluous. To test this contention we must recur to the provision of the act of 1866, which has been previously quoted. By that provision, *a*, What should constitute the sum of the capital of a state bank for the purpose of taxation was declared; *b*, The right to an exemption of circulation, when such circulation was less than five per cent, was also declared, and the power to deposit money with the Treasurer of the United States to the extent of the outstanding circulation and thus avoid the continuance of a tax thereon was also given; *c*, The liability of a national banking association for the tax upon the circulation of a state bank which had been assumed as well as the right of the national banking association to the benefits of the exemption when ninety-five per cent of the circulation of the state bank had been retired was also expressed. The argument is that to give

to § 3411 the restrictive significance we have adopted is to render § 3416 superfluous. It is indeed true that the effect of the construction in an extremely narrow and technical sense might be considered as operating a redundancy. But the asserted redundancy is more seeming than real, as § 3416 was plainly not enacted in order to reiterate what was expressly or impliedly embodied in § 3411, but was to declare the obligation of a national bank in a stated contingency to make return and payment on the outstanding circulation of a state bank which was subject to taxation.

The elaborate argument made at bar, to the effect that Congress at the time of the revision must have contemplated the non-existence of state banks and the extinguishment of their circulation, and, therefore, must be considered as having intended to make § 3411 applicable to the outstanding circulation of national banks, is, we think, so clearly in conflict with the plain manifestation of the purpose of Congress, as shown by the reënactment in the revision of the provisions as to state banks and their circulation, as to require no further notice.

Affirmed.

J. M. CEBALLOS & COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 108. Argued March 10, 1909.—Decided May 17, 1909.

Where a contract requires construction as to the mode of its performance, a similar contract in writing between the same parties which had been fully performed prior to the execution of the contract to be construed, serves, within proper limitations, to throw light upon the construction of the later contract and may be referred to for that purpose.

A contract having been made by the United States with Ceballos & Co. for the repatriation of the Spanish prisoners in Cuba after the Spanish war, similar in terms to another contract subsequently made with the same parties for the repatriation of the Spanish prisoners

in Manila, providing certain accommodations for officers and steerage accommodations for men and other persons designated by the Secretary of War, the fact that in the performance of the Cuban contract the wives and children of the officers were given similar cabin accommodations to those of their respective husbands and fathers, and the United States had paid therefor the higher rate, *held* to be material in construing the Philippine contract and also *held* that Ceballos & Co. were entitled to payment for the transportation of the wives and children of officers at cabin rates.

The same contract construed as entitling Ceballos & Co. to half rates of cabin transportation for children under ten, and steerage rates for the "other persons designated by the Secretary of War," that expression not embracing wives and children of officers, but embracing all designated persons other than officers and their wives and children. A contract carrying out treaty obligations should be liberally construed so as to effectuate the purposes intended by the treaty.

In the light of all the surrounding circumstances it will not be assumed that the United States in carrying out its stipulations for the capitulation of Manila would commit an act of inhumanity such as separating the surrendered officers from their wives and children by furnishing the former with cabin, and the latter with steerage, accommodations on the voyage to Spain under the repatriation provision of the treaty of peace.

42 C. Cl. 318, reversed.

THE facts, which involve the construction of the contract between Ceballos & Co. and the United States for the repatriation of the prisoners of war and other persons from the Philippine Islands to Spain, are stated in the opinion.

Mr. William V. Rowe and *Mr. John J. Hemphill* for appellants.

Mr. Assistant Attorney General John Q. Thompson, with whom *Mr. Franklin W. Collins* was on the brief, for the United States.

MR. JUSTICE WHITE delivered the opinion of the court.

Speaking in a general sense, this case involves determining how much, if anything, is due by the United States to J. M.

Ceballos & Co., the appellants, for services rendered in pursuance of oral and written contracts for the repatriation of certain persons from the Philippine Islands to Spain. Before coming to the case as made by the record it is necessary to dispose of a preliminary consideration which may throw light upon one of the questions arising for decision.

Ceballos & Co.—who here assert their rights as arising from contracts made, as we have said, concerning transportation of persons from the Philippine Islands to Spain—after the surrender of the Spanish forces at Santiago, made a contract with the United States for the repatriation from Cuba to Spain of the prisoners of war resulting from that surrender. That contract was performed, and it is conceded that all obligations of the United States under the same were discharged. It is admitted, however, that at the trial below the Cuban contract, as it is termed, was offered and the mode of execution thereof was established by competent evidence, upon the assumption that such facts were proper to be taken into view in the elucidation of the particular contracts which are here involved. No finding was made by the lower court on the subject, although one was requested. After the filing of the record in this court a motion was made praying that the lower court be directed to find whether or not the Cuban contract had been made as stated, and whether or not the wives and children of Spanish officers transported thereunder were also transported under the contract, and, if they were, the rate paid for such transportation. The motion was resisted, and action thereon was postponed until the hearing on the merits. In the discussion at bar it was conceded by the Government that the Cuban contract had been offered in evidence below, that the contract was correctly printed in one of the briefs, and that it had been performed in a particular manner. It was, however, insisted that the Philippine contracts here involved were unambiguous, and therefore the Cuban contract was irrelevant. It was conceded, if it was deemed that there was such ambiguity in the Philippine contracts as to require construction, and that

the construction might be elucidated by the Cuban contract and the mode of its performance, that contract and the admission as to the manner in which it had been performed might be treated as part of the record for the purposes of the case before us without the necessity of directing findings on the subject. As we are clearly of opinion that the contracts which are here involved require construction, and that the previous contract between the parties as to the movement of the prisoners of war from Cuba to Spain, and the construction which obtained in the execution thereof, may serve within proper limitations to throw light upon the construction of the contracts here involved we treat the Cuban contract and its mode of performance as embraced in the record, and review the case in the light thereof.

In the month of July, 1898, and from that time until the commencement of this litigation, the members of the appellant firm were the American operators and agents of the Compañía Transatlántica, a steamship line engaged in the transportation of freight and passengers between the ports of Spain and the Philippine Islands. As such agents Ceballos & Co. executed a contract with the United States, a copy of which is in the margin [1] to safely transport from Cuba to Spain the

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[1] Cuban Contract.

Sealed proposals having been invited for the transportation of the Spanish prisoners of war who surrendered to the United States forces in Cuba, from Santiago de Cuba to Cadiz, or such port of same as might thereafter be designated, and the proposal submitted by J. M. Ceballos & Company of New York, having been duly accepted:

It is hereby, on this twenty-first day of July, 1898, agreed, by and between the Secretary of War of the United States and said J. M. Ceballos & Company, that said company shall transport well and safely all of the troops of Spain that were surrendered by General Toral to the Army of the United States in Cuba, in the capitulation entered into by him at Santiago de Cuba, from said Santiago de Cuba to such port in Spain as the Secretary of War of the United States may designate, and that the Government of the United States will pay for such transportation, and for the subsistence and delivery on shore of the prisoners, the sum

troops of Spain surrendered at Santiago de Cuba. Under this contract the wives and children of Spanish officers were carried in the cabins, and without question, the first-class rate was paid for the transportation.

The city of Manila surrendered the thirteenth of August,

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of twenty dollars ($20) for each enlisted man or private soldier, and the sum of fifty-five dollars ($55) for each officer so delivered.

The said company further stipulates that said subsistence furnished by the company shall be equal to United States Army garrison rations; that cabin accommodations are to be supplied for the said officers, and third-class or steerage accommodations, having suitable galley accommodations with ample space and ventilation for the enlisted men or privates; that for the purpose aforesaid it will have at Santiago de Cuba within seventeen (17) calendar days from this day (that is to say, on or before the seventh day of the month now next following) seven (7) steam vessels with a total capacity for the conveyance of at least ten thousand (10,000) prisoners in conformity with the foregoing stipulations, and ready to take them on board and proceed immediately to Spain; and the remaining vessels, in number and capacity as the Secretary of War may notify the company, within twenty-one (21) days from the date of such notice.

The Secretary of War stipulates that the United States will give safe conduct as against the Army and Navy of the United States to the vessels of the company engaged in the business aforesaid while proceeding to Santiago and from there to Spain, such safe conduct not to apply to ships already seized or in blockaded ports, and the ships employed as aforesaid to have only such armament as is customarily carried by merchant ships. Such safe conduct is to extend to foreign, West Indian, Cuban and Spanish ports, and to remain in effect until the prisoners are unloaded in a Spanish port designated, and is expressly made applicable to steamers of the Spanish Transatlantic Line, under the Spanish flag.

For the better security of such safe conduct a document in the following form and duly signed will be furnished to the company for each ship, which shall be exhibited on demand, together with a copy of this contract, to any officer of the Army or Navy of the United States visiting the vessel:

"The President of the United States to all whom it may concern, greeting: This is to certify that the ——— ——— is employed under contract with the Government of the United States in the business of

1898, and August 14 the United States and Spanish authorities agreed upon written terms of capitulation, of which article 5 is as follows:

"All questions relating to the repatriation of officers and men of the Spanish forces and of their families and of the expenses which said repatriation may occasion, shall be referred to the Government of the United States at Washington."

The following statement as to the situation at Manila and the making of an oral contract and subsequently of a written contract are taken from findings made below.

There was surrendered to the United States forces at Manila on August 13, 1898, a large number of civil, naval, and military officers and their families, and a much larger number of enlisted men, together with the wives and children of some of these enlisted men. Many of these were in a pitiable condition physically, exhausted with exposure and disease—1,200 being sick at one time—all of them fed, guarded and attended at

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transporting from Santiago de Cuba to a port in Spain Spanish prisoners heretofore surrendered to the Army of the United States in Cuba; that the Government of the United States has guaranteed safe conduct for this purpose to the ——— ——— in going to and from Santiago de Cuba and until the disembarking of said prisoners in a Spanish port.

"All persons under the jurisdiction of the United States are required to respect such guarantee.

——— ———."

The company further stipulates that it will furnish the bond of ——— for the proper and faithful performance of this contract.

The Secretary of War agrees that the United States will deliver the prisoners aforesaid on board at Santiago within a reasonable time after the vessels are ready, and to the number of at least ten thousand men (10,000) men, five hundred (500) officers, and that the payment of the said twenty ($20.00) dollars and fifty-five ($55.00) dollars for each man and officer to the numbers last aforesaid shall be made when satisfactory evidence that the prisoners have been transported and delivered in accordance with this contract is presented to him.

Witness our hands and seals this twenty-first day of July, 1898.

R. A. Alger, *Secy. of War.*

J. M. Ceballos & Co.

the expense of the United States. Smallpox had been prevalent and infection was apprehended. The civil prisoners included Spanish civil officers on duty in the Philippine Islands under the government of Spain. Many of these had wives and children with them. There were besides a number of civilians, such as nurses, nuns, monks, friars, sisters of charity and lady pensioners. The United States treated all of these classes as prisoners of war, and had supreme control of them after the surrender of Manila until they were delivered aboard plaintiff's ships for transportation, at which time the supervision of the United States ceased. Spanish officers had in the meantime only such supervision over their troops as the United States permitted.

General Otis, commanding the United States forces in Manila, considered that an emergency existed requiring immediate action, and on October 7 and October 24, 1898, cabled the War Department at Washington the request of the Spanish general at Manila for permission to allow sick Spanish officers and soldiers to depart for Spain. Permission being granted, these officers and soldiers were shipped on vessels of the Compañía Transatlántica by the Spanish authorities in Manila, acting under the supervision and control of the United States authorities, but under an oral agreement with Ceballos & Co., as hereinafter stated.

In the emergency deemed existing by the commanding general, and communicated to the War Department, the Secretary of War, in October or November, 1898, entered into an oral agreement with Ceballos & Co., by which the latter agreed to transport such of the Philippine prisoners as the United States desired to return to Spain, the price to be paid for such transportation to be the price fixed after the United States should advertise for bids for such transportation, under contract expected thereafter to be entered into under the terms of a treaty of peace between the United States and Spain.

Under this oral agreement, Ceballos & Co. immediately began furnishing vessels, and the transportation of the Phil-

ippine prisoners commenced by a vessel which sailed from Manila, November 7, 1898, and continued until another and a written contract was entered into for the transportation of those prisoners not transported under the oral agreement.

The shipments under the oral contract were five in number, and the wives and children of officers were carried in the cabin, as under the Cuban contract.

On December 10, 1898, by the treaty of peace it was stipulated in paragraph 1, article 5, that—

"The United States, will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

And in article 6, that—

"Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"The Government of the United States will, at its own cost, return to Spain, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively under this article."

On January 20, 1899, the Quartermaster General, U. S. Army, by direction of the Secretary of War, invited sealed proposals "for the transportation of the Spanish prisoners of war now in the Philippine Islands . . . to Cadiz or such other ports of Spain as may hereafter be designated." Among other things it was stated in the advertisement as follows:

"Their number is estimated as about 16,000 officers and

enlisted men. Cabin accommodations are to be supplied for the officers and third-class or steerage accommodations, having suitable galley accommodations, conforming to the United States requirements as to space and ventilation, for the enlisted men.

* * * * * * * *

"Proposals will state the price per capita for transporting officers and for transporting enlisted men and for their subsistence and delivering them on shore at the Spanish port, or ports to be designated, and will be accompanied by a guarantee that the prisoners will be comfortably cared for and subsisted while on the journey.

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"Payment for the service will be made when evidence is furnished that the ship has arrived with her passengers at point of destination. The number of officers and men counted aboard at place of embarkation by the quartermaster is to determine the number to be paid for. . . ."

The following bid was submitted:

"Sir: In accordance with the advertisement of Gen. M. I. Luddington, quartermaster general, U. S. Army, copy of which is hereto attached, I propose, on behalf of Messrs. J. M. Ceballos & Co., agents of the Compañía Transatlántica, de Barcelona, to furnish transportation for the Spanish prisoners now in the Philippine Islands to any port or ports in Spain. Their number estimated at 16,000 officers and enlisted men. I propose to use in this service the steamers named in the annexed list, which fully sets forth the classification of each, the tonnage capacity of each, their speed, the berth accommodations upon each, and the approximate length of time required by each vessel to make the voyage to Spain. (The length of time is estimated from Manila.) Said list gives the time at which each vessel will arrive in or off the harbor of Manila for orders, the act of God and all dangers of the sea excepted.

"It is proposed not to load the steamers beyond two-thirds

of their steerage capacity. This is considered not only advisable as an act of humanity, but absolutely necessary, owing to climatic conditions and length of voyage.

"I further propose to call at any port of the Philippine Islands that the U. S. Government may designate, provided the vessels can safely lay afloat.

"The charge for this service is dependent on the ports of call in the Philippines, and also on the quarantine regulations in Spain, but I propose and hereby agree to do this service at a price not to exceed in any case:

For each officer.....$215 00

For each enlisted man..... 73 75

"It is proposed to furnish subsistence equal to the United States garrison rations, or, if preferred, the usual rations furnished under Spanish regulations.

"I will furnish a satisfactory bond for the faithful fulfillment of this service."

This bid was accepted, and on March 4, 1899, a contract was executed between the Secretary of War and Ceballos & Co., by their attorney in fact, which, omitting the attestation clause and signatures, is as follows:

"Whereas, under the terms of the treaty of peace entered into by and between the representatives of the Governments of the United States and of Spain, signed at Paris on December 10, 1898, it is mutually agreed and stipulated in the first paragraph of Article V that—

" 'The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces.'

" 'And in Article VI, which reads as follows:

" 'Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

"'Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"'The Government of the United States will, at its own cost, return to Spain, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article.'

"And whereas sealed proposals having been invited for the transportation of the Spanish prisoners from Manila or such other port in the Philippine Islands as may be designated to Cadiz or such other port in Spain as may be designated, and in response thereto the proposal of J. M. Ceballos & Company, of New York, having been duly accepted by the Secretary of War of the United States:

"Therefore this article of agreement is made and entered into this 4th day of March, 1899, by and between the said J. M. Ceballos & Company for the transportation of the said prisoners of war, from the Philippine Islands to Spain, as are designated in the terms of the treaty of peace, referred to and quoted herein.

"The said J. M. Ceballos & Company hereby agree to furnish good and safe transportation for such number of prisoners of war and persons as may be designated by the Secretary of War, from the Philippine Islands to such port in Spain as may be designated by the Secretary of War, and to furnish to them subsistence while en route and on board the ships, and to deliver them on shore in Spain.

"The said company further agrees that for the purpose herein stipulated they will provide a sufficient number of steamships for the safe and comfortable transportation of the prisoners of war and such other persons as may be designated by the Secretary of War, with cabin accommodations for all officers, and third-class or steerage accommodations, space

and ventilation for the enlisted men and other persons on board each ship; that the subsistence furnished by the company shall be equal in every respect to the United States army garrison rations.

"The company further agrees to provide a sufficient number of steamships in the harbor of Manila to perform the entire service as herein stipulated, so that the embarkation of the last of the prisoners of war and the other persons may be made not later than May 1st, 1899; that the ships to be used for the purpose are named and described in the list submitted with their proposals, copy of which is hereto attached as a part of this agreement, and the company agrees that no troops shall be transported upon any one of said ships in excess of two-thirds of the steerage capacity of each ship as shown in the list referred to.

"In consideration of the faithful performances of the foregoing stipulations and in compensation therefor, the Secretary of War hereby agrees on behalf of the United States to pay to the said J. M. Ceballos & Company, for the transportation, subsistence, and delivery on shore of each commissioned officer, the sum of two hundred and fifteen dollars ($215.00), and for each enlisted man, private soldier, or other person designated by the Secretary of War for transportation the sum of seventy-three dollars and seventy-five cents ($73.75), the said sums to be due and payable upon evidence that said officers, enlisted men, or persons have been transported, subsisted, and delivered on shore in Spain.

"It is further agreed that the prisoners of war and all other persons to be transported shall be delivered by the United States on board the ships at such ports in the Philippine Islands as may be designated by the Secretary of War, within five (5) working days after the vessel or vessels are ready to receive them. Demurrage, if any, earned by any such steamer or steamers to be paid by the United States at the rate fifteen cents (15c.) per gross ton register per day, and for any prisoners on board at the rate of $1.50 for each officer per day and

forty cents for each enlisted man per day. An account of the number of officers, enlisted men, or other persons to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos & Company, and payment to the said company shall be made upon the basis of the number of officers, enlisted men, and persons counted on each ship.

"It is further agreed that all steamers shall call at the port of Manila for orders, and should the Secretary of War elect to deliver prisoners to any steamer or steamers at any other port in the Philippine Islands, orders to that effect must be given within twenty-four hours after the steamer or steamers have reported to the commanding officer at the port of Manila.

"No member or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom."

The findings show that the vessels which were supplied to perform this contract, like those which were supplied to perform the Cuban contract and the subsequent Philippine oral contract, were furnished with cabin and steerage accommodations, and that the officers, civil and military, with their respective families, were carried in the cabin, and in the steerage were carried the enlisted men and their families and other persons entitled to third-class passage.

For the first twenty-five shipments payment was made by the United States upon certificates of the masters of the respective ships on which said prisoners of war and other persons were transported, certified to be correct at the place of landing, showing the different classes of passengers.

The court below also found as follows:

The obligation of this country to repatriate any other persons or classes of persons than those who were actually prisoners of war or political prisoners was questioned by the Secretary of War.

On December 18, 1899, the Secretary of War addressed an

official letter to the Attorney General, stating that under the terms of the treaty of peace the obligation of the United States to send to Spain at its own cost the wives and children of officers and soldiers and civil prisoners designated as officials and their wives and children was not clearly defined, and that the rates of compensation for the transportation of such persons were not set forth in the contract. But in that connection the Secretary requested an opinion as to the construction of the treaty of peace in regard to the scope of the description of Spanish prisoners, whether and to what extent the treaty included the repatriation of non-combatants at the cost of the United States. The Secretary further requested a construction of the contract rate of compensation which might be allowed and paid per captia for each class of persons charged for under the terms of the contract with Ceballos & Co. On January 6, 1900, the Attorney General answered this official communication of the Secretary of War and construed the contract substantially as follows: That it was questionable whether all the persons tendered and transported were not within the purview of the treaty, but that this was a question for the United States authorities and not for the carrier, who would have been guilty or might have been guilty of a breach of his contract in refusing to carry persons designated to be carried by the United States. The Attorney General further informed the Secretary of War that the contract related to the transportation of prisoners; that as between the contracting parties it rested alone with the United States to say whom it would send back to Spain, and in doing so to alone determine who were prisoners and who came within the purview of the treaty or the contract. That the words "other persons" were included within "enlisted men," and that as to all enlisted men and all persons other than officers, military and civil, $73.75, and no more, was payable by the United States under the contract.

On January 19, 1900, the Secretary of War notified one of the firm of Ceballos & Co. that he had, on January 17, cabled

General Otis at Manila that civil officials, prisoners' wives and children were entitled to passage to Spain, and that the contract provided for shipment of civil officials as officers on the basis of $215 per capita; that wives and children of officers, soldiers and civil officials were entitled to transportation to Spain on the basis of $73.75 per capita.

As shown on statement, copied in the margin,[1] the United States paid to Ceballos & Co., under the Philippine oral and written contracts, the sum of $1,544,595. It will be seen that no payments were made in respect of the transportation of other persons than officers and enlisted men until after the Attorney General had rendered the opinion above referred to. Of the various classes of persons specified, all but "officers"

[1] Payments.

Sundry Checks Received by J. M. Ceballos & Co.—Payments on % by United States Government.

	Officers.	Enlisted men.	Women and major children.	Minor children.	Civil officials.	Warrants.	
June 20–99...	1019	7067	.....	.....	.....	$666,247.62	($74,028.62, 10% retained by Government.)
Nov. 28–99...	131	1198	.....	.....	.....	190,545.12	(inclu. previous 10% as above.)
July 30–1900..	288	3728	1302	406	.....	447,853.75	
Oct. 6–1900..	148	1425	53	.....	.....	140,822.50	
Apr. 11–1902..	.....	.....	.....	.....	393	28,983.75	
Apr. 21–1902..	.....	.....	.....	.....	.....	9,746.25	(315 Civ.)
July 3–1902..	.....	.....	.....	.....	.....	34,747.50	(Off. @ $141.25, diff. bet. 1st and 3d class.)
Oct. 31–1902..	....	16	.....	.....	.....	1,180.00	
	....	19	.....	.....	.....	1,401.25	
	....	6	.....	.....	.....	442.50	
	1	4	.....	.....	.....	510.00	
Nov. 3–1902.	1	.....	.....	.....	.....	215.00	
	....	10	.....	.....	.....	737.50	
	....	1	.....	.....	.....	73.75	
Nov. 3, rec'd and ret'd...	8	17	6	.....	.....	3,416.25	
Feb. 26–1903, deposited...	1	1	2	.....	.....	436.25	
	5	91	.....	.....	.....	7,786.25	
	9	.....	.....	.....	.....	1,935.00	
M'ch 7–1903..	...	.....	12	.....	18	4,755.00	
Sup. Bill No.	....	.....	8	.....	2	1,020.00	
22.....	...	.....	9	.....	3	1,308.75	
	....	.....	1	.....	.....	73.75	
	2	less not	1 all'd	.....	.....	356.25	
Totals...	1613	13583	1392	406	416	$1,544,595.00	

were paid for at steerage or third-class rates, and this regardless of whether cabin or steerage accommodations were furnished. Minor children, that is, those under the age of ten years, were paid for at half the adult rate.

On August 15, 1908, Ceballos & Co. commenced this action in the Court of Claims to recover a balance alleged to be due under the Philippine contracts for the carriage of 3,445 cabin passengers at $215 each; 415 minor children, carried in cabin at half rate, $107.50; 13,647 steerage passengers at $73.75 each, and 20 minor children carried in steerage at half steerage rate, $36.75 each. For this service it was averred $1,792,491.25 had been earned, and after deducting payments of $1,544,595 there was still due Ceballos & Co. $247,896.25. Subsequently an amended petition was filed, in which full adult cabin and steerage rates were demanded for minor children, increasing the alleged indebtedness of the United States to the sum of $293,246.25.

A counterclaim, contained in three numbered paragraphs, was filed on behalf of the United States. In paragraph first it was in substance averred that the United States was entitled to recover back from the claimants the sum of $371,988.75, paid for the transportation of persons under the alleged oral contract in November and December, 1898, and January, 1899, because the same was paid without authority of law prior to the execution of any contract, expressed or implied, between the United States and Ceballos & Co., or any one in its behalf. In paragraph second an indebtedness from Ceballos & Co. of $12,788.75 was alleged, because of moneys paid to the firm for the transportation of persons who were not actually landed in Spain as required by the contract. In paragraph third it was averred that as to two shipments made on November 25, 1899, and December 18, 1899, the claimants by means of a supplemental bill had collected a second time transportation charges for fourteen military officers (at the rate of $215 each) and 91 enlisted men (at the rate of $73.75 each), whereby $9,721.25 had been overpaid by the United States to Ceballos & Co.

There was contention then in the court below in regard to the number of persons carried from the Philippines to Spain and as to the compensation to be paid. For the Government it was urged that, deducting the overcharge covered by the third counterclaim for the transportation of 105 persons, payment in full had been made for all persons legally shown to have been transported, viz., 17,305 persons. On the other hand, the appellants contended that 17,527 persons had been carried, a difference of 222 persons. As to such excess the Government alleged it had refused payment as to 198 persons, because it had not been shown by the evidence stipulated for in the contract that such persons had embarked and been carried to Spain, and that it had refused payment as to the remaining 24, because twice counted.

The dispute as to compensation arose from the contention by Ceballos & Co. that it had carried the wives and children of Spanish military officers and civil officials in the cabin and the cabin rate was properly chargeable, while the Government insisted that the steerage rate applied and had been paid. Ceballos & Co. also contended that for the carriage of other non-combatants, who were entitled to be considered prisoners of war, the cabin rate applied, whereas the Government contended that all non-combatants were embraced within the category of "other persons," who under the contract were to be carried in the steerage and paid for at the steerage rate.

The court rejected the first and second counterclaims of the Government and allowed the third. It sustained the contention of the United States as to the number of persons carried to Spain and the rate of transportation which governed, except it was held that Ceballos & Co., instead of being paid half adult steerage rate for the transportation of minor children, should have been allowed the full adult rate for each child, and judgment was entered on that basis, in favor of Ceballos & Co., for the sum of $5,391.25. 42 Ct. Clms. 318.

Without hereafter reproducing the findings verbatim, we

shall state, in a condensed form such of the facts found as we think material to be recited.

Ceballos & Co. alone have appealed and the argument at bar on their behalf has been confined to two questions. 1, the construction of the contract in respect to the persons entitled to be carried at cabin rates; 2, the correctness of the action of the court below in disallowing the claim for the alleged transportation of 198 persons, asserted to have been actually carried under the contracts.

The court below substantially followed the construction of the contract adopted by the Attorney General, and decided that the "higher rate" specified in the contract related to one class and the lower rate to another class, and within the second class the contract embraced priests, nuns, sisters of charity, all women and children and every other person designated within the term "prisoners" by the United States, and whether carried in the cabin or steerage. Civil officials were held entitled to be classified with military officers and their transportation properly chargeable at the cabin rate.

In disposing of the questions arising for consideration we will first consider that relating to the 198 persons claimed by the appellants to have been transported to Spain, but for whose transportation the United States refused to make payment. As already mentioned, for the first twenty-five shipments of prisoners of war from the Philippine Islands to Spain payment was made by the Government of the United States upon the certificates of the masters of the respective ships on which said prisoners of war and other persons were transported, showing the different classes of passengers certified to be correct at the place of landing.

The method of determining the persons entitled to transportation under the written contract was, however, changed as to the last fifteen shipments—running from February 20, 1900, to July 14, 1901, during which time it is claimed said 198 persons were carried to Spain—so that requests for transportation with reference to available space were required to

be made upon the appellants. Thereupon the United States quartermaster at Manila made demand upon the appellants in writing to furnish transportation "to the following Spanish prisoners," separately enumerating, as the case might be, the number of commissioned officers, the number of enlisted men, the number of civil officials, the number of wives of officers and officials, the number of children under three years of age, the number of children between three and ten years of age, the number of children over ten years of age, etc.

Pursuant to the requisition of the Quartermaster General all the men who were placed on the list of passengers for each shipment were required to be at a particular place at a certain time in the morning, and they were counted by an officer of the Quartermaster's Department and taken aboard launches and carried out to the Spanish vessel ready to sail; and as they went on board the persons mentioned in the requisitions were counted by another United States officer, accompanied with the officer who represented the steamship company. Occasionally permission was given to officers of considerable rank to go aboard in their own conveyances, and these were checked off when they went aboard by an officer representing the Government and an officer representing Ceballos & Co., and were thereby included in the numbers called for by the requisitions.

No objections were offered by Ceballos & Co. at the time of the change in the method of computing the number of persons to go aboard.

The 198 persons in question were not embraced in the requests sent by the quartermaster for transportation nor were they included in the count at the time and place of embarkation. The accounts presented to the Treasury for payment asked compensation for the transportation of such persons, based upon certificates signed by the American consul at the landing place in Spain, to the effect "that the following Spanish prisoners," classifying the persons substantially as in the requisitions above referred to, had been "furnished transportation from Manila, P. I., to Spain," by the appellants on a

named steamship. For the reason that the method prescribed by the contract for determining the initial fact that the persons had been taken on board in the Philippine Islands by the appellants had not been pursued, and further because the evidence did not establish to the satisfaction of the court that said 198 persons, although certified by the consul to have been landed in Spain, were entitled to transportation under the contract, the Court of Claims refused to make any allowance for the transportation of such persons. The passages of the contract relating to this branch of the controversy are as follows:

"An account of the number of officers, enlisted men, or other persons to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos & Co., and payment to the said company shall be made upon the basis of the number of officers, enlisted men, and persons counted on each ship."

After reciting the compensation to be paid, the contract recited:

"The said sums to be due and payable upon evidence that said officers, enlisted men, or persons have been transported, subsisted, and delivered on shore in Spain."

In refusing to make any allowance for the asserted transportation of these 198 persons, we cannot say, in view of the findings of the court below, that error was committed.

We come to consider the remaining subject of contention, which is thus succinctly stated in the third specification of error made in the brief of counsel for Ceballos & Co.: "The court erred in holding that the wives and children of Spanish officers, civil and military, and other non-combatant prisoners of war, although transported as first-class passengers and afforded cabin accommodations aboard ship, were to be paid for at the third-class rate specified in the contract, to wit, $73.75."

The principal question involved in this assignment is whether the United States shall pay cabin rates for the transportation of the wives and children of Spanish officers, and other officials of equal rank, who were in fact returned to

Spain with such officers as cabin passengers. As stated in the findings the oral agreement made in October or November, 1898, between Ceballos & Co. and the Secretary of War was "to transport such of the Philippine prisoners as the United States desired to return to Spain," the compensation therefor to be fixed by the written contract which was expected to be thereafter entered into. There was no substantial change in the method of carrying out this oral contract from that pursued with respect to the Cuban contract. In the Philippines, as in Cuba, the United States tendered with the military officers and civil officials which it desired carried to Spain their wives and children. The proposals invited as the basis of a written contract, were couched in similar phraseology to that employed in the Cuban contract, and called for proposals for the transportation "of the Spanish prisoners of war now in the Philippine Islands . . . in number estimated as about 16,000 officers and enlisted men." When, therefore, Ceballos & Co. submitted a bid for furnishing such transportation, in reason they held themselves out as ready if the United States tendered for transportation the wives and children of the officers and enlisted men of the Spanish forces to regard them as entitled to the same treatment required by the Government for the head of the family. We cannot impute to the parties to the contract an intention to condemn and refuse to give effect to the practice which had been pursued in carrying out the oral agreement, that is, the treating the wives and children as entitled to transportation and as being for the purpose of the accommodations to be furnished, of the class to which the Government had in effect assigned their male relatives. That the classification referred to as "such other persons as may be designated by the Secretary of War" was not intended to embrace the wives and children of officers, is, it seems to us, manifest from the entire text. The Government was concerned not only with the furnishing of safe but of comfortable accommodation to those who were to be carried on the long voyage from Manila to Spain. It exacted from

Ceballos & Co. a stipulation that it should provide "safe and comfortable transportation" for those to be carried; the officers with "cabin accommodations," and "third-class or steerage accommodations, space and ventilation to be supplied for the enlisted men and other persons on board each ship." It is to be presumed that the agents of the United States in the Philippines saw to it that this stipulation of the contract was observed. It is inconceivable, however, that the Government or the appellants intended to commit such an act of inhumanity as would necessarily have arisen if the written contract required that the family of an officer should be separated from the husband and father on shipboard and be relegated to the discomforts of the steerage and the society of enlisted men and other persons. Clearly the spirit of the contract is opposed to any such conception. The wives and children of the officers and enlisted men were associated with them in the written terms of capitulation of the Spanish forces at Manila, signed August 14, 1898, the fifth article which, again reproduced, is as follows:

"All questions relating to the repatriation of officers and men of the Spanish forces and of their families, and of the expenses which said expatriation may occasion, shall be referred to the Government of the United States at Washington."

Under the Cuban contract the wives and children of officers were treated as entitled to be classed with the head of the family in respect to the accommodation to be supplied, and in the performance of the Philippine oral contract a like practice was pursued. In effect, therefore, by a course of conduct the United States had associated the wives and children of the officers and enlisted men with such officers and men for the purpose of the transportation to be furnished and the treatment to be accorded them on the homeward voyage. Just as in the opinion rendered by the Attorney General, civil officials of equal grade with military officers were assimilated to such officers in construing the terms of the contract, so we think an enlarged meaning must be taken as intended by

the terms officers and enlisted men where employed in the written contract. As observed by the Attorney General, in the light of the purpose of the contract, which was to carry out the engagements made by this Government with Spain, a liberal construction should be accorded to the terms employed in order to effectuate to the fullest extent the purposes intended by the treaty. Construing the written contract of March 4, 1899, according to its manifest spirit, and looking to the prior conduct of the parties, we are of opinion that such contract and the oral contract which was dependent upon it, so far as the wives and children of officers and enlisted men were concerned, should receive the same construction as under the Cuban contract, viz., that the wives and children of Spanish officers tendered by the United States for transportation were to be classed with such officers and the wives and children of enlisted men were to receive like accommodations as were given to enlisted men.

As it is not questioned by the United States that civil officials representing the Spanish government in the Philippines were entitled, both under the oral and written contracts, to cabin accommodations, we have assumed that construction to be well founded. It follows from the reasoning heretofore employed that the wives and children of such officials were likewise entitled when tendered by the agents of the United States for transportation to receive cabin accommodations, and Ceballos & Co. on furnishing such accommodations were entitled to compensation at the rate stipulated for cabin service. In view, however, of the distinction shown to have been made in the requisitions for space between adults and minor children, the practice shown as to payments made under the contract and the original demand of Ceballos & Co. in the court below, we think it results that the parties in actual practice treated the full rate for children under ten years as but half the adult rate specified in the contract, and we think that rate ought to have been applied by the court below for each minor child, whether carried in the cabin or in the steerage.

We are unable to yield our assent to the contention that other non-combatants than the wives and children of officers, enlisted men, and officials of the government of Spain should be embraced in the class entitled as of right to cabin accommodations for which appellants were entitled to be compensated at cabin rates. The mere circumstance that a particular person, although a non-combatant, was a constructive prisoner, did not—at least in the absence of evidence that the United States tendered such person as a cabin passenger—serve to take the person out of the category of persons whom the Secretary of War might designate to receive transportation in the steerage at third-class rates.

From finding XIV it appears that the wives and children above the age of ten years of military officers and civil officials aggregated 1,327, and that the appellants were paid for the transportation of each the steerage rate of $73.75, instead of the cabin rate of $215 each. The appellants are, therefore, entitled to a further payment on account of the transportation of such persons of $141.25 each, in all, $187,438.75. It is also shown in such finding that the number of children of Spanish military officers and civil officials who were carried to Spain and were under the age of ten years aggregated 395, and that Ceballos & Co. were paid for their transportation $36.87½ each, one-half the adult steerage rate, instead of $107.50 each, one-half the adult cabin rates. Ceballos & Co. were, therefore, entitled for such service to a further payment as to each child of $70.62½, aggregating for the 395 children $27,896.87. From the total of these sums, viz., $215,335.62, must, however, be deducted the overpayment recited in the third counter-claim (which counter-claim the court below sustained), viz., $9,721.25, leaving due to Ceballos & Co. the sum of $205,614.37.

It results that the judgment of the Court of Claims must be reversed, with instructions to enter a judgment in favor of the appellants for the sum of $205,614.37, and

It is so ordered.

GOODRICH v. FERRIS.

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

No. 120. Argued March 19, 22, 1909.—Decided May 17, 1909.

The mere fact that a constitutional question is alleged does not suffice to give this court jurisdiction of a direct appeal from the Circuit Court if such question is unsubstantial and so clearly devoid of merit as to be clearly frivolous. *Farrell* v. *O'Brien*, 199 U. S. 100.

A probate proceeding by which jurisdiction of the probate court is asserted over a decedent's estate for the purpose of administration is in the nature of a proceeding *in rem*, as to which all the world is charged with notice; the law of California conforms to this rule.

Even though the power of the State to prescribe length of notice be not absolute, a notice authorized by the legislature will only be set aside as ineffectual on account of shortness of time in a clear case. *Bellingham Bay Co.* v. *New Whatcom*, 172 U. S. 314.

Whether or not a State can arbitrarily determine by statute the length of notice to be given of steps in the administration of estates in the custody of its courts, ten days' notice for the settlement of the final accounts of an executor and action on final distribution is not so unreasonable as to be wanting in due process of law under the Fourteenth Amendment; and so *held* that the contention that §§ 1633 and 1634 of the Civil Code of California prescribing such length of notice are unconstitutional as depriving a distributee of his property without due process of law is without merit. *Roller* v. *Holly*, 176 U. S. 398, distinguished.

Writ of error to review 145 Fed. Rep. 844, dismissed.

THE facts are stated in the opinion.

Mr John G. Johnson, with whom *Mr Henry Arden*, *Mr. Tyson S. Dines* and *Mr. L. Sidney Carrère* were on the brief, for appellant:

The notice of final settlement and distribution posted for ten days in San Francisco, did not constitute due process of law as to appellant, who was and is a citizen and resident of

the State of New York. *Hovey* v. *Elliott*, 167 U. S. 409, 447; *Chicago &c. R. R.* v. *Chicago*, 166 U. S. 232; *Galpin* v. *Page*, 18 Wall. 350; *Smyth* v. *Ames*, 169 U. S. 466; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Rec. Dist.*, 111 U. S. 712.

In *Roller* v. *Holly*, 176 U. S. 398, five days' personal service on a defendant residing in Virginia was made of a process issued in Texas, and the court in holding it insufficient said that a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose. Citing *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation Dist.*, 111 U. S. 701, 712.

The notice, even if it had been served upon him personally, would not have given appellant an opportunity to make a proper appearance in court, and due process of law has been repeatedly interpreted by this court to mean not only that a party shall have notice, but that he shall have a reasonable and fair opportunity of being heard. *Hagar* v. *Reclamation Dist.*, 111 U. S. 722.

Mr. J. W. Dorsey and *Mr. Henry E. Davis*, with whom *Mr. Henry Ach* was on the brief, for appellees:

No question of a Federal nature is involved in this case. It is not a matter of National concern whether or not succession in cases of intestacy shall be determined under the ancient rules of the civil, the common, or the Scotch law, or through restricted and arbitrary rules of the local government. Who are heirs of a deceased person is determined and declared by statute. As the heir takes by the grace of the State, he can only take to the extent and under the procedure established by the State, which has entire freedom of choice as to the selection of persons who shall stand as heirs at law or beneficiaries of a decedent, intestate or testate, as well as the methods and procedure by and through which succession is

effected. No fundamental rights are involved in probate proceedings. In matters of this sort the power to limit involves the power to dispense with limitations. *Allen* v. *Georgia*, 166 U. S. 138; *Hovey* v. *Elliott*, 167 U. S. 409; *Wilson* v. *North Carolina*, 169 U. S. 586.

The probate jurisdiction of the Superior Court is essentially a jurisdiction under the control of the state legislature which the law-making power may enlarge or restrict, and it necessarily follows that opportunity to be heard, accorded by the statute of the State controlling the subject-matter, is sufficient to constitute due process of law. *Lent* v. *Tillson*, 72 California, 404.

As said by Mr. Chief Justice Waite, due process of law is process according to the law of the land. This process in the States is regulated by the law of the State. *Walker* v. *Sauvinet*, 92 U. S. 90.

It necessarily follows, that if any notice is given, or its service made, in pursuance of the requirements of the statute, it cannot be violative of any inherent or constitutional right of the persons affected thereby, and hence must be in accord with the law of the land, and amount to due process of law. *Estate of Davis*, 136 California, 590, 596; *Wulzen* v. *Board of Supervisors*, 101 California, 15, 22; *Burnam* v. *Commonwealth*, 1 Duv. (S. C.) 210; *Shepherd* v. *Ware*, 46 Minnesota, 174; *Taylor* v. *Judges of Court*, 175 Massachusetts, 71; *Dillon* v. *Heller*, 39 Kansas, 607; *In re Empire City Bank*, 18 N. Y. 199, 216.

The sufficiency of the notice must be determined in each case from the particular circumstance of the case in hand. *Davidson* v. *New Orleans*, 96 U. S. 97.

The objects of probate proceedings are to administer, settle and distribute the estates of deceased persons, and our system contemplates that these objects shall be accomplished with reasonable dispatch—that the administration shall be speedily accomplished, and closed, and the estate devolve to a new and competent ownership. *Maddock* v. *Russell*, 109 California, 422, 423; *Estate of Moore*, 72 California, 342; *Estate of*

Davis, 136 California, 596; *Carran* v. *O'Calligan*, 125 Fed. Rep. 663; *Hamilton* v. *Brown*, 161 U. S. 256.

The State has provided a complete and effective probate jurisdiction. The world must move on and those who claim an interest in persons or things must be charged with notice of their status and condition and of the vicissitudes to which they are subject. *Townsend* v. *Eichelberger*, 38 N. E. Rep. 207, 208; *De Mares* v. *Gilpin*, 24 Pac. Rep. 568, 572; *Merchants' Nat. Bank* v. *Spates*, 23 S. E. Rep. 683, 685; *Naddo* v. *Barden*, 47 Fed. Rep. 787; *Manning* v. *San Jacinto Tin Co.*, 9 Fed. Rep. 737; *Rudland* v. *Mastick*, 77 Fed. Rep. 688; *Robbins* v. *Hope*, 57 California, 495.

A person is conclusively presumed to know the state of his own title to property. *Cobb* v. *Wright*, 43 Minnesota, 85; *Robbins* v. *Hope*, 57 California, 495. See also *Townsend* v. *Eichelberger*, 38 N. E. Rep. 207; *De Mares* v. *Gilpin*, 24 Pac. Rep. 568; *Rudland* v. *Mastick*, 77 Fed. Rep. 688; *Case of Broderick's Will*, 21 Wall. 503; *Davidson* v. *New Orleans Board*, 96 U. S. 97, 105; *Hurtado* v. *California*, 110 U. S. 516, 533; *State* v. *Boswell*, 4 N. E. Rep. 677; *Wilson* v. *North Carolina*, 169 U. S. 586.

Mr. Justice White delivered the opinion of the court.

Upon demurrers, the court below dismissed the bill filed by Goodrich, the appellant, for want of equitable jurisdiction to grant the relief which was prayed. 145 Fed. Rep. 844. To review that decree this appeal direct to this court is prosecuted. Jurisdiction to review is challenged. That question therefore at the outset requires attention.

To clarify the issue for decision, instead of reciting the allegations of the bill in the order in which they are therein stated, we shall briefly recapitulate the facts alleged in their chronological order, in so far as essential to be borne in mind for the purpose of the question of our jurisdiction.

In February, 1886, Thomas H. Williams, a resident of California, died in San Francisco, leaving as his lawful heirs four

sons, viz., Sherrod, Thomas H., Jr., Percy and Bryant, and one daughter, Mary, who was the wife of Frank S. Johnson. The wife of the deceased and the mother of his children had died before him. Williams left an estate of large value, composed principally of real property. Shortly after his death, on April 2, 1886, in the court having probate jurisdiction in San Francisco, a last will and codicil thereto of Williams were duly admitted to probate. Leaving out of view certain bequests of personal property and small legacies in money, the estate was principally disposed of as follows: The title of the property was vested in the executor and trustee named in the will, George E. Williams, a brother of the deceased, for the purpose of making the distribution which the will provided. To one of the sons, Sherrod, nothing was given. It was provided that the sum of $50,000 should be absolutely vested in the son Percy, that $200,000 should "be set aside absolutely" for the benefit of the daughter Mary, wife of Johnson, and that $100,000 should be set aside for the benefit of each of the sons, Thomas H., Jr., Percy and Bryant. The will, however, provided that the gifts to the children above stated, other than the gift of $50,000, which was to vest absolutely in Percy, were only intended for the use and benefit of the children to whom they were given during their respective lives, with the remainder in fee to the lineal descendants, or if none such, to the surviving brothers or sister, as the case might be. The residuum of the estate was directed to be set aside in equal shares for the benefit of the daughter and two of the sons (Thomas H., Jr., and Percy) during their respective lives, with the remainder in fee as heretofore recited. The will contained the following clause:

"Item 4. When the term of three years after my death, shall have elapsed, unless the executor, herein named, shall for good cause extend it for two years, or in case there be another executor, three of my children, or representatives, shall by writing, extend it for two years, distribution of my estate, shall be made, as herein directed."

Until the setting aside or distribution thus directed the executor was authorized to advance monthly to the daughter the sum of $250, and to each of the three sons $100. The executor was authorized to carry on the business in which the testator was engaged at the time of his death, and extensive powers were conferred in regard to the sale and reinvestment of the property to be set aside for the benefit of the children, etc. George E. Williams qualified as executor and entered upon the performance of his duties.

In 1888 one of the sons, Sherrod, died unmarried and without issue. In the same year Frank S. Johnson, the husband of Mary, the daughter, obtained a decree of divorce against his wife, by which he was awarded the custody of an infant son, Frank Hanson Johnson, the issue of the marriage. In December of the following year Mary, the divorced wife, married George G. Goodrich, and thereafter lived with him in the city of New York. The son Percy was married in August, 1888; a child was born in 1889, but died the year following; and Percy died on October 3, 1890, leaving his widow surviving. Bryant Williams, another son, died in May, 1893, unmarried and without issue. In that year also Mrs. Goodrich, the daughter, died in the city of New York without issue from her marriage with Goodrich, leaving her husband surviving.

In the nearly eight years which supervened between the death of the father and the death of Mary, the daughter, the latter undoubtedly received from the executor of the estate of the father, by way of revenue or allowance, the provision made for her benefit by the will of the father. By the various deaths it came to pass that at the end of 1893 those entitled to the estate of Williams by the terms of the will, either for life or in remainder, were the surviving son, Thomas H. Williams, Jr., and the infant son of Mary, the daughter, represented by his father, Frank S. Johnson, who had, in 1889, in the proper probate court, been duly appointed the guardian of the estate of such minor.

After the death of Mrs. Goodrich her husband went from

New York to California for the purpose of the interment of the remains of his wife, and while being there a short time undoubtedly met the executor. Goodrich returned to New York, where he continued to reside. In 1896, three years after the return of Goodrich to New York, in the court having jurisdiction over the estate and person of the minor, the guardian Johnson applied for authority to agree with the executor of the estate of Williams on a final distribution of the estate. In making this application no reference was made to the fact of the marriage of Goodrich with the mother of the minor after her divorce. Conforming to the requirements of the California code of procedure, after hearing, the guardian was authorized to make the agreement for final distribution. Simultaneously or thereabouts the executor also filed in the proper probate court a petition asking the authority of the court to pass his accounts and make a final distribution of the estate. Express notice was given to Williams, the surviving son, and to Johnson, the guardian of the minor, and in accordance with the provisions of the California code a publication, by a posting of notice for a period of ten days, was ordered and duly made. On January 5, 1897, after hearing and in view of the consent of the parties, the accounts were finally passed and a full distribution of the estate was made between the parties in interest, that is, 40 per cent of the estate was transferred to the minor, Frank Hanson Johnson, through his guardian, $26\frac{2}{3}$ per cent to Thomas H. Williams, Jr., the son in fee, and $33\frac{1}{3}$ per cent was vested in Williams as trustee for the benefit during life of Thomas H. Williams, Jr.

Nearly three years after the entry of the decree of final distribution, in December, 1899, Williams, the trustee, died, and by proceedings in the Superior Court of the city and county of San Francisco, John W. Ferris was appointed trustee.

More than eighteen years after the death of Williams and the probate of his will, about eleven years from the date of the death of the daughter Mary, the wife of Goodrich, and more than seven years after the passing of the final account of the

executor and the final distribution of the estate by the probate court, viz., on May 19, 1904, the bill which is here in question was filed. Ferris, trustee, Williams, the surviving son of the deceased, and Johnson, as guardian, and his minor son were made defendants. The facts above recited in various forms of statement were alleged, and, in substance, it was charged that the will and codicil of Williams, the deceased, were void because the absolute power of alienation of the property of the deceased, contrary to the laws of California against perpetuities, was by the terms of the will suspended for a period of three years, and not for a period measured by the continuance of lives in being, and therefore as to all property included in the trust which Williams, the deceased, attempted to create by his will he had died intestate, and all his property by reason thereof vested at his death in his heirs at law. It was averred that complainant, as heir of his deceased wife, was entitled to a stated share of her estate. It was charged that all the proceedings had in the probate court were fraudulent and subject to be avoided; that in those proceedings the fact of the remarriage of the daughter, Mary, and the survivorship of her husband, Goodrich, the complainant, had been sedulously concealed for the purpose of misleading the court; that when Goodrich was in California, after the death of his wife, he was notified, as the result of an inquiry made of the executor, that the death of his wife terminated her interest in the estate of her father; that the proceedings in the probate court concerning the final accounting and distribution were fraudulently had for the purpose of depriving the complainant of his interest in the estate, and it was expressly charged that in those proceedings the existence of the complainant and his interest in the estate were concealed. The whole proceedings, it was also averred, were not only subject to be avoided because of fraud, but to have been absolutely wanting in due process of law, because of the absence of express notice to the complainant, and because the provisions of the statutes of California providing for notice by ten days' posting were void, because insuffi-

cient as to a resident of the city of New York, and in consequence repugnant to the due process clause of the Fourteenth Amendment. Without stating the various grounds upon which the defendants demurred, it suffices to say that the bill having been submitted to the court on the demurrers was, by it dismissed, as we have said, because the court was without jurisdiction in equity to set aside the probate of the will and to reopen upon the grounds alleged in the bill the probate proceeding had conformably to the local law.

It is manifest from the foregoing statement that the only possible ground upon which the assertion that we have jurisdiction by direct appeal to review the action of the trial court can rest is the contention made below that as to the complainant the notice of the hearing in the probate court upon the petition for the settlement of the account of the executor and for the final distribution of the estate of Williams did not amount to due process of law. *Farrell* v. *O'Brien*, 199 U. S. 89, 100, and cases cited. It is equally certain as held in the cited case that the mere fact that a constitutional question is alleged does not suffice to give us jurisdiction to review by direct appeal, if such question is unsubstantial, and so devoid of merit as to be clearly frivolous.

The grounds for the contention that a constitutional question exists are thus stated in the brief of counsel for appellant:

"4. Sections 1633 and 1634 of the Civil Code of California, upon which jurisdiction of the court to make the consent decree of distribution is based, are in contravention of section 1, article VI, of the Constitution of the United States.

"The notice of final settlement and distribution posted for ten days in the city and county of San Francisco did not constitute due process of law as to appellant, who was and is a citizen and resident of the State of New York."

The sections of the California code above referred to are thus set forth in the bill:

"SEC. 1633. When any account is rendered for settlement, the clerk of the court must appoint a day for the settlement

thereof and thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. If, upon the final hearing at the time of the settlement, the court, or a judge thereof, should deem the notice insufficient for any cause, he may order further notice to be given as may be proper.

"SEC. 1634. If the account mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said account, the notice of settlement must state those facts, which notice must be given by posting or publication. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had, without further notice or proceedings."

While various decisions of this court and of the courts of two States are cited in the brief of counsel for appellant under each of the foregoing propositions, none of them are apposite, and indeed, although citing them, counsel have specifically commented upon but one, viz., *Roller* v. *Holly*, 176 U. S. 398. That case, however, concerned the validity of original process by which the conceded property of a non-resident situate within the jurisdiction of the State of Texas was sought to be subjected to the control of its courts. The proposition which was presented for decision in that case was whether a statutory notice of five days given to a resident of Virginia, requiring him to appear in Texas and defend a suit brought against him to foreclose a vendor's lien upon his land, constituted reasonable and adequate notice for the purpose. Manifestly, that case is not in any particular analogous to the one under consideration, which is a case involving the devolution and administration of the estate of a decedent, a subject peculiarly within state control. *Case of Broderick's Will*, 21 Wall. 503, 519. It is elementary that probate proceeding by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of a pro-

ceeding *in rem*, and is therefore one as to which all the world is charged with notice. And that the law of California conforms to this general and elementary rule is beyond question. *Wm. Hill Co.* v. *Lawler*, 116 California, 359. The distribution of the estate of Williams was but an incident of the proceeding prescribed by the laws of California in respect to the administration of an estate in the custody of one of its probate courts. Under such circumstances, therefore, and putting aside the question of whether or not the State of California did or did not possess arbitrary power in respect to the character and length of notice to be given of the various steps in the administration of an estate in the custody of one of its courts, we hold that the claim that ten days' statutory notice of the time appointed for the settlement of the final account of the executor and for action upon the petition for final distribution of the Williams estate was so unreasonable as to be wanting in due process of law, was clearly unsubstantial and devoid of merit, and furnished no support for the contention that rights under the Constitution of the United States had been violated. As held in *Bellingham Bay Co.* v. *New Whatcom*, 172 U. S. 314, 318, even although the power of a state legislature to prescribe length of notice is not absolute, yet it is certain "that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time."

The jurisdiction to determine this appeal upon the merits being dependent upon the existence of a constitutional question in the record, and the mere averment that such a question was raised below not being sufficient where the alleged Federal question is so wanting in merit as to cause it to be frivolous or without any support whatever in reason, it follows that the appeal must be and it is

Dismissed for want of jurisdiction.

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

WOODWELL *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 143. Argued April 8, 12, 1909.—Decided May 17, 1909.

Where there is no specific provision in the appropriation for government work and there is no intention of the department in which a Government employé is employed to call upon him to fill another separate and distinct office, his designation by the head of his department to do certain work for another department does not entitle him to extra compensation; and, under § 1765, Rev. Stat., he cannot be allowed extra compensation therefor, even though the services be of value to the Government, are rendered out of hours, and are in addition to the full performance of his regular employment. 41 C. Cl. 357, affirmed.

THE facts are stated in the opinion.

Mr. William H. Robeson for appellant.

Mr. Assistant Attorney General John Q. Thompson, with whom *Mr. Clark McKercher* was on the brief, for The United States.

MR. JUSTICE WHITE delivered the opinion of the court.

This appeal is from a judgment of the Court of Claims, dismissing a petition filed by the appellant to recover from the United States the sum of $3,675. 41 Ct. Cl. 357. From the findings of the court below the facts upon which the claim was based are substantially as follows: Woodwell, the appellant, is by profession a mechanical and electrical engineer. From a date prior to March 3, 1901, up to the time of the bringing of this suit, he was an inspector of electric light plants under the jurisdiction of the Treasury Department, receiving a salary of $2,000 per annum. In the sundry civil

act, approved March 3, 1901, the following appropriation was made (31 Stat. 1156):

"For the establishment of electric lighting plants for the buildings occupied by the offices of the Department of the Interior, the Patent Office building, the old Post Office building, now occupied by the General Land and Indian Bureaus, and the Pension Office building, and for improvements in the heating of the Patent Office building, including necessary conduits, the laying and construction of which is hereby authorized, $74,000."

On March 11, 1901, the Secretary of the Interior sent to the Secretary of the Treasury a communication, in which, after reciting the terms of the appropriation act above referred to, he said:

"When this item was under consideration the Committee on Appropriation of the House of Representatives secured, through the Assistant Superintendent of the Treasury, the itemized estimate of cost of the proposed work upon which the amount of appropriation is based, and, at the hearing before the committee, it was also indicated by members thereof that it would be expected that the projected work should conform to the estimate and the general plan outlined therein.

"I have, therefore, to request that, if practicable, some competent person connected with the Treasury Department, expert in such matters, may be authorized to prepare detailed plans and specifications, upon which proposals for the work contemplated in the appropriation may be called for at an early date."

On March 14, 1901, the Secretary of the Treasury, acknowledging the receipt of this letter, said:

"In reply you are informed that the work incident to the preparation of the plans and specifications can be performed under the supervision of a qualified employé of this office, who is familiar with the requirements, but as the work will involve the employment of draftsmen and other persons who cannot be supplied from the regular force of this department

without detriment to its business, it is assumed that such service can be paid for from the appropriation provided for the installation of the plant. Such expense will not exceed $500, including the expense incident to a general inspection of the work during the period of the installation.

"It is the judgment of this department that the installation can be completed in all its details in the most satisfactory manner without exceeding the limits of the appropriation provided therefor—namely, $74,000."

In answering this letter the Secretary of the Interior said:

"Referring to your letter of March 14, 1901, in which you state that in compliance with the request of this department a competent person connected with the Treasury Department will be authorized to prepare necessary plans and specifications covering the installation of the electric lighting plant for the buildings of this department, and to your suggestion that the work will involve the employment of draftsmen and other persons who cannot be supplied from the regular force of the Treasury Department, and which would involve an expense not to exceed $500, which would include the expense incident to the general inspection of the work during the period of installation, I have the honor to inclose herewith a copy of the decision of the Comptroller of the Treasury, to whom the matter was submitted by this department, in which the conclusion is reached that prior to July 1, 1901, the preliminary expenses necessary to carry into effect the appropriation for the electric lighting plant may be incurred, although payment therefor cannot be made previous to that date.

"The department would be glad to have the preliminary work commenced at the earliest practical date, and would be pleased to consider any recommendations as to the employment of the services of draftsmen, etc., referred to in your letter. If such services cannot be procured upon the terms named by the Comptroller, it is believed that it can, in the meantime, be furnished by detail from some branch of this department."

And on May 10, 1901, the Secretary of the Treasury notified the Secretary of the Interior as follows:

"Referring to your letter of May 8, 1901, you are informed that Mr. J. E. Woodwell, inspector of electric light plants, has been directed to confer with E. M. Dawson, chief clerk, Department of the Interior, relative to the installation of an electric light, heat and power plant in the old Post Office Department building in this city."

Subsequently, the Secretary of the Interior made the following order, an official copy of which was sent to Mr. Woodwell through the Secretary of the Treasury:

"Order.

"Department of the Interior,
"Washington, June 21, 1901.

"A board to consist of Mr. Edward M. Dawson, chief clerk of the department; Mr. J. E. Woodwell, inspector of electric light plants, Treasury Department, and Mr. Joseph S. Hill, engineer, etc., 'General Post Office,' is hereby constituted to, from time to time, open bids and recommend awards of contracts for the work embraced in the installation of the electric lighting plant for the buildings of the Interior Department, and in the improvement of the heating of the Patent Office building.

"The board will meet at the office of the chief clerk of the department at such time as may be designated by advertisements for opening proposals for the work."

On November 23, 1901, the Acting Secretary of the Treasury sent the following communication:

"Referring to your letter of November 21, 1901, requesting that Mr. J. E. Woodwell, inspector of electric light plants, Treasury Department, be instructed to conduct a test of the engines and dynamos being manufactured by the Ridgeway Dynamo and Engine Company, Ridgeway, Pa., for the Interior Department, I have the honor to state that, owing to prior and important instructions, it will be impractical for

Mr. Woodwell to make the test the 25th instant, as desired by you.

"You are advised, however, that, if the matter can be held in abeyance until December 2, 1901, Mr. Woodwell will be instructed to make the test."

Thereafter the following from the Acting Secretary of the Interior was received by Mr. Woodwell:

"Department of the Interior,
"Washington, January 2, 1902.

"Permission having been obtained from the Secretary of the Treasury for you to perform such service, you are hereby authorized and directed to proceed to Ridgeway, Pa., as the representative of this department at shop tests to be made, commencing on Monday next, the 6th instant, of the engines and dynamos to be furnished by the Ridgeway Dynamo and Engine Company, under contract with this department.

"There is herewith inclosed, for your information and guidance, a copy of the specifications of the contract, wherein it is provided that 'The regulation, guaranteed efficiency, heating effect, and insulation resistance shall be determined by actual test in the presence of the department's authorized inspector, who shall determine test conditions. The tests to be made at the shops where the dynamos are constructed, upon due notification by contractors of their readiness to commence said test, and at the expense of the contractor, except traveling and other necessary expenses of department's agent. Should the test be delayed or require repetition for any reason for which the contractor is justly responsible, the cost of the delayed or any subsequent test, including the traveling and other necessary expenses of the department's agent, shall be at the expense of the contractor.'

"Mr. L. K. Sager, of this department (Patent Office), will be detailed to accompany you and assist in making the tests.

"Your actual expenses while engaged upon this service

will be paid by this department upon presentation of proper accounts and vouchers from funds available."

Because of the foregoing correspondence Mr. Woodwell, as a mechanical and electrical engineer, performed certain services in and about the installation of said electric lighting and heating plant, between the tenth day of May, 1901, and the first day of February, 1902, and devoted 897 hours to said service, and also necessarily expended $110 in connection therewith.

The services rendered were performed by Woodwell outside of his regular office hours as an employé in the Treasury Department, and during the time when the services were rendered he also fully discharged his duties as such employé of the Treasury Department.

While the Court of Claims declared that the facts above recited presented a strong equitable case in favor of the claimant, entitling him to a reasonable allowance if authority of law existed therefor, it nevertheless entered judgment for the Government upon the ground that the law—as contained in §§ 1763, 1764 and 1765 of the Revised Statutes, copied in the margin [1]—forbade the awarding of any compensation.

[1] SEC. 1763. No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law.

SEC. 1764. No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other department; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

SEC. 1765. No officer in any branch of the public service, or any other person whose salary, pay or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance or compensation.

It was held that the facts did not make out a case of the holding by one person at the same time of two distinct offices, places, or employments, each having its own duties and its own compensation, but was merely a case of the performance of extra services by a Government employé, for the performance of which, even if it be assumed that there was authority of law therefor, nevertheless there was no "appropriation therefor explicitly stating that it was for such additional pay, extra allowance, or compensation."

We see no reason to doubt the correctness of the reasoning and conclusion of the court below. A succinct history of the legislation respecting the question of extra compensation for Government employés is contained in the case of *United States* v. *King*, 147 U. S. 676, 679–681. The decision of this case does not require that we should restate that history. If the facts presented by the record before us exhibit a case merely of the performances of extra services and not one of the filling of two distinct places, offices or employments, payment for such extra service is plainly prohibited by the terms of § 1765, Rev. Stat. That section was taken from two statutes, the first passed March 3, 1839 (5 Stat. 349, c. 83), and the second August 23, 1842 (5 Stat. 510, c. 183), and may be considered to be to some extent *in pari materia* with §§ 1763 and 1764. *United States* v. *Saunders*, 120 U. S. 126. As said in the *Saunders case*, speaking of §§ 1763–1765:

"Taking these sections all together, the purpose of this legislation was to prevent a person holding an office or appointment, for which the law provides a definite compensation by way of salary or otherwise—which is intended to cover all the services which, as such officer, he may be called upon to render—from receiving extra compensation, additional allowances, or pay for other services which may be required of him either by act of Congress or by order of the head of his department, or in any other mode added to or connected with the regular duties of the place which he holds; but that

they have no application to the case of two distinct offices, places or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case he is in the eye of the law two officers, or holds two places or appointments, the functions of which are separate and distinct, and, according to all the decisions, he is in such case entitled to recover the two compensations. In the former case he performs the added duties under his appointment to a single place, and the statute has provided that he shall receive no additional compensation for that class of duties unless it is so provided by special legislation."

Not only was there no specific provision in the appropriation for the employment and compensation of an electrical engineer to prepare plans and supervise the construction and installation of the plant in question, but the correspondence does not permit an inference that it was the intention of the Department of the Interior to call upon Mr. Woodwell to fill a separate and distinct office or employment from that which he already held under the Government. The letter of the Secretary of the Interior of date March 11, 1901, imports that the estimate upon which the appropriation was based was made upon the assumption that such work as was desired to be performed by the experts requested from the Treasury Department would be without extra cost to the Government, and the whole correspondence tends to negate the conception of either an express or implied contract between the Secretary of the Interior and Mr. Woodwell, by which the latter was to perform services for which he was to be specially compensated out of the appropriation in question or otherwise. The request made of the Secretary of the Treasury was not that he should name a competent person with whom the Secretary of the Interior might contract for the performance of the desired services, but was that he should "authorize," that is, designate, "a competent person" to do such work. The reply to such request, dated March 14, 1901, we think makes evident the

fact that it was not expected that the person who was to be supplied from the regular force of the Treasury Department, because it could be done without detriment to the public service, would be additionally compensated. Indeed, any inference that such thought was entertained by the Secretary of the Treasury is rebutted by the circumstance that in his letter he directed the attention of the Secretary of the Interior to the fact that an expense of about $500 would be necessary for the employment of draftsmen and others who could not be supplied by the Treasury Department, and that this sum would be regarded as sufficient for "the expense incident to a general inspection of the work during the period of installation." The direction given to Mr. Woodwell to confer with the chief clerk of the Department of the Interior "relative to the installation of an electric light, heating and power plant in the old Post Office Department building . . ." was addressed to him in his capacity of "inspector of electric light plants" in the Treasury Department. Presumptively, the aid which Mr. Woodwell rendered by direction of the Secretary of the Treasury to the Department of the Interior was done by him in and by virtue of the order and direction of his superior officer, and was not, therefore, a distinct employment. Certainly it cannot be said that Mr. Woodwell, whatever may have been the value of his services, was called upon to render a service specially required by an existing law and for the performance of which the remuneration was fixed by law. These conclusions clearly bring the case within the prohibitions against payment contained in § 1765, Rev. Stat. As there is no contention in argument respecting the claim for expenses ($110), which it is assumed has been paid, we eliminate it from consideration.

Affirmed.

WELCH *v.* SWASEY ET AL., AS THE BOARD OF APPEAL FROM THE BUILDING COMMISSIONER OF THE CITY OF BOSTON.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

No. 153. Argued April 15, 16, 1909.—Decided May 17, 1909.

Whether a state statute is illegal because it delegates legislative power to a commission does not raise a Federal question.

A statute limiting the height of buildings cannot be justified under the police power unless it has some fair tendency to accomplish, or aid in the accomplishment of, some purpose for which that power can be used; if the means employed, pursuant to the statute, have no real substantial relation to such purpose, or if the statute is arbitrary, unreasonable and beyond the necessities of the case, it is invalid as taking property without due process of law.

In determining the validity of a state statute affecting height of buildings, local conditions must be considered; and, while the judgment of the highest court may not be conclusive, it is entitled to the greatest respect, and will not be interfered with unless clearly wrong.

Where the highest court of the State has held that there is reasonable ground for classification between the commercial and residential portions of a city as to the height of buildings, based on practical and not æsthetic grounds, and that the police power is not to be exercised for merely æsthetic purposes, this court will not hold that such a statute, upheld by the state court, prescribing different heights in different sections of the city is unconstitutional as discriminating against, and denying equal protection of the law to, the owners of property in the district where the lower height is prescribed.

Where there is justification for the enactment of a police statute limiting the height of buildings in a particular district, an owner of property in that district is not entitled to compensation for the reasonable interference with his property by the statute.

Chapters 333 of the acts of 1904 and 383 of the acts of 1905 of Massachusetts, limiting the heights of buildings in Boston and prescribing different heights in different sections of the city are, in view of the decision of the highest court of Massachusetts holding that the discrimination is based upon reasonable grounds, a proper exercise of the police power of the State, and are not unconstitutional under the equal protection and due process clauses of the Fourteenth Amendment.

193 Massachusetts, 364, affirmed.

THE plaintiff in error duly applied to the justices of the Supreme Judicial Court of the State of Massachusetts for a mandamus against the defendants, who constitute a board of appeal from the Building Commissioner of the City of Boston, to compel the defendants to issue a permit to him to build on his lot on the corner of Arlington and Marlborough streets, in that city. The application was referred by the justice presiding to the full court, and was by it denied (193 Massachusetts, 364), and the plaintiff has brought the case here by writ of error.

The action of defendants in refusing the permit was based on the statutes of Massachusetts, chap. 333 of the acts of 1904, and chap. 383 of the acts of 1905. The two acts are set forth in the margin.[1] The reason for the refusal to grant the building

[1] Acts of 1904, Chapter 333.

An Act Relative to the Height of Buildings in the City of Boston.

Be it enacted, etc., as follows:

SECTION 1. The city of Boston shall be divided into districts of two classes, to be designated districts A and B. The boundaries of the said districts, established as hereinafter provided, shall continue for a period of fifteen years, and shall be determined in such manner that those parts of the city in which all or the greater part of the buildings situate therein are at the time of such determination used for business or commercial purposes shall be included in the district or districts designated A, and those parts of the city in which all or the greater part of the buildings situate therein are at the said time used for residential purposes or for other purposes not business or commercial shall be in the district or districts designated B.

SEC. 2. Upon the passage of this act the mayor of the city shall appoint a commission of three members, to be called "Commission on Height of Buildings in the City of Boston." The commission shall immediately upon its appointment give notice and public hearings, and shall make an order establishing the boundaries of the districts aforesaid, and within one month after its appointment shall cause the same to be recorded in the registry of deeds for the county of Suffolk. The boundaries so established shall continue for a period of fifteen years from the date of the said recording. Any person who is aggrieved by the said order may, within thirty days after the recording thereof, appeal to the commission for a revision; and the commission may, within

permit was because the building site for the proposed building was situated in one of the districts B, as created under the provisions of the acts mentioned, in which districts the height of

six months after its appointment, revise such order, and the revision shall be recorded in the registry of deeds for the county of Suffolk, and shall date back to the original date of recording. The members of the commission shall serve until the districts have been established as aforesaid; and any vacancy in the commission caused by resignation, death or inability to act shall be filled by the mayor, on written application by the remaining members of the commission or of ten inhabitants of the city. The members of the commission shall receive such compensation as the mayor shall determine.

SEC. 3. In the city of Boston no building shall be erected to a height of more than one hundred and twenty-five feet above the grade of the street in any district designated A, and no building shall be erected to a height of more than eighty feet above the grade of the street in any district designated B. These restrictions shall not apply to grain or coal elevators or sugar refineries in any district designated A, nor to steeples, domes, towers or cupolas erected for strictly ornamental purposes, of fireproof material, on buildings of the above height or less in any district. The Supreme Judicial Court and the Superior Court shall each have jurisdiction in equity to enforce the provisions of this act, and to restrain the violation thereof.

SEC. 4. This act shall take effect upon its passage. (Approved May 13, 1904.)

Acts of 1905, Chapter 383.

An Act Relative to the Height of Buildings in the City of Boston.

Be it enacted, etc., as follows:

SECTION 1. Within thirty days after the passage of this act the mayor of the city of Boston shall appoint a commission of three members to determine, in accordance with the conditions hereinafter provided, the height of buildings within the district designated by the commission on height of buildings in the city of Boston as district B, in accordance with chapter three hundred and thirty-three of the acts of the year nineteen hundred and four.

SEC. 2. Said commission shall immediately upon its appointment give notice and public hearings, and shall make an order establishing the boundaries of or otherwise pointing out such parts, if any, of said district B as it may designate in which buildings may be erected to a height exceeding eighty feet but not exceeding one hundred feet, and the height between eighty feet and one hundred feet to which build-

the buildings is limited to eighty, or, in some cases, to one hundred feet, while the height of buildings in districts A is limited to one hundred and twenty-five feet. The height of the building which plaintiff in error proposed to build and for which he asked the building permit was stated by him in his application therefor to be one hundred and twenty-four feet, six inches.

The designation of what parts in districts B and upon what conditions a building could be therein erected more than eighty while not more than one hundred feet high was to be made by a commission, as provided for in the act of 1905, and the commission duly carried out the provisions of the act in that respect. The sole reason for refusing the permit was on

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ings may so be erected, and the conditions under which buildings may be erected to said height, except that such order may provide for the erection of buildings as aforesaid to a height not exceeding one hundred and twenty-five feet in that portion of said district B which lies within fifty feet from the boundary line separating said district B from the district designated by the commission on height of buildings in the city of Boston as district A, in accordance with said chapter three hundred and thirty-three, provided said boundary line divides the premises affected by such order from other adjoining premises, both owned by the same person or persons, and within sixty days after its appointment shall cause the same to be recorded in the registry of deeds for the county of Suffolk. Any person who is aggrieved by such order may, within sixty days after the recording thereof, appeal to the commission for a revision; and the commission may, previous to the first day of January in the year nineteen hundred and six, revise such order, and the revision shall be recorded in the registry of deeds for the county of Suffolk and shall date back to the original date of recording. The boundaries so established shall continue for a period of fifteen years from the date of the recording of the order made by the commission on height of buildings in the city of Boston under chapter three hundred and thirty-three of the acts of the year nineteen hundred and four. The members of the commission shall receive such compensation as the mayor shall determine.

SEC. 3. Within such parts of district B as may be designated by the commission as aforesaid (which may, except as hereinafter provided, include any parts of said district B affected by prior acts limiting the height of buildings) buildings may be erected to the height fixed by the commission as aforesaid, exceeding eighty feet but not exceeding

account of the proposed height of the building, being greater than the law allowed.

The plaintiff in error contended that the defendants were not justified in their refusal to grant the permit, because the statutes upon which their refusal was based were unconstitutional and void, but he conceded that if they were valid the defendants were justified in their refusal.

The court, while deciding that mandamus was a proper remedy, held that the statutes and the reports of the commissions thereunder were constitutional.

Mr. Burton Edward Eames, with whom *Mr. Charles H.*

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one hundred feet, or one hundred and twenty-five feet, as hereinbefore provided, and subject to such conditions as may be fixed as aforesaid by the commission; but within the following described territory, to wit: Beginning at the corner of Beacon street and Hancock avenue, thence continuing westerly on Beacon street to Joy street, thence continuing northerly on Joy street to Myrtle street, thence continuing easterly on Myrtle street to Hancock street, thence continuing southerly on Hancock street and Hancock avenue to the point of beginning, no building shall be erected to a height greater than seventy feet, measured on its principal front, and no building shall be erected on a parkway, boulevard or public way on which a building line has been established by the board of park commissioners or by the board of street commissioners, acting under any general or special statute, to a greater height than that allowed by the order of said boards; and no building upon land any owner of which has received and retained compensation in damages for any limitation of height or who retains any claim for such damages shall be erected to a height greater than that fixed by the limitation for which such damages were received or claimed.

SEC. 4. No limitations of the height of buildings in the city of Boston shall apply to churches, steeples, towers, domes, cupolas, belfries or statuary not used for purposes of habitation, nor to chimneys, gas holders, coal or grain elevators, open balustrades, skylights, ventilators, flagstaffs, railings, weather vanes, soil pipes, steam exhausts, signs, roof houses not exceeding twelve feet square and twelve feet high, nor to other similar constructions such as are usually erected above the roof line of buildings.

SEC. 5. This act shall take effect upon its passage. (Approved May 8, 1905.)

Tyler and *Mr. Owen D. Young* were on the brief, for plaintiff in error:

The first point in the argument of the plaintiff in error is that the purpose of these acts is not within the sphere of purposes for which the police power may lawfully be exercised.

The court will look to the real purpose of the statute. *Watertown* v. *Mayo*, 109 Massachusetts, 315, 319; *Austin* v. *Murray*, 16 Pick. 121, 126; *State* v. *Redmon*, 134 Wisconsin, 89, 107; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Brimmer* v. *Rebman*, 138 U. S. 78, 82; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Soon Hing* v. *Crowley*, 113 U. S. 703, 710; *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59, 63; *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Cal. Reduction Co.* v. *Sanitary Wks.*, 199 U. S. 306; *Health Dept.* v. *Rector*, 145 N. Y. 32, 40; *Matter of Jacobs*, 98 N. Y. 98, 110; *Farist Steel Co.* v. *Bridgeport*, 60 Connecticut, 278, 292; *Priewe* v. *Wisconsin &c. Imp. Co.*, 103 Wisconsin, 537, 549.

In determining what is the real purpose of the statute, the court will consider the history of the times and the circumstances leading up to its enactment. *Holy Trinity Church* v. *United States*, 143 U. S. 457.

The purpose may also be inferred from the terms of the act itself. *Lochner* v. *New York*, 198 U. S. 45; *Talbot* v. *Hudson*, 16 Gray, 417, 420; *Simpson* v. *Story*, 145 Massachusetts, 497, 498; *Pollock* v. *Farmers L. & T. Co.*, 157 U. S. 429, 558 *et seq.*; *Farist Steel Co.* v. *Bridgeport*, 60 Connecticut, 278.

The real purpose of these acts was æsthetic.

This appears from the circumstances under which they were passed. Contemporaneous statutes and contemporaneous litigation, tend to the conclusion that they were aimed not at dangers to the public health, safety, morals or well-being, but that they were designed purely for purposes which may be called æsthetic, to preserve architectural symmetry and regular sky-lines.

The first act was passed in the legislative session of 1903–1904, very shortly after the decisions by the Supreme Judicial

Court of Massachusetts and by this court sustaining the statutes which limited the height of buildings in the vicinity of Copley Square and upon Beacon Hill as lawful exercises of the power of eminent domain. *Attorney-General* v. *Williams*, 174 Massachusetts, 476 (October, 1899); *Parker* v. *Commonwealth*, 178 Massachusetts, 199 (March, 1901); *Attorney-General* v. *Williams*, 178 Massachusetts, 330 (March, 1901); *Williams* v. *Parker*, 188 U. S. 491 (February, 1903).

The police power cannot properly be exercised for an æsthetic purpose.

Although property may be taken by right of eminent domain for æsthetic purposes,—*Higginson* v. *Nahant*, 11 Allen, 530; *Attorney-General* v. *Williams*, 174 Massachusetts, 476,—that purpose is not sufficient to warrant the exercise of the police power in such manner as to interfere with the use of property. *Commonwealth* v. *Boston Ad. Co.*, 188 Massachusetts, 348; *St. Louis* v. *Hill*, 116 Missouri, 527; *St. Louis* v. *Dorr*, 145 Missouri, 466; *People* v. *Green*, 85 App. Div. (N. Y.) 400; *Bostock* v. *Sams*, 95 Maryland, 400; *Posting Sign Co.* v. *Atlantic City*, 71 N. J. L. 72; *Passaic* v. *Patterson Bill Post. Co.*, 72 N. J. L. 285; *Chicago* v. *Gunning System*, 214 Illinois, 628; Article on "Public Æsthetics," by Wilbur Larremore, in Harvard Law Review, November, 1906, p. 42.

The infringement upon rights of property involved in these acts is unreasonable.

The principle of reasonableness is a principle of proportionateness. The courts appear to have adopted the principle that the legislative acts under the police power, when affecting private rights, must have "some fair and reasonable relation of means to end which courts can see and admit the force of," and that the infringement of rights must bear a reasonable relation to the public necessity, *i. e.*, the measure must be proportionate to the end in view. *Ex parte Whitwell*, 98 California, 73; *State* v. *Speyer*, 67 Vermont, 502; *Commonwealth* v. *Tewksbury*, 11 Met. 55, 57; Cooley on Constitutional Limitations (7th ed.), 878; *Miller* v. *Horton*, 152 Massachu-

setts, 540, 547; *State* v. *Ashbrook*, 154 Missouri, 375; *People* v. *Gillson*, 109 N. Y. 389, 403; *Health Department* v. *Rector*, 145 N. Y. 32; *Matter of Jacobs*, 98 N. Y. 98, 110; *Mugler* v. *Kansas*, 123 U. S. 623; *Chicago &c. Ry.* v. *Drainage Commissioners*, 200 U. S. 561, 593; *Railway Co.* v. *Husen*, 95 U. S. 465; *Sawyer* v. *Davis*, 136 Massachusetts, 239; *Rideout* v. *Knox*, 148 Massachusetts, 368.

Any regulation which deprives any person of a profitable use of his property constitutes a taking of property, and entitles him under the Constitution to compensation, unless the invasion of rights is so slight as to permit the regulation to be justified under the police power. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 179; *United States* v. *Lynah*, 188 U. S. 445; *Sweet* v. *Rechel*, 159 U. S. 380, 399; *Eaton* v. *Boston &c. R. R.*, 51 N. H. 504; *Bent* v. *Emery*, 173 Massachusetts, 495; *Grand Rapids* v. *Jarvis*, 30 Michigan, 308, 320, 321; *Matter of Jacobs*, 98 N. Y. 98, 105, 106; *Edwards* v. *Bruorton*, 184 Massachusetts, 529, 532, 533; Holmes, J., in *Miller* v. *Horton*, 152 Massachusetts, 540, 547.

The legislature of Massachusetts in the previous statutes limiting the height of buildings about Copley Square in Boston to the height of ninety feet, and on Beacon Hill, in the vicinity of the State House, in Boston, to a height of seventy feet, recognized that such a regulation involved a taking of property, Stats. 1898, ch. 452; Stats. 1899, ch. 457, and the Supreme Court of Massachusetts, in the decisions sustaining those statutes as exercises of the power of eminent domain, likewise recognized this fact. *Attorney-General* v. *Williams*, 174 Massachusetts, 476; *Parker* v. *Commonwealth*, 178 Massachusetts, 199; *Attorney-General* v. *Williams*, 178 Massachusetts, 330.

Even if the statutes were enacted for some object properly within the scope of the police power, they involve an invasion of private rights which is entirely disproportionate to any of the objects which the legislature might properly have had in view.

The only objects, aside from the æsthetic, which it is at all conceivable might have been in view of the legislature, are the public health or safety, and no public necessity existed for either of those objects sufficient to justify the measures.

The experience of other cities with buildings much higher than anyone has yet desired to build in Boston, and much higher than the limits fixed by these statutes, goes very strongly to show that the danger of injury to health and the danger from fire where tall buildings are properly constructed are very slight.

Even if the object or purpose of these acts was within the legitimate sphere of purposes permissible to the police power, yet the classification adopted has no proper relation to either of the possible ostensible objects, but is arbitrary and unreasonable. The constitutional provision for equal protection of the laws means that all persons are to be treated alike. It contemplates the right of the legislature to make reasonable classifications, and the protection given by the law is considered equal if all persons within the classes thus established are treated alike under like circumstances and conditions. *Missouri* v. *Lewis*, 101 U. S. 22; *Magoun* v. *Illinois Savings Bank*, 170 U. S. 283, 293; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Hayes* v. *Missouri*, 120 U. S. 68, 71.

The classification adopted must be a reasonable one, with reference to the purpose for which the statute is enacted; it cannot be arbitrary. *Gulf &c. Ry.* v. *Ellis*, 165 U. S. 150, 159, 165; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 560; *Atchison &c. R. R.* v. *Mathews*, 174 U. S. 96, 104; *Heath & Milligan* v. *Worst*, 207 U. S. 338.

So far as it may be desirable to do so, the court will take judicial notice of facts of common knowledge, of the location of the lines drawn by the commission, of the situation of various streets, and of the character of the various districts and localities of the city. *Brimmer* v. *Rebman*, 138 U. S. 78; *Minnesota* v. *Barber*, 136 U. S. 313, 321; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 23; *Muller* v. *Oregon*, 208 U. S. 412, 421;

Siegbert v. *Stiles*, 39 Wisconsin, 533; *The Montello*, 11 Wall. 411; *Gardner* v. *Eberhart*, 82 Illinois, 316; *Prince* v. *Crocker*, 166 Massachusetts, 347.

The situtation and character of the various districts and localities of the City of Boston being matters of common knowledge, of which the Supreme Judicial Court of Massachusetts would and did take notice, this court is authorized to do likewise as, upon writ of error, it takes judicial notice of all matters which were matters of law in the state court. By analogy, therefore, this court should notice judicially all matters not required to be proved as facts in the state court, including matters of judicial notice. Matters of judicial notice are matters of law.

The classification attempted in these statutes is arbitrary and is not considered with a purpose to safeguard either the public health or the public safety.

They are special laws, applying only to Boston, and while a reasonable classification of cities may be made, it must be based upon some real difference with reference to the purposes of the act. *Tenement House Department* v. *Moeschen*, 179 N. Y. 325; *Watertown* v. *Mayo*, 109 Massachusetts, 315; *State* v. *Hammer*, 42 N. J. Law, 435, 440; *Bessette* v. *People*, 193 Illinois 334.

The classification attempted within the City of Boston is not based upon reasonable grounds. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 368; *Newton* v. *Belger*, 143 Massachusetts, 598.

The statute gives exceptional rights to property holders in district B whose property is situated within fifty feet of the division line established, provided they also own land on the other side of the division line.

It is provided that the height of buildings in district B above eighty feet shall depend upon the width of the building upon the street.

The statutes create exceptions in favor of certain occupations. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Mr. Thomas M. Babson for defendant in error:

The first question is whether an act limiting the height of buildings is constitutional at all. The statute was enacted, according to the decision of the Supreme Judicial Court of the State, in behalf of the public health and safety, and the Supreme Court of the United States will not strike it down as an unconstitutional interference with private property unless it can plainly see that it has no real and substantial relation to those objects and is a mere arbitrary attack upon the owners of land. *Slaughter-House Cases*, 16 Wall. 36; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Munn* v. *Illinois*, 94 U. S. 113; *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Barbier* v. *Connolly*, 113 U. S. 27; *Mugler* v. *Kansas*, 123 U. S. 623; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Lawton* v. *Steele*, 152 U. S. 133; *Holden* v. *Hardy*, 169 U. S. 366; *Fischer* v. *St. Louis*, 194 U. S. 361; *Reduction Co.* v. *Reduction Works*, 199 U. S. 306; *Bacon* v. *Walker*, 204 U. S. 311; *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349.

The right of the State to regulate the construction of buildings has been recognized and exercised ever since the population of our cities became dense enough to make regulation desirable and necessary for the protection of the inhabitants from fire and disease. *Ex parte Fiske*, 72 California, 125; *Baumgartner* v. *Hasty*, 100 Indiana, 575; *Mt. Vernon First National Bank* v. *Sarlls*, 129 Indiana, 201; *Wadleigh* v. *Gilman*, 12 Maine, 403; *Easton* v. *Covey*, 74 Maryland, 262; *Watertown* v. *Mayo*, 109 Massachusetts, 315; *Salem* v. *Maynes*, 123 Massachusetts, 372; *Brady* v. *Northwestern Insurance Co.*, 11 Michigan, 425; *New York Fire Department* v. *Gilmour*, 149 N. Y. 453; *Rochester* v. *West*, 164 N. Y. 510; *Republica* v. *Duquet*, 2 Yeates (Pa.), 493; *Douglass* v. *Commonwealth*, 2 Rawle (Pa.), 262; *Klinger* v. *Bickel*, 117 Pa. St. 326; *City Council* v. *Elford*, 1 McMullan (S. C.), 234; *Knoxville* v. *Bird*, 12 Lea (Tenn.), 121; *Baxter* v. *Seattle*, 3 Washington, 352; *Charlestown* v. *Reed*, 27 W. Va. 681.

Until the introduction within recent years of steel frame

construction, very tall buildings were not practicable, and it is only lately that there has been any need of legislation restricting the height of buildings, for the natural difficulties were formerly sufficient protection to the public.

In determining whether a state statute is aimed and adapted to promote the public welfare, this court will hesitate to overturn a decision of the highest court of the State. The validity of the statute may depend on certain facts, general, notorious and acknowledged within the State, and with which the state courts may be assumed to be exceptionally familiar. They understand the situation which led to the demand for the enactment of the statute, and they appreciate the disastrous results which in all probability would flow from a denial of its validity. *Clark* v. *Nash,* 198 U. S. 361; *Strickley* v. *Highland Boy Mining Co.,* 200 U. S. 527; *Bacon* v. *Walker,* 204 U. S. 311.

What is a reasonable regulation in one city might be unreasonable in another. The Massachusetts legislature has deemed this restriction wise, and its highest court has called it reasonable; their decision should carry great weight.

Plaintiffs in error are not entitled to compensation because there was no taking of this property. This court has never accepted the fanciful doctrine that whatever decreases the value of land is the taking, *pro tanto,* of the owner's property and so unconstitutional unless he is paid for the damage, but has steadfastly adhered to the older and sounder rule that land is not taken unless it is physically entered upon or the owner substantially deprived of the beneficial use. *Smith* v. *Washington,* 20 How. 135; *Transportation Company* v. *Chicago,* 99 U. S. 635; *Osborne* v. *Missouri Pacific R. R. Co.,* 147 U. S. 248; *Gibson* v. *United States,* 166 U. S. 275; *Meyer* v. *Richmond,* 172 U. S. 95; *Sharp* v. *United States,* 191 U. S. 341; *Bedford* v. *United States,* 192 U. S. 217.

Regulations and restrictions upon the use of real property have been imposed which limit its use and impair its value more severely than those in the case at bar without giving rise to any constitutional obligation to compensate the owner.

Slaughter-House Cases, 16 Wall. 36; *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Barbier* v. *Connolly*, 113 U. S. 27; *Mugler* v. *Kansas*, 123 U. S. 623; *Fischer* v. *St. Louis*, 194 U. S. 361.

There is no requirement in the Fourteenth Amendment or elsewhere in the Constitution that the laws of a State be uniform in their application throughout the State. *Missouri* v. *Lewis*, 101 U. S. 22; *Hayes* v. *Missouri*, 120 U. S. 68; *Budd* v. *New York*, 143 U. S. 517, 548; *Gardner* v. *Michigan*, 199 U. S. 325.

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

The ground of objection of plaintiff in error to this legislation is that the statutes unduly and unreasonably infringe upon his constitutional rights, (*a*) As to taking of property without compensation; (*b*) As to denial of equal protection of the laws.

Plaintiff in error refers to the existence of a general law in Massachusetts applicable to every city therein, limiting the height of all buildings to one hundred and twenty-five feet above the grade of the street (acts of 1891, ch. 355), and states that he does not attack the validity of that act in any respect, but concedes that it is constitutional and valid. See also on same subject acts of 1892, ch. 419, § 25, making such limitation as to the City of Boston. His objection is directed to the particular statutes, because they provide for a much lower limit in certain parts of the City of Boston, to be designated by a commission, and because a general restriction of height as low as eighty or one hundred feet over any substantial portion of the city is, as he contends, an unreasonable infringement upon his rights of property; also that the application of those limits to districts B, which comprise the greater part of the City of Boston, leaving the general one hundred and twenty-five feet limit in force in those portions of the city, which

the commission should designate (being the commercial districts), is an unreasonable and arbitrary denial of equal rights to the plaintiff in error and others in like situation.

Stating his objections more in detail, the plaintiff in error contends that the purposes of the acts are not such as justify the exercise of what is termed the police power, because, in fact, their real purpose was of an æsthetic nature, designed purely to preserve architectural symmetry and regular skylines, and that such power cannot be exercised for such a purpose. It is further objected that the infringement upon property rights by these acts is unreasonable and disproportioned to any public necessity, and also that the distinction between one hundred and twenty-five feet for the height of buildings in the commercial districts described in the acts, and eighty to one hundred feet in certain other or so-called residential districts, is wholly unjustifiable and arbitrary, having no well-founded reason for such distinction, and is without the least reference to the public safety, as from fire, and inefficient as means to any appropriate end to be attained by such laws.

In relation to these objections the counsel for the plaintiff in error, in presenting his case at bar, made a very clear and able argument.

Under the concession of counsel, that the law limiting the height of buildings to one hundred and twenty-five feet is valid, we have to deal only with the question of the validity of the provisions stated in these statutes and in the conditions provided for by the commissions, limiting the height in districts B between eighty and one hundred feet.

We do not understand that the plaintiff in error makes the objection of illegality arising from an alleged delegation of legislative power to the commissions provided for by the statutes. At all events, it does not raise a Federal question. The state court holds that kind of legislation to be valid under the state constitution and this court will follow its determination upon that question.

We come, then, to an examination of the question whether

these statutes with reference to limitations on height between eighty and one hundred feet and in no case greater than one hundred feet are valid. There is here a discrimination or classification between sections of the city, one of which, the business or commercial part, has a limitation of one hundred and twenty-five feet, and the other, used for residential purposes, has a permitted height of buildings from eighty to one hundred feet.

The statutes have been passed under the exercise of so-called police power, and they must have some fair tendency to accomplish, or aid in the accomplishment of some purpose, for which the legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently decided as not to require the citation of many authorities. If the means employed, pursuant to the statute, have no real, substantial relation to a public object which government can accomplish; if the statutes are arbitrary and unreasonable and beyond the necessities of the case; the courts will declare their invalidity. The following are a few of the many cases upon this subject: *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Minnesota* v. *Barber*, 136 U. S. 313, 320; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 28; *Lochner* v. *New York*, 198 U. S. 45, 57; *Chicago Railway Company* v. *Drainage Commissioners*, 200 U. S. 561, 593.

In passing upon questions of this character as to the validity and reasonableness of a discrimination or classification in relation to limitations as to height of buildings in a large city, the matter of locality assumes an important aspect. The particular circumstances prevailing at the place or in the State where the law is to become operative; whether the statute is really adapted, regard being had to all the different and material facts, to bring about the results desired from its passage; whether it is well calculated to promote the general and public welfare, are all matters which the state court is familiar with, but a like familiarity cannot be ascribed to this court, assum-

ing judicial notice may be taken of what is or ought to be generally known. For such reason this court, in cases of this kind, feels the greatest reluctance in interfering with the well-considered judgments of the courts of a State whose people are to be affected by the operation of the law. The highest court of the State in which statutes of the kind under consideration are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature) and with the general situation surrounding the subject-matter of the legislation than this court can possibly be. We do not, of course, intend to say that under such circumstances the judgment of the state court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong. In this case the Supreme Judicial Court of the State holds the legislation valid, and that there is a fair reason for the discrimination between the height of buildings in the residential as compared with the commercial districts. That court has also held that regulations in regard to the height of buildings, and in regard to their mode of construction in cities, made by legislative enactments for the safety, comfort or convenience of the people and for the benefit of property owners generally, are valid. *Attorney-General* v. *Williams*, 174 Massachusetts, 476. We concur in that view, assuming, of course, that the height and conditions provided for can be plainly seen to be not unreasonable or inappropriate.

In relation to the discrimination or classification made between the commercial and the residential portion of the city, the state court holds in this case that there is reasonable ground therefor, in the very great value of the land and the demand for space in those parts of Boston where a greater number of buildings are used for the purposes of business or commercially than where the buildings are situated in the residential portion of the city, and where no such reasons exist for high buildings. While so deciding the court cited, with

approval, *Commonwealth* v. *Boston Advertising Company*, 188 Massachusetts, 348, which holds that the police power cannot be exercised for a merely æsthetic purpose. The court distinguishes between the two cases and sustains the present statutes. As to the condition adopted by the commission for permitting the erection, in either of the districts B, that is, the residential portion, of buildings of over eighty feet, but never more than one hundred, that the width on each and every public street on which the building stands shall be at least one-half its height, the court refuses to hold that such condition was entirely for æsthetic reasons. The Chief Justice said: "We conceive that the safety of adjoining buildings, in view of the risk of the falling of walls after a fire, may have entered into the purpose of the commissioners. We are of opinion that the statutes and orders of the commissioners are constitutional."

We are not prepared to hold that this limitation of eighty to one hundred feet, while in fact a discrimination or classification, is so unreasonable that it deprives the owner of the property of its profitable use without justification, and that he is therefore entitled under the Constitution to compensation for such invasion of his rights. The discrimination thus made is, as we think, reasonable, and is justified by the police power.

It might well be supposed that taller buildings in the commercial section of the city might be less dangerous in case of fire than in the residential portion. This court is not familiar with the actual facts, but it may be that in this limited commercial area the high buildings are generally of fireproof construction; that the fire engines are more numerous and much closer together than in the residential portion, and that an unlimited supply of salt water can be more readily introduced from the harbor into the pipes, and that few women or children are found there in the daytime and very few people sleep there at night. And there may in the residential part be more wooden buildings, the fire apparatus may be more widely scattered and so situated that it would be more difficult to obtain the necessary amount of water, as the residence quar-

ters are more remote from the water front, and that many women and children spend the day in that section, and the opinion is not strained that an undiscovered fire at night might cause great loss of life in a very high apartment house in that district. These are matters which it must be presumed were known by the legislature, and whether or not such were the facts was a question, among others, for the legislature to determine. They are asserted as facts in the brief of the counsel for the City of Boston. If they are, it would seem that ample justification is therein found for the passage of the statutes, and that the plaintiff in error is not entitled to compensation for the reasonable interference with his property rights by the statutes. That in addition to these sufficient facts, considerations of an æsthetic nature also entered into the reasons for their passage, would not invalidate them. Under these circumstances there is no unreasonable interference with the rights of property of the plaintiff in error, nor do the statutes deprive him of the equal protection of the laws. The reasons contained in the opinion of the state court are in our view sufficient to justify their enactment. The judgment is therefore

Affirmed.

GRAY *v.* NOHOLOA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 174. Submitted April 20, 1909.—Decided May 17, 1909.

Which is the correct English translation of a will written in the Hawaiian language is a pure question of fact, and in this case this court follows its usual course in regard to the findings of fact of both the lower courts and adopts the translation which both found to be correct.

The will of a childless testatrix, who lived with her husband in the

leper colony of Hawaii leaving all her property to her husband, was rightfully construed as relating to all property whether situated in that colony or outside thereof, it not being presumed that she died intestate as to any of her property or that she would limit her bounty to her husband by omitting any of her property.
18 Hawaii, 265, affirmed.

THE appellant herein appeals from the decree of the Supreme Court of the Territory of Hawaii. The facts relating to the case are as follows:

Hikaalani Hobron Noholoa was a resident of the island of Molokai, Territory of Hawaii, which is called the leper settlement, and was a leper, about seventy-five years of age, at the time of her death, on or about the twenty-ninth of June, 1906. Deceased left a husband, who was also a resident of the settlement and a leper, and a niece, the appellant, Kaimiola Nakookoo Gray, also residing on the island, and two grandnieces, being minors, residing in Honolulu. She left a will, written in the Hawaiian language, of which the following was taken as a translation by the courts below:

"I, the undersigned, a leper residing at Kalaupapa, Island of Molokai, Territory of Hawaii, do make this my Last Will for all property known belonging to me and appearing in my name situate at Kalaupapa aforesaid, with good will (or intention,) do hereby bequeath the same as hereinafter described: One gray horse, one bay mare; one black mare; one frame wooden house and other houses owned by me, as well as all other property owned by me, to my husband David Noholoa, residing at Kalaupapa aforesaid, to him and to his heirs, administrators and executors forever. Renouncing all claims that my relatives may set up in law to this."

The above will was duly admitted to probate in the Circuit Court of the Second Circuit of the Territory on the twelfth day of December, 1906, and, upon petition duly made, the court granted letters of administration with the will annexed to Enoch Johnson, who thereupon received such letters and entered upon his duties as such administrator.

After the application on the part of the husband for the probate of the will of his wife, and after the filing of the same with the clerk of the Circuit Court, but before the granting of letters of administration to Enoch Johnson, as prayed for by the husband, a petition was filed with the same court by Kaimiola Nakookoo Gray, the appellant herein, and a niece of the deceased testatrix, in which petition it was averred that the will of the testatrix, which was offered for probate, did not dispose of any property other than which was within and at the leper settlement, and that the testatrix at the time of her death owned other property outside of the settlement of the assessed value of several thousand dollars, and it was averred that there was no person who could lawfully demand settlement of the people who had possession of the property outside of the settlement, and therefore the petitioner asked for the appointment of some suitable person as administrator of the estate of which decedent died intestate, and that due notice might be given thereof.

Subsequently to the filing of this petition the probate court duly admitted the will as translated by the court to probate, and also denied the petition of the niece for letters of administration upon that portion of the land of deceased which she asserted was not included in the will. The translation of the will which she put in evidence in her proceeding, was the same one that was made by the court in the proceeding to admit the will to probate.

Kaimiola Nakookoo Gray duly appealed from the order or decree of the probate court refusing to grant letters of administration, as petitioned for, and the appeal was duly argued, without objection, in the Supreme Court of the Territory upon the same translation of the will, and the decree was affirmed.

A motion was then made for a rehearing of the case, and upon that motion, for the first time, *ex parte* affidavits were used on behalf of the appellant in regard to the translation of the will of testatrix. These affidavits asserted that the translation adopted, and most of it made, by the probate court, and

adopted by the Supreme Court upon the hearing, without protest or question on her part, was not an accurate translation, and the following was asserted to be the true translation:

"I, the undersigned, a leper residing at Kalaupapa, Island of Molokai, Territory of Hawaii, make this my last testament concerning all chattels known as mine and in my possession, being in Kalaupapa aforementioned; with sane mind I bequeath all those said goods of mine described as follows, to wit,

"1 Creamed colored horse,

"1 Bay mare,

"1 Black mare,

"1 Wooden house together with certain other houses, and all other chattels belonging to me, to my husband, David Noholoa, residing at said Kalaupapa and to his heirs and assigns forever. My heirs shall not have any right to claim these at law.

"In witness whereof I hereunto subscribe my name this 18th day of November, 1901."

The court refused to accept such translation or to set aside or correct the translation already made and adopted by it, and thereupon denied the motion for a rehearing, Frear, Chief Justice, dissenting.

From the decree of affirmance, Kaimiola Nakookoo Gray has appealed to this court.

Mr. David L. Withington, Mr. J. Alfred Magoon and *Mr. J. Lightfoot* for appellant.

Mr. William L. Stanley, Mr. Clarence H. Olson and *Mr. Henry Holmes* for appellee.

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

The sole question in this case is whether property which belonged to testatrix in her lifetime, and was situated outside

of the leper island, or settlement, at the time of her death passed by her will.

The appellant asserts that the translation of the will, although made by one and adopted by both courts below without opposition, and offered on her part in this proceeding, both in the trial court and upon review, is, nevertheless, inaccurate; that the translation which she submitted in her motion for a rehearing, as contained in certain *ex parte* affidavits, is the more accurate of the two, and if it were adopted the original will in such case, as so translated, would not dispose of any property which belonged to the testatrix at the time of her death, situated outside of the leper settlement; and, as no executor was appointed in the will, the petition of the appellant for the appointment of an administrator with the will annexed as to all outside property of which the testatrix died intestate should, as she claims, have been granted, and to that end the order should be reversed.

What is the correct English translation of the original will in this case, written in the Hawaiian language, is a pure question of fact.

The record shows that Judge Kepoikai, judge of the probate branch of the Circuit Court, Second Circuit, himself translated, at least in part, the will now before us for construction. The record discloses no objection or opposition to such translation, or any criticism of its accuracy at that time. The Supreme Court, on appeal, used the same translation, without criticism or opposition, as had been used by the trial court, and, upon that translation, affirmed the decree. Mr. Justice Hartwell, in writing the opinion of the Supreme Court, said: "The original of the will shows more clearly than does the evidently defective translation that the intention was to dispose of 'also all the other property known to be mine.' The decedent evidently knew well what her property at Kalaupapa was, and there is no reason to suppose she did not know of the property in Honolulu." So that whether the translation adopted by the court below and the Supreme Court was defective or not, the

view of the latter court was that a correct translation showed the intention of the testatrix to dispose of all her property, or, as the court said, "also all the other property known to be mine."

As the two courts below have determined the question of fact, we follow our usual course in such cases and adopt the translation of the will which they have adopted.

The legal question then arising is, what did the testatrix mean by her will? Her intention is to be derived from her language, and we are of opinion that the lower court was correct in its construction as given to us.

A perusal of the will as translated and adopted by the courts below leaves us in no doubt that the testatrix's intention was to give to her husband, not only the property which she left situated at Kalaupapa, but also all other property owned by her, wherever it might be situated and whatever it might be. We do not think she intended to die intestate as to any portion of her property, or to limit her bounty to her husband to such property only as was situated at Kalaupapa.

The decree of the Supreme Court of the Territory is therefore

Affirmed.

COLLINS *v.* O'NEIL, SHERIFF.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

SAME *v.* THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO.

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

Nos. 241, 320. Argued April 5, 1909.—Decided May 17, 1909.

Where a provision in a treaty or convention is plain it must receive a reasonable and sensible construction, and not one which it is impossible to conceive that the representatives of civilized countries would enter into.

The rule that a person extradited under treaty provisions cannot be tried for an offense other than that for which he was extradited until after he has had opportunity to leave the country to which he was surrendered does not apply to an offense committed after he arrives in the latter country. *United States* v. *Rauscher*, 119 U. S. 407.

Whether a person extradited and who thereafter commits a crime in the country to which he is surrendered shall be first tried for the earlier or later crime is a matter wholly within the jurisdiction of the country to which he is surrendered and is of no interest to the surrendering country.

A fugitive from justice has no inherent right of asylum; his rights in that respect depend wholly upon the treaty between the countries demanding and surrendering him.

Under the treaty of 1842 and convention of 1889 with Great Britain a surrendered person can be tried for an offense committed in this country after his arrival; and the trial for such offense does not have to await the conclusion of the trial of the offense for which he was surrendered; and so *held* that one who, on the trial of the offense for which he was surrendered and which resulted in a disagreement, committed perjury could be indicted and tried for that offense without being allowed an opportunity to leave this country and without waiting for the final conclusion of the trial for the crime for which he was surrendered.

151 California, 340, and 154 Fed. Rep. 980, affirmed.

In No. 241, the plaintiff in error, being imprisoned in the county jail of San Francisco, in the State of California, by the sheriff, applied to the Supreme Court of that State in banc for a writ of *habeas corpus* to obtain his discharge from imprisonment. The writ was granted, and after hearing was dismissed, and the petitioner remanded to the custody of the sheriff. 151 California, 340. A writ of error was then sued out from this court and the case brought here.

In No. 320 the appellant applied to the Circuit Court of the United States for the Northern District of California for a similar writ, which was issued, and a hearing had and the writ dismissed by the court. 149 Fed. Rep. 573; and see 151 Fed. Rep. 358; 154 Fed. Rep. 980. From the order of dismissal an appeal was allowed to this court. The two cases have been heard here as one.

The material facts are these: On July 13, 1905, an indictment was found by the grand jury of San Francisco county, California, against the plaintiff in error, charging him with the crime of perjury, alleged to have been committed in San Francisco on June 30 of that year. The plaintiff in error not being found within the State, it was subsequently discovered was in Victoria, British Columbia, and proper demand, under the treaty between the United States and Great Britain, being made for his surrender upon that indictment for trial, he was, on October 7, 1905, duly surrendered, and removed from Victoria by one Gibson, the agent designated in the Canadian extradition warrant, to San Francisco, where he was placed in the custody of the then sheriff, who also had a bench warrant issued from the Superior Court on the perjury indictment against the plaintiff in error.

His trial upon the indictment upon which he had been extradited began in San Francisco in December, 1905, and resulted in the disagreement of the jury on the twenty-third of December of that year, and the case was then continued, to be thereafter reset for trial. Upon the trial of the indictment for which plaintiff in error was extradited he was himself sworn, and testified as a witness, and on the twenty-ninth of December, 1905, after he had given such evidence, he was indicted again by the grand jury of San Francisco county, the indictment charging him with perjury committed on December 12, 1905, while testifying on his own behalf on the trial, as already stated. He was arraigned on this indictment in January, 1906, and after he had made all objections to his being arraigned or placed on trial on this second indictment until the conclusion of the first, and until he had then been afforded opportunity to return to Victoria, he was, nevertheless, brought to the bar and the trial proceeded with, resulting in a verdict of guilty on February 27, 1906, upon which judgment was entered that he be imprisoned in the state prison for the term of fourteen years.

From that judgment he appealed to the District Court of

Appeals of California, where it was affirmed, and thereafter he applied to the state Supreme Court for a rehearing by that court, which was denied. *People* v. *Collins*, 6 California App. 492; *S. C.*, 92 Pac. Rep. 513.

Thereupon the plaintiff in error, being restrained of his liberty, as well under the judgment of conviction, as otherwise under the extradition warrant, applied to the state Supreme Court for a writ of *habeas corpus*, as above stated, contending that his conviction and sentence were void and in excess of the jurisdiction of the state court, as being in contravention of his extradition rights under the treaty between the United States and Great Britain, and § 5275 of the United States Revised Statutes, set forth in the margin.[1]

The writ was issued and a return made, denying many of the allegations of the petition, and, after hearing, it was finally dismissed, and the plaintiff in error remanded to the custody of the sheriff. 154 Fed. Rep. 980.

Mr. George D. Collins, plaintiff in error and appellant, *pro se*, submitted:

The accused has the legal right, by virtue of the treaty, to a trial to a final conclusion of the extradition case. This right is supreme, paramount and exclusive. It imposes an obligation which the State must first obey and perform, and to which all its laws and process and judicial power are necessarily in-

[1] Section 5275, Rev. Stat.; 3 U. S. Compiled Statutes, page 3596.

"Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safekeeping and protection of the accused."

ferior and subordinate. It is incompatible with this right and obligation, and in violation of the treaty, to arrest the accused, put him to trial and prosecute him on a charge of committing another offense subsequently to the extradition surrender, and do this while the extradition case is pending and awaiting trial to a final conclusion. Nothing in article 3 of the convention of 1889, authorizes any such nullification of the supremacy of the extradition process and of the supremacy of the extradition jurisdiction in its exclusive authority and control over the person of the accused.

The extradition jurisdiction over the person of the accused, is special and limited, and extends no farther than the charge on which he has been extradited. It is a jurisdiction derived entirely from the treaty; and consequently is supreme and exclusive until it has wrought its function by securing to the accused a trial to a final conclusion of the specific charge on which his extradition was granted, and he has been afforded reasonable time and opportunity after his final release on that charge, to return to the country of asylum.

To conserve and enforce the fundamental and paramount right to a trial to a final conclusion of the extradition case, the law of the treaty prohibits the arrest or trial of the accused upon any other charge, until he is first given a reasonable time and opportunity after his final release from custody or imprisonment in the case where his extradition was granted, to return to the country of asylum. This principle also maintains in exclusive and supreme control of the person of the accused, the extradition jurisdiction, until the extradition case is ended. The well-settled law on this point deems the accused to be present and actually resident within the territory of the nation granting the asylum; thus necessitating a new extradition to authorize the subsequent trial and prosecution on the subsequent extraditable offense. There is absolutely nothing in article 3 of the convention of 1889, that can by any possibility be construed to the contrary. It simply fails to prohibit, and it would be very ridiculous if it did prohibit, the prosecu-

tion for the subsequent offense. It certainly does not authorize a prosecution for a subsequent extraditable offense, without the necessity of a new extradition. It does not and could not deal with the subject of subsequent offenses; it is entirely foreign in its scope and purpose to all such matters. Above all else it does not permit a trial and prosecution for the subsequent offense, while the extradition case is pending, and while the extradition jurisdiction extends its supreme and exclusive authority over the person of the accused; the treaty would clearly be self-stultifying and self-contradictory if it did.

By § 5275, Rev. Stat., the extradited prisoner is invested with the legal right to a trial to a final conclusion of the charge specified in the warrant of extradition. The statute no more than the treaty, nor than the well-settled principle of international law, makes any distinction whatever, between such prosecutions for subsequent offenses and such prosecutions for prior offenses; nor is it possible for any such distinction to find support in reason or authority. It can make no difference at all and is entirely irrelevant to the point, that there exists an absolute immunity as to prosecutions for prior offenses, and none as to prosecutions for subsequent offenses.

By the treaty, the statute, and the principle of international law, the extradited person is entitled as a matter of right to have his trial to a final conclusion, in the extradition case, within a reasonable time. What is a reasonable time will usually be determined by analogy to the *lex fori*. In California the period is sixty days and is held by the Supreme Court of the State to apply as much to a case where there has been a mistrial as it does to a case where no trial has taken place at all. *Ex parte Begerow*, 133 California, 349.

Holding the accused in custody for years on the extradition charge, against his constant protest, without a trial to a final conclusion of the charge on which he was extradited, is extremely and oppressively unreasonable; and, in law, operates to terminate the jurisdiction over his person, and he is entitled to his discharge on *habeas corpus*. *Ex parte Begerow*, 133

California, 349; Hughes, Crim. Law. and Proc., § 2567; Hawley on Int. Extr., p. 12.

The extradition warrant gives the sheriff of San Francisco no authority to imprison the appellant and plaintiff in error; nor has the sheriff been vested with any such power by the United States. So that, even if the warrant were now in full force and effect, the sheriff is not authorized by it to hold the custody of the accused.

See, in support of the foregoing propositions: *Ex parte Rauscher*, 119 U. S. 407; *Johnson* v. *Browne*, 205 U. S. 309; Pomeroy on International Law, § 199; 2 Wharton's Digest of International Law, § 270; *United States* v. *Watts*, 8 Sawyer, 370; *Adriance* v. *Lagrave*, 59 N. Y. 114.

Mr. William Hoff Cook, for defendants in error and appellees:

After a fugitive criminal is surrendered by the agent designated in the extradition warrant to the sheriff, who is the person designated by law as the proper party to receive him, where a state law has been violated *instanter* the provisions of such warrant have been complied with, and the warrant itself becomes *functus officio*. *United States* v. *Watts*, 8 Sawyer, 383; *State* v. *Vanderpool*, 39 Ohio St. 273; *Ex parte Collins*, 151 California, 340, and cases there cited.

The manifest scope and object of the treaty was to deal with the present and past offenses, and the future was only considered in relation to the return of such fugitive to the surrendering country, after an acquittal, and in connection with his status as a criminal at the time of extradition. It was never for a moment considered, by the treaty making powers, that a fugitive criminal was to be clothed with all the immunity from arrest or punishment with which a minister, ambassador or consul is vested while domiciled as a representative of his government.

It was never contemplated by the treaty makers, nor will any court declare that there shall be ingrafted on to the treaty, by implication, an absolute *carte blanche* to an extradited

fugitive criminal to commit, with impunity, any number of extraditable or non-extraditable crimes, while awaiting trial for the extradition crime.

If Collins had no right to demand an asylum in Canada for offenses which he had already committed, *a fortiori*, he had no prospective right to demand such asylum or security in relation to any other crime which he subsequently might, or intended, to commit in California. As to the subsequent offense which he did commit, he never became a fugitive to Canada. He committed the offense in the California jurisdiction and never departed therefrom. Nor does the treaty direct that such jurisdiction by California over his person should be temporarily surrendered, and he be allowed to depart, and seek a new asylum and domicil, either in Canada, Honduras, or any other foreign country. *United States* v. *Rauscher*, 119 U. S. at page 411; *Ker* v. *Illinois*, 119 U. S. 436.

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

The objections which the plaintiff in error urges to his further imprisonment are founded upon what he insists is implied from the provisions of the treaties between the United States and Great Britain (1842–1889), and he contends that under those treaties the State of California had no right or jurisdiction to try him for any offense whatever other than the one for which he was extradited and delivered to the Government of the United States for trial, even though he committed an offense subsequently to the extradition, and he further asserts that after a trial has been had for the offense for which he was extradited, he is entitled to be afforded reasonable time and opportunity after his final release on that charge to return to the country of asylum, and that the trial of the crime for which he was extradited must be had within a reasonable time after his extradition, or he is for that reason entitled to his discharge. In other words, the plaintiff in error claims immunity, under the treaties, from arrest or detention for any crime com-

mitted by him after he has been brought back upon the extradition warrant until he has been allowed a reasonable time to return to the place from which he was taken. He contends that the duty originally resting upon the demanding country to try him only for the offense for which he was extradited and to then afford him reasonable opportunity to return, is unaffected by the fact that he committed another crime after his extradition.

The treaty of 1842, August 9 (8 Stat. 576, § 10), is the one in regard to which discussions as to its meaning have arisen. *United States* v. *Rauscher*, 119 U. S. 407. Subsequently to the treaty, Great Britain passed the extradition act of 1870 (32 and 33 Victoria, chapter 52); and also in 1873 an act to amend the extradition act of 1870 (36 and 37 Victoria, chapter 60). Both these acts are cited as the extradition acts of 1870 and 1873. See 1 Moore on Extradition (1891), pages 741, 755. In subdivision 2 of § 3 of the act of 1870 it is provided: "(2) A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State for any offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded."

Article 3 of the treaty or convention of 1889, July 12, between Great Britain and the United States is to be found in 26 Stat. 1508–9, and is also, among others, set out in *Johnson* v. *Browne*, 205 U. S. 309, 319, as follows: "Article III. No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered." The treatment of the criminal for all acts committed or said to have been committed by him prior to extradition is thus fully provided for.

The contention of the plaintiff in error that the duty to afford opportunity to return after a trial or other termination of the case upon which he was extradited is unaffected by any subsequent crime he may have committed, is not even plausible. Nothing in the *Rauscher case* (*supra*) is authority for any such contention. The duty to afford opportunity to return after trial, as stated, is limited to matters which happened before extradition, and in the nature of things such duty cannot be extended by implication so as to cover a totally different state of facts. Because, in some cases, in construing the treaty, it has been stated that a person extradited can be tried only for the offense for which he was surrendered for trial until he has had an opportunity of returning, it is assumed by the plaintiff in error that such language prohibits the trial of a person so extradited for any crime committed by him subsequently as well as prior to the surrender, without an opportunity for his return to the other country. The whole question is simply one as to the meaning of the treaty, and we cannot doubt for a single moment what that meaning is.

Much is said by the plaintiff in error as to his right to an asylum as if it inhered in himself. The right is, however, simply provided for by treaty, and must be found therein, so far alone as the criminal is concerned.

The question then is, does either the treaty or convention, by express provision or by inference, provide for a return of the criminal to the surrendering country after his surrender and after a subsequent commission of a crime in the country to which he was surrendered? To ask the question is to answer it. The plaintiff in error contends for the treaty right to leave the country, notwithstanding his commission of the subsequent crime. This we cannot assent to. It is impossible to conceive of representatives of two civilized countries solemnly entering into a treaty of extradition, and therein providing that a criminal surrendered according to demand, for a crime that he has committed, if subsequently to his surrender he is guilty of murder or treason or other crime is, nevertheless, to

have the right guaranteed to him to return unmolested to the country which surrendered him. We can imagine no country, by treaty, as desirous of exacting such a condition of surrender or any country as willing to accept it. When a treaty or statute contains a provision that the party surrendered shall be tried for no other offense until he has had an opportunity to leave the country, the meaning of such a provision is perfectly plain, and must receive a reasonable and sensible construction. The party proceeded against must not be tried for any other offense existing at the time when he was extradited (whether at the time of such extradition it had or had not been discovered), until he shall have had a reasonable time to return to the country from which he was taken, after his trial or other termination of the proceeding. That such privilege should be accorded to one who commits a crime after his surrender to a demanding government lacks all semblance of reason or sense.

Spear in the second edition of his work on the Law of Extradition says, at page 84, that the party extradited is not "protected against trial for any offenses which he may commit against the receiving government subsequently to his extradition, and while in its custody, or after his discharge therefrom . . ." Such a criminal has no asylum, because he never had an asylum within the jurisdiction of the government delivering him, with regard to the crime which he committed since such delivery.

The contention is also without merit that he has, at any rate, the right to a trial to a conclusion of the case for which he was extradited, before he can be tried for a crime subsequently committed. The matter lies within the jurisdiction of the State whose laws he has violated since his extradition, and we cannot see that it is a matter of any interest to the surrendering government.

There is nothing in section 5275, Rev. Stat., *supra*, which gives the least countenance to the claims of the plaintiff in error.

The other objections made by him in regard to the person who now has him in custody under the various warrants and processes, copies of which are returned in the record, we regard as unimportant.

As soon as the judgments herein are affirmed the plaintiff in error will, of course, pursuant to the judgment entered upon the verdict of conviction against him, be taken to the state prison in California, provided for in the sentence, and there confined according to law. The orders and judgments in the two cases are

Affirmed.

UNITED STATES *ex rel.* PARISH *v.* MACVEAGH, SECRETARY OF THE TREASURY.

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

No. 111. Argued March 11, 12, 1909.—Decided May 17, 1909.

If the reference by Congress to the Secretary of the Treasury to ascertain the amount due to a claimant and pay the same requires the exercise of discretion the courts cannot control his decision, *Riverside Oil Company* v. *Hitchcock*, 190 U. S. 316; but where the statute simply requires him to ascertain the amount, according to certain prescribed rules, the duty is administrative; and, the amount being ascertained according to those rules, the courts can by mandamus compel the Secretary to issue his warrant therefor.

The statute involved in this case, referring the ascertainment of the amount due a claimant to the Secretary of the Treasury, construed on the supposition that Congress regarded the controversy as over and that only the amount remained for ascertainment, as any intricate judicial problem would naturally be referred to the judicial tribunals.

The history of the litigation and legislation in regard to the claim of Parish against the United States for damages on contract for ice made in 1863 for use of armies in the field reviewed and *held* that

under the act of February 17, 1903, c. 559, 32 Stat. 1612, directing the Secretary of the Treasury "to determine and ascertain the full amount which should have been paid to Parish if the contract had been carried out in full without charge or default by either party" and to issue his warrant therefor, no judicial duty devolved upon the Secretary, nor has the Secretary power to determine what was right or proper but only the administrative duty of ascertaining the amount and paying the same; and, the amount having been ascertained, the claimant is entitled to a writ of mandamus directing the Secretary to issue his warrant therefor.

30 App. D. C. 45, reversed.

THIS is a writ of error directed to review the judgment of the Court of Appeals of the District of Columbia affirming a judgment of the Supreme Court dismissing a petition for mandamus to require Leslie M. Shaw, then Secretary of the Treasury, to issue a draft in favor of the petitioner, plaintiff in error here, for the sum of $181,358.95, in payment of a claim referred to him by an act of Congress, approved February 17, 1903. Shaw, pending the appeal, resigned, and Cortelyou, his successor in office, was made a party in his stead, and subsequently Franklin MacVeagh, becoming Secretary, he was substituted for Cortelyou. We shall call plaintiff in error relator and defendant in error respondent, they having occupied that relation in the trial court.

J. W. Parish, of whose estate relator is executrix, entered into a contract with the United States, as J. W. Parish & Company, to deliver, for the use of the United States medical department at Memphis, St. Louis and Cairo the whole amount of ice required to be consumed during the remainder of the year 1863. The quality of the ice was to be "A No. 1," and the contract stated the prices to be paid at the designated points respectively. On March 25, 1863, Joseph B. Brown, by instruction of the Assistant Surgeon General, issued an order directing Parish to deliver the ice as follows: St. Louis 5,000 tons, Cairo 5,000 tons, Memphis 10,000 tons and Nashville 10,000 tons, "making a total," the order recited, "of 30,000 tons which you have contracted to deliver. The ice to

be delivered at Nashville and Memphis is for the use of the sick of the armies in the field, and should be furnished without delay." Parish immediately proceeded to execute the order, and was performing it when, on March 31, 1863, he received a letter from the Assistant Surgeon General, under instructions of the Surgeon General, suspending the order of March 25 until instructions should be received from the Surgeon General. At the date of this letter 12,768 tons of ice had been delivered and paid for at the contract price. The order of suspension was never recalled. Under the authority of an act of Congress, approved May 31, 1872, Parish brought suit against the United States to enforce his demand under the contract. The Court of Claims dismissed the suit. 12 Ct. Cl. 609. This court reversed the judgment and remanded the case, with directions to ascertain the damages sustained by Parish. 100 U. S. 500. The Court of Claims rendered judgment for the claimant for the sum of $10,444.91. 16 Ct. Cl. 642. Parish then petitioned Congress to satisfy as much of his claim as had not been satisfied by the Court of Claims. Responding to a reference by a committee of the House of Representatives, the War Department, through the Surgeon General, reported that the whole of the undelivered ice, through the order of suspension, amounted to 17,232 tons, and the same had been lost by the contractor. The report also stated that under the evidence before the Court of Claims, and additional evidence before the department, Parish was entitled to be reimbursed, in addition to the judgment of the Court of Claims, in the sum of $58,341.85, for the loss he had sustained because of the non-delivery of the 17,232 tons. After this report, on February 20, 1886, Congress passed an act directing payment of said sum of $58,341.85 to Parish, in addition to said sum of $10,444.91, being the balance of money laid out and expended by him in the purchase of 17,232 tons of ice for the use and at the request of the Government of the United States, which were not afterwards called for, but were wholly lost to the said Parish. 24 Stat. 653. Parish again

applied to Congress for relief, and, on February 17, 1903, the act in controversy was passed. It will be given in the opinion.

Mr. Holmes Conrad and *Mr. Leigh Robinson* for appellant:

In performing the duty laid upon him by the act of 1903, the Secretary of the Treasury was not acting in the exercise of judicial or discretionary but only of ministerial powers. *Marbury* v. *Madison*, 1 Cranch, 70; *Kendall* v. *United States*, 12 Pet. 524; *United States* v. *Black*, 128 U. S. 48; *People* v. *Supervisors of Otsego*, 51 N. Y. 401. Cases cited by the Court of Appeals, viz.: *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *United States* v. *Black*, 128 U. S. 40, and others, reviewed and distinguished.

A ministerial duty is one to be performed or exercised on a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and irrespective of the judgment of him on whom the duty is imposed as to the propriety of the performance. *Commonwealth* v. *Justices of Fairfax County*, 2 Virginia Cases, 9; *Betts* v. *Dimon*, 3 Connecticut, 107; *Flournoy* v. *City*, 17 Indiana, 174; *Supervisors* v. *United States*, 4 Wall. 435; *Kendall* v. *United States*, 12 Pet. 593, 594.

The findings of the Court of Claims are like a special verdict, where a jury find the facts of the case, and refer the decision of the cause upon those facts to the court. So far as they go, the findings constitute "the evidence collected in the case in the Court of Claims." *Lumber Co.* v. *Buchtel*, 101 U. S. 638; *Suydam* v. *Williamson*, 20 How. 432; *Stone* v. *United States*, 164 U. S. 382; *United States* v. *Smith*, 94 U. S. 218; *United States* v. *New York Indians*, 173 U. S. 470; *Stanley* v. *Supervisor*, 121 U. S. 547; *Runkle* v. *Burnham*, 153 U. S. 225; *Consolidated Canal Co.* v. *Mesa Canal Co.*, 177 U. S. 302.

A rule for the measure of damages which directs that in case of breach of contract the injured party shall receive from the defaulting party just what would have been received had there been no default is a perfectly plain rule which has no tendency to mislead anyone, and therefore did not mislead

the auditor who stated the account. The rule is not one of novelty. *United States* v. *Behan*, 110 U. S. 338; *Alder* v. *Keightly*, 15 M. & W. 117; *Hadley* v. *Boxendale*, 10 Exch. 341; *Benjamin* v. *Hilliard*, 23 How. 167.

Assertion of unspecified evidence, alleged to exist in contravention of proofs clearly presented in the petition, is assertion having no probative force. Such allegation, when made for the purpose of impairing the effect of existing judgments, would be irrelevant, even if the allegation could be proved and had been proved.

Profits which admit of "clear and direct proof" and profits which are "remote and speculative in character" can be distinguished as follows: In the former case the gross result of the work under the contract is a sum fixed absolutely, and the cost of the work is able to be fixed with something like certainty. In the latter case the gross result is speculative and contingent, depending upon the fluctuation of the market and the chances of business. This is too remote. *Coosaw* v. *Mining Co.*, 75 Fed. Rep. 865.

When it is known with mathematical certainty what the gross result would be there is no speculative or precarious element present to be considered.

When, as stated by the Law Board, "under the act of February 17, 1903, there is not a single question of fact to be determined other than the amount saved to the contractor by the non-delivered portion of the ice," all the other deductions directed by the act having been previously determined; so that, "after the determination of the amount saved to the contractor by the non-delivery of the undelivered portion of the ice, the case presents simply a mathematical proposition;" nothing is left for the exercise of judicial or other discretion. There is no right of private judgment as to the response to be given to a mathematical proposition.

Mr. Assistant Attorney General Russell for appellee:

The act of Congress herein in question was not an un-

equivocal order to the Secretary of the Treasury to make a simple calculation which could have been made in a short time by any accountant, but was a reference to the Secretary of the entire question whether any amount was due to the claimant, and, if so, what amount.

Claimant's theory is that the Secretary should have determined from evidence collected by the Court of Claims how much he saved by not having to deliver the ice he claims to have purchased. And that is a business as purely addressed to the judgment and discretion of the Secretary as can be imagined.

The weighing of evidence and drawing conclusions from it are two of the most important and characteristic functions of the judiciary.

It is not to be supposed that practical men in Congress intended the public moneys to be paid out until there should be a full and complete examination of the claim and a determination, as a result thereof, that a balance was really and fairly due the claimant by virtue of a contract.

He is to get his facts from the evidence "collected." He is not told to regard the findings of the Court of Claims or decisions of the Supreme Court, or the act of 1886 allowing the $58,000, partly on evidence said to be on file in the War Department, as so many things adjudicated.

On the contrary, he is to examine the claim *de novo* in spite of the most solemn and authoritative adjudications on matters of fact and law.

The theory of standing by adjudications obviously would be fatal to the appellant's case.

It is because the Supreme Court says the Court of Claims had erred and the committees said this court had blundered that the Secretary is called in to examine the evidence collected and make a full and complete examination in the light of that and of the supposedly new and improved rule of *Behan's case* for the measure of damages.

From this it follows that he can make up his own mind as to

how many tons were actually purchased, paid for, and not delivered.

He might reach a wholly different conclusion from that attributed to the Surgeon General in 1886, especially as he has not the same evidence before him.

Appellant did not, as that rule contemplates, lose these profits because the one party prevented delivery without fault of the other party. The Court of Claims found he was not in a condition to deliver the ice because transportation was impossible. That was not the other party's fault, but his misfortune or miscalculation.

Nor is there any room in this case, and especially as to that ice, for the principle that failure to tender is no breach, if the other party clearly shows that acceptance would be declined. For the record indicates, it seems to us, that the Government took about all the ice that was actually offered to it and could be delivered under the contract. Ice in large quantities was taken at all four places—St. Louis, Cairo, Memphis, Nashville. And there is no indication that any ice was declined.

We understand that the question here, as the case is presented, is, Shall the Secretary be ordered to accept the finding of the auditor as conclusive?

Obviously the special act does not require that he should. That is too plain for argument.

However, supposing a proper case had been presented to raise the other question, Was the Secretary given a mere order to do a thing about which people could not differ or was he ordered to use his judgment? The answer is equally obvious.

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

It will be observed that the controversy in this case started in a contract of no uncertainty of meaning, and an ordinary action for damages for its breach, but has accumulated incidents and complexity, and has finally terminated in a dispute over an ambiguous statute.

The case was submitted in the Supreme Court of the District upon what may be called a demurrer to the return, which was regarded, and is now regarded, as presenting the question of the power of the Secretary of the Treasury under the act of Congress. This is the ultimate question. If that officer had the power, which he asserts in his return, to review the evidence taken in the Court of Claims, and to "make such findings" as might "seem right and proper to him," the judgment of the Court of Appeals must be affirmed. As we may not control the Secretary's discretion (*Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316), we can have no concern with the reasoning advanced by him to support its exercise.

As we have seen, in the first suit brought by Parish the Court of Claims decided against him. It based its decision on the ground that the Assistant Surgeon General had no "right to interpret the contract and decide that it called for 30,000 tons of ice, and direct how it should be delivered." The court, however, found the facts. It found as follows: "IX. The said Parish was *prepared and willing* [italics ours] to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendant had notice, but they would not, nor did receive more than the 12,768 tons aforesaid." This finding is quoted in the reports of the Congressional committees as one of the elements inducing their recommendation of the passage of the bill.

This court disagreed with the Court of Claims upon the question of the authority of the Assistant Surgeon General, and reversed that court, but decided that the measure of Parish's damages was "the cost of ice purchased at Lake Pepin and lost, the expense bestowed upon its care and the time and expense of making that purchase, and any sum actually lost in regard to the other 17,232 tons of ice purchased to enable them to meet the requirements." This ruling was based on the assumption that Parish "neither delivered nor offered to deliver the remainder."

The Court of Claims, upon the return of the case to it, found obstruction in its rules to taking additional evidence, but on that before it made an award in favor of Parish in the sum of $10,444.91.

He was dissatisfied, and justly dissatisfied. He appealed to Congress, the petition alleges, and respondent does not deny the allegation, for "the means of satisfying so much of his claim as the court of last resort had adjudicated to be his unquestionable right." The petition further alleges (again with no denial by respondent) that his "claim was referred by the House committee to the War Department for report. The Surgeon General found that the whole amount of undelivered ice, viz., 17,232 tons, was lost to said Parish, and ascertained the cost thereof." Congress passed an act February 20, 1886, appropriating the sum of $58,341.85 to pay that loss. 24 Stat. 653–654. By the payment of the money appropriated, Parish received the contract price on the ice actually delivered, namely, 12,768 tons, and, in addition, what he had actually spent and actually lost on account of the balance, namely, 17,232 tons of ice. This is not denied, nor that that which was paid to him was only that which this court had decided should have been paid to him January 1, 1864. "That is to say," to quote from the petition, "the said Parish had not only lost the interest on this large sum of money for more than two decades, but had been forced to meet the expense of litigating the claim, and had been subjected to the labors and anxieties and trials of prosecuting the same."

The next step was the passage of the act in controversy and we come to its consideration and the determination of how its ambiguity, if indeed it have any, is to be resolved. It had, we may say at the start of our discussion, its impulse in the belief that injury had been done to Parish, and it was intended to provide a means of redress. Keeping in view this purpose, we may get light by which to interpret the act.

As we have already said, the ruling of this court in *Parish* v. *United States*, 100 U. S. 500, was based on the assumption that

Parish had "neither delivered nor offered to deliver" the 17,232 tons of ice, the non-acceptance of which has given rise to this controversy. Commenting on that declaration the committees of Congress called it a "mistaken allegation" and a "false assumption," and said that the decision of the court turned upon it. The committees further said that the court "entirely overlooked" finding IX of the Court of Claims, and that the "result of this oversight was to cause the court to lay down a rule of damages inconsistent with the facts and unjust to the parties." The committees then reviewed certain cases, among others *United States* v. *Behan*, 110 U. S. 338, and declared that the latter case established the *prima facie* measure of damages for a breach of a contract sustained by the injured party to consist of "two distinct items or grounds of damage, namely, first, what he has already expended toward performance less the value of material on hand; secondly, the profits that he would realize by performing the whole contract." The report recognized that profits cannot always be recovered, that they may be remote and speculative, incapable of that clear and direct proof which the law requires. But it is manifest that the committees did not think the case called for that limitation, for it was said that the reasons for the application of the "equitable rules in the *Behan case* were not nearly so clear and strong as in the *Parish case*," and declared as follows:

"In the latter case the contract expressly provided what should be paid for the ice delivered at the various places named. The profits, therefore, were readily and easily ascertainable. In fact, that was the theory of the plaintiff in making his case before the Court of Claims, and the record of that court shows that the proofs on that point were explicit, bringing the case properly within the principles laid down in *United States* v. *Behan*.

"In a word, it is perfectly clear that the Supreme Court quite overlooked one of the most important findings of fact in the *Parish case*. At all events, there is no doubt that the law

is properly stated in the *Behan case*. And all the present bill contemplates is a final and proper settlement on the rule of law which is older than our republic, and is everywhere recognized as the only equitable one that can be applied in the premises."

It is manifest, therefore, that the act was passed under the conviction that Parish had rights which had not been satisfied, and we are brought to the consideration of the act as the means of satisfying them.

The act provides "that the Secretary of the Treasury is hereby authorized and directed to make full and complete examination into the claim of Joseph W. Parish against the United States for balances alleged to be due him by virtue of a contract made by Joseph W. Parish & Co., with Henry Johnson, medical storekeeper, acting on behalf of the United States. . . . That the Secretary shall determine and ascertain the *full amount which should have been paid said J. W. Parish & Co., if the said contract had been carried out in full without change or default made by either of the parties thereto,* [italics ours] under the ruling of the measure of damages laid down by the Supreme Court of the United States in the case of *United States* v. *Behan,* 110 U. S. 338, and *in accordance with the evidence in the case collected by the United States Court of Claims* [italics ours], and for determining the full amount thus due, . . . under said contract and rule of law aforesaid, to deduct therefrom all payments . . . stating what balance, if any, is due under the ruling and evidence presented herein, and pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balances is hereby appropriated out of any money in the Treasury which has not been otherwise appropriated." 32 Stat. 1612, c. 559, February 17, 1903.

The issue between the parties in their ultimate statement is as follows: Relator contends that the Secretary was directed to ascertain what amount Parish should receive under the contract, "which he was ready, able and willing to carry out." Respondent contends that the Secretary was to pass on the

evidence taken in the Court of Claims, and make such finding as might seem right and proper to him. In other words, to exercise judgment and discretion.

To sustain their respective contentions the parties do not urge the same words as the tests of the meaning of the statute. The appellant, to determine the Secretary's duty, puts emphasis on the provision that he was to ascertain the "full amount which should have been paid . . . if the contract had been carried out in full, without change or default made by either of the parties thereto." Respondent finds difficulty with that provision, and says that "at first glance" it "may look positive and arbitrary." But, it is urged that the clause "does not say which *would* have been paid, but which 'should' have been paid, and when we turn to the 'contract' an ambiguity immediately arises, because the contract, 'carried out in full,' did not call for any particular quantity of ice." And to remove the effect of the certainty in the quantity of ice required made by the order for 30,000 tons, it is said that the "special act nowhere speaks of this order, but only of the contract." The final comment is that "no other clause of the act seems to be worth quoting as an unambiguous order to make an arbitrary calculation and allowance," while the act "in places unequivocally requires something different from an arbitrary calculation." To support this it is urged that the act directs a full and complete examination of Parish's claim for a balance alleged to be due him by virtue of the contract. To do this, it is argued, "would require as much judgment and discretion as the Secretary could muster." A striking contrast is exhibited to this by declaring that the duty required of the Secretary under appellant's contention was "to do a sum in arithmetic which any school boy could do in five minutes; that is, multiply the prices per ton with the 30,000 tons and deduct the amount already paid, as per receipts on file in the Treasury."

It is elementary that all the words of the statute must be considered in determining its meaning, and we may not,

therefore, disregard the provision of the statute which directs the Secretary to determine and ascertain the full amount which should have been paid if the said *contract had been carried out in full without change or default made by either of the parties*. And it seems to us that these words express the subject of inquiry, the exact command to the Secretary to which the other provisions of the statute are subordinate. He was not to determine if Parish was in default. That inquiry was precluded. It had been adjudged otherwise by the Court of Claims and by this court. It had been declared otherwise by the legislature. The act of Congress of February 20, 1886, passed to complete the judgments of the courts, appropriated the sum of $58,341.85, "being the balance of money laid out and expended by him (Parish) in the purchase of 17,232 tons of ice, for the use and at the request of the Government of the United States, which were not afterwards called for, but *were wholly lost to said Parish*" (the italics ours).

The following things therefore had been determined: The existence of a contract for the delivery of ice, quantity not mentioned, at different points and at different prices. The quantity was afterwards fixed at 30,000 tons and the contract made specific in every particular, quantity, quality, places of delivery and prices. Performance was undertaken and 12,768 tons delivered. Then came the order of suspension—not revocation, it must be kept in mind, and Parish had to keep prepared. He was not permitted to fulfill his contract, he dared not be unprepared to do so upon any notice. This court in *Parish* v. *United States, supra,* has portrayed the situation. The demand upon him was "an unequivocal demand," the court said, for 30,000 tons, and "to enable him to fulfill this demand . . . required promptitude and diligence in securing the ice." The court states why. A moment's reflection on the situation shows us why. The ice was needed for the use of the armies in the field. It might be demanded at any time. The necessity for it might be imperative. If Parish could not have supplied it, this court said, the officers of the

Government would have procured it at any price in the market, a price which would have been enormously enhanced by that very demand, and Parish would have been liable for the difference between such price and the contract price. He was, therefore, this court said, "under an imperative necessity to prepare to fulfill this requirement." He realized his situation, and that he prepared against its contingencies was the finding of the Court of Claims, it was the declaration of Congress in the act of February 20, 1886, and it was the repeated declaration of the committees of Congress in their recommendation of the passage of the act in controversy. We see now the reason for regarding the opening clause of the act as its principal and dominating clause. We see now why his readiness to perform, the possession of the means of performance and the offer of performance were to be assumed by the Secretary and the loss of profits only was to be determined. And the profits, the committees said, "were readily and easily ascertainable." Indeed, because they were, their calculation was referred to an executive officer. If to ascertain them involved an intricate judicial problem the reference would have been to the judicial tribunals, for we cannot agree with the intimation of the Government that Congress would imagine that the Court of Claims and this court were unable "to master the difficulties" of that problem. The better supposition is that Congress regarded the controversy as over and that the time for reparation had arrived, and, that it might be quick and complete, referred the matter to that officer who could best state the balance due and pay it.

It does not militate with this conclusion that the duty enjoined was simple. The committees of Congress believed it to be so, believed that the extent of relief to which Parish was entitled and the items of it had been established. The act in controversy was the expression of that belief. Its purpose was relief shown to be due from a problem already solved, not to start another problem. The duty enjoined required a reference in a sense to evidence, it may be, but it was to evidence

whose probative force had been estimated and declared. It conduced to but one conclusion. That conclusion was stated by the Auditor of the War Department, following the direction of the statute, to be a balance in Parish's favor of $181,358.95. This amount represented the amount that Parish should have received over and above what he was paid by direct payment, judgment or appropriation by Congress and the balance due him under the rule in the *Behan case*.

The judgment of the Court of Appeals is reversed, and that court is directed to reverse the judgment of the Supreme Court and direct the latter court to sustain the demurrer of relator to the return of respondent and enter judgment as prayed for in petition of relator.

MR. JUSTICE MOODY took no part in the decision.

DISTRICT OF COLUMBIA *v.* BROOKE.

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

No. 117. Argued April 7, 1909.—Decided May 17, 1909.

Where no objection was made to a technical defect in the return which could have been rectified by amendment had attention seasonably been called thereto, a party who, as disclosed by the record, was not prejudiced, cannot raise the objection at a later date.

Quære, whether there is any distinction between "a parcel" and "a letter" that renders defective a return showing service of statutory notice by mail.

A property owner cannot urge against a statutory drainage system the non-existence of the necessity for drainage, or the fact that he had adopted a system of his own which is either sufficient or better than that required by the law. Such a contention would deny to Congress the right to create any drainage system for the District of Columbia.

The mere existence of dwelling houses, whether occupied or not, indicates the necessity for drainage; and the owner is not deprived of his property without due process of law by a compulsory drainage act because the house happens to be unoccupied at the time.

The police power is one of the most essential of governmental powers,

at times one of the most insistent, and always one of the least limitable.

A wide range of discretion is necessary to make legislation practical and the courts cannot be made a refuge from ill-advised, unjust or oppressive laws.

Quære, and not decided, whether there is any prohibition on Congress from enacting discriminatory legislation, and whether, in the absence of any express prohibition to that effect any prohibition can be implied, especially in regard to the exercise of police power in the District of Columbia. See *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, as to power of Congress to enact discriminatory legislation under the commerce clause of the Constitution.

If the power of Congress to enact discriminatory legislation as to the District of Columbia is limited either expressly or by implication, the prohibition cannot be stricter or more extensive than the due process and equal protection clauses of the Fourteenth Amendment are upon the States.

The Fourteenth Amendment does not deprive the States of the power of classification or require the classification to be logically or scientifically accurate; and sufficient practical reasons exist for a classification of resident and non-resident property owners in the enforcement of police regulations, provided that the act is impartial as between the classes. *Field* v. *Barber Asphalt Co.*, 194 U. S. 618.

While the enforcement of a statute enacted under the police power by criminal proceedings against resident owners, and by civil proceedings against non-resident owners is a discrimination, if, as in this case, it is justified by the circumstances it does not render the statute unconstitutional, nor is it so rendered by the fact that the remedy as to one class may be more efficient than the remedy as to the other.

In determining whether a statute is constitutional suppositions and questions which might possibly arise, but which have not arisen, will be answered when they do arise and affect the operation of the statute.

The act of May 19, 1896, c. 206, 29 Stat. 125, providing for the drainage of the District of Columbia, is not unconstitutional as depriving non-resident owners of their property without due process of law, or denying them the equal protection of the law on account of the different methods provided for enforcing the law against resident and non-resident owners.

29 App. D. C. 563, reversed.

THIS writ was issued to review a judgment of the Court of Appeals, affirming a judgment of the Supreme Court, quash-

ing and vacating certain proceedings taken for the assessment of a drainage tax upon the property of defendant in error under the authority of an act of Congress of May 19, 1896, "An act to provide for the drainage of lots in the District of Columbia." 29 Stat. 125, c. 206, May 19, 1896.

The act provides (1) that each original lot or subdivisional lot in the District of Columbia, where there is a public sewer, shall be connected with such sewer, and where there is a water main, connected with such water main, under certain conditions, which are enumerated. (2) It is made the duty of the Commissioners of the District to notify the owner or owners of every lot required by the act to be connected with a public sewer or water main, as the case may be, to so connect such lot, the work to be done in accordance with the regulations governing plumbing and house drainage in the District. (3) If the owner or owners neglect for thirty days after receipt of notice to make such connections he shall or they shall be deemed guilty of a misdemeanor, and be punished by a fine of not less than one dollar nor more than five dollars for each day of neglect. (4) If the owner be a non-resident of the District or cannot be found therein, the Commissioners shall give notice by publication twice a week for two weeks in some newspaper published in the city of Washington, to such owners, directing the connection of such lot with such sewer or such water main, as the case may be; "Provided, however, that if the residence or place of abode of the said non-resident lot owner be known or can be ascertained on reasonable inquiry, then, and in that case, a copy of the aforesaid notice shall be mailed to said non-resident, addressed to him in his proper name, at his said place of residence with legal postage prepaid; and in case such owner or owners shall fail or neglect to comply with the notice aforesaid within thirty days it shall be the duty of said Commissioners to cause such connection to be made, the expense to be paid out of the emergency fund; such expense, with necessary expense of advertisement, shall be assessed as a tax against such lot, which tax shall be carried on the regular tax

roll of the District of Columbia, and shall be collected in the manner provided for the collection of other taxes."

The petition of defendant in error for certiorari alleges that she is a resident of Maryland and was owner of the property against which the assessment was made at the time the connections were made by the Commissioners. She alleges that the assessment or tax is illegal in its entirety and beyond the power of the respondent (the District) to collect, in this, that the respondent had no jurisdiction of her property, "the said act of Congress being," she further alleges, "unconstitutional and void, because it discriminates between owners of real estate in said District; the said act not being uniform and capable of universal enforcement." She also alleges that the assessment or tax is void in its entirety, because the provisions of the fourth section of the act were not complied with in certain particulars which were set out. We do not give them, because two only are relied on, to wit, that the record does not show that notice was mailed to her as provided by § 4, and that the record fails to disclose that any nuisance existed on her property or that the means of drainage already there were unsanitary or insufficient.

A rule to show cause was issued, to which the District made return. The return was verified by the Commissioners. It denied some of the allegations of the petition, averred the constitutionality of the act and that due and legal proceedings were taken thereunder in making the connections and assessing the tax, including notice to petitioner. To the return were attached, to use the language of the Court of Appeals, "copies of such pertinent official papers and records as were in the custody of the District."

The writ was ordered to be granted. The return to the rule was made the return to the writ. Subsequently, the court, reciting that the cause having been argued by counsel and submitted to the court on the writ of certiorari, and the return thereto filed herein by respondent, adjudged the tax to be "illegal and void," and that it should be "quashed and held

for naught." The respondent was "forthwith directed to cancel the same on its tax records."

The judgment was affirmed by the Court of Appeals. 29 App. D. C. 563.

Mr. F. H. Stephens, with whom *Mr. E. H. Thomas* was on the brief, for plaintiff in error:

The discrimination in this law is not between the resident and non-resident but between those who can be found in the District and those who cannot be found in the District.

"The legislation in question in the present case is that of the Congress of the United States, and must be considered in the light of the conclusion, so often announced by this court, that the United States possess complete jurisdiction, both of a political and municipal nature, over the District of Columbia." *Parsons* v. *District of Columbia*, 170 U. S. 53.

"There is in this District no division of powers between the general and state governments. Congress has the entire control over the District for every purpose of government." *Kendall* v. *The United States*, 12 Pet. 619.

"Congress may legislate within the District, respecting the people and property therein, as may the legislature of any State over any of its subordinate municipalities." *Mattingly* v. *District of Columbia*, 97 U. S. 687.

The discrimination made in the statute is not between residents and non-residents. Section 4 of the statute, by its express terms, in the opening sentence distinguishes only between resident owners who can be found and resident or non-resident owners who cannot be found.

The test of the application of § 4 is whether the property owner can be found in the District, and that is the question presented in the record. Indeed, the opinion practically states this. It says:

"If he lives in the District or can be found here, his premises may not be molested but he may be fined. If he cannot be found here the object of the law is easily effectuated and

the expenses connected therewith become a charge upon the lot."

"The fact that the mode prescribed for the non-resident may be more inconvenient than that prescribed for the resident is not because the statute intends to make a discrimination, but because of the situation of the parties, and because, in the judgment of the law-making power, no other as effective way could be adopted for the protection of the public." *McFadden* v. *Blocker*, 58 L. R. A. 898.

If any distinction has been made by the Court of Appeals between residents and non-residents, such distinction does not exist under this statute because it treats absent residents and non-residents alike. There is no discrimination against the non-resident owner solely because he is a non-resident.

Even where personal liberty was involved a similar statute was held constitutional. *Frost* v. *Brisbin*, 19 Wend. 11. (This case has been cited and followed by the Court of Appeals in *Howard* v. *The Citizens' Bank & Trust Co.*, 12 App. D. C. 222, 235, and *Robinson* v. *Morrison*, 2 App. D. C. 105, 128.)

If it be thought that the discrimination is between residents and non-residents, nevertheless the discrimination is a reasonable one.

It is a matter of common knowledge in the legal profession that statutes exist in nearly every State of this country permitting an attachment against the property of non-residents, real and personal, in actions *ex contractu*, before any adjudication of the debt is had, where none is permitted against the resident.

Also, laws discriminating against non-residents in other matters are not uncommon and the courts are constantly enforcing them. *Central Loan & Trust Co.* v. *Campbell Commission Co.*, 173 U. S. 84; *Allen* v. *Wyckoff*, 48 N. J. L. 90; *Chemung Canal Bank* v. *Lowery*, 93 U. S. 72; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618; *Savannah &c., Ry.* v. *Savannah*, 198 U. S. 392; *Hawley* v. *Hurd*, 72 Vermont, 122; *McFadden* v. *Blocker*, 54 S. W. Rep. 872; *Tatem* v. *Wright*, 23 N. J. L.

429; *Connecticut* v. *Insurance Co.*, 73 Connecticut, 255; *Cribbs* v. *Benedict*, 64 Arkansas, 555.

There is no unlawful discrimination in the remedy which may be used to enforce the doing of the work prescribed by the act. All owners may be required to do such work. *Schmidt* v. *Indianapolis*, 168 Indiana, 631.

That the non-resident owner who cannot be found cannot be fined is of no importance.

The statute is effective and may be enforced against all persons by civil process, notwithstanding its penal provisions.

The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance. *Carllton* v. *Rugg* (Mass.), 5 L. R. A. 193.

The duty to make said connections having been imposed on all owners and the duty of requiring all owners to do the work having been cast on the Commissioners by the statute, why cannot the obligations of the statute be enforced by mandatory injunction?

A bill in equity is maintainable by the Commissioners of this District in their own names as Commissioners for a mandatory injunction to compel a person, whose license to temporarily occupy a portion of a public avenue and parking has been revoked, to remove a structure used as a refreshment stand from such avenue and parking. *McBride* v. *Ross*, 13 App. D. C. 576.

Also to remove a show-window. *Guerin* v. *Macfarland*, 27 App. D. C. 478.

The owner cannot remain silent while work is being done, of which he has notice, and then, after it is completed and his property benefited, be heard to complain that the proceedings are illegal.

"It is a general rule, now fully accepted in this State, that where the owner of property subject to assessment for public improvements, stands by and makes no objection to such improvements, which benefit his property, he may not deny the authority by which the improvements are made, or defeat

the assessments made against his property for the benefits derived; and that this is true both where the proceedings for the improvement are attacked for irregularity, and where their validity is denied, but color of law exists for the proceedings." *Commissioners* v. *Plotner*, 149 Indiana, 116, 119, cited in 2 Cooley (3d ed.), p. 1515, with many other cases from Indiana, Iowa, Kentucky, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, Oregon and Pennsylvania. Approved in *Wight* v. *Davidson*, 181 U. S. 371, 377.

Mr John Ridout, with whom *Mr. George C. Gertman* was on the brief, for defendant in error:

The act of Congress here in question is unconstitutional and void. This contention is based upon certain salient vices in the act which are apparent on its face, of which the principal are:

(*a*) The attempt to give controlling evidential effect to the mere existence of an improvement in case of improved property, and to the *ex parte* certificate of the health officer in the case of unimproved property, thus violating the "due process" clause of the Constitution.

(*b*) Because the act lacks the requisite uniformity inasmuch as it undertakes to provide one law for property of resident and another for property of non-resident owners in said District.

(*c*) Because the act is not capable of universal enforcement, and creates unequal burdens.

(*d*) Because the act is incapable of uniform enforcement as against all property in the District of Columbia.

Perusal of the act will clearly disclose the absolute lack of uniformity which is essential to the validity of such an act even though it be considered that it embodies a lawful exercise of the so-called police power, under the guise of which so many attacks have been made upon the due process and uniformity clauses in the Constitution.

The invalidity of such an act has been shown in the opinion

in *McGuire* v. *District of Columbia*, 24 App. D. C. 22. That case involved the validity of the snow and ice law which the court declared to be most beneficial in its purpose and which the court expressed its desire to sustain, yet it found itself unable to do so, and by unanswerable reasoning determined upon the grounds stated in the opinion that the act was unconstitutional. See, also, *Heylman* v. *District of Columbia*, 27 App. D. C. 563.

The act involved in this case is far more vicious in form.

If the purpose of the law is to be effective as against all the property coming within this act, then the means to make it so must, of course, be found in the act itself, and yet in certain situations neither the Commissioners nor anybody else would have any power to enforce such connection as against the resident owner who elects to pay the fine rather than comply with the notice. It is apparent that to make the legislation valid, power should be given to the Commissioners to make the connection in all cases, and to pay the cost out of the emergency fund so that the act shall apply equally to all classes of property, and in the absence of such authority this act furnishes no uniform and effective means for its enforcement, and therefore it fails to subserve the purpose of its enactment. To put it differently, in the act under consideration there is apparently one law, namely, a civil one, for owners not found in the District, and another law, namely, a criminal one, for those who are found in the District. As to one class the Commissioners are given the power to make good the requirements of the law by making the connection, while as to the other class such power is withheld from the Commissioners.

If the language of the law is to be interpreted as though it read, that in case the owner or owners of a lot cannot be found in the District, leaving out the words "be a non-resident or non-residents of the District," which is the most favorable construction that can be given to the act, we have two separate and distinct classes of persons to which the law has an unequal application so far as their liability is concerned—to the

class found in the District, a criminal liability—to the class not so found, a civil liability; and moreover, as already stated, the law is capable of exact enforcement for the purpose for which it was enacted as to the class of owners not found in the District, while the contrary is true as to those found therein.

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

Defendant in error, to sustain her contention that the record does not show notice to her of the proposed work, says that it shows only that a "parcel" was mailed to her, not a letter, and that the contents of the parcel are not disclosed. To the extreme technicality of this contention the Court of Appeals answered that no objection was made to the return, and that it averred that the officers and agents of the District made diligent search for defendant in error in the District, and that she could not be found there, and that plaintiff in error believed that she was a citizen and resident of the State of Maryland. The court also pointed out that the return alleged that notice was given to her by publication, as required by the act of Congress, and by registered letter, postage prepaid, which was received by her. A registry return receipt, with her signature attached thereto, was made part of the return. Commenting on this, the court said that if there was a defect in the return it was purely technical, and could have been corrected. "Upon the granting of the writ," the court observed, "had objection been made to the adoption by the Commissioners of their preliminary return, the court undoubtedly would have permitted an amendment to the record for the purpose of supplying the defects now complained of by petitioner [defendant in error here.] Having then made no objection to the form of the return, it is too late to do so now." If we could concede that the record justifies the distinction made by defendant in error between a parcel and a letter, we should adopt without hesitation the reply made by the Court

of Appeals to the contention based on that distinction, or upon any defect in the return, which could have been removed if objection had been seasonably made.

The second contention of defendant in error is that the record fails to disclose that any nuisance existed on her property, or that the means of drainage already there was unsanitary or insufficient, or that any necessity existed for making the connection. This contention seems to be made in this court for the first time. It certainly received no notice from the Court of Appeals, and the fact that it assumes that there was means of drainage on defendant in error's lot is not alleged in her petition. But suppose the fact had been alleged, a property owner cannot urge against the drainage system of the District that he had adopted a system of his own and challenge a comparison with that of the District, and obey or disobey the law according to the result of the comparison. The contention virtually denies any power in Congress to create a system of drainage to which a lot owner must conform.

Finally, defendant in error attacks the validity of the law, and bases the attack, to use her words, "upon certain salient vices in the act which are apparent on its face, of which the principal are—

"(*a*) The attempt to give controlling evidential effect to the mere existence of an improvement in case of improved property, and to the *ex parte* certificate of the health officer in the case of unimproved property, thus violating the 'due process' clause of the Constitution.

"(*b*) Because the act lacks the requisite uniformity, inasmuch as it undertakes to provide one law for property of resident and another for property of non-resident owners in said District.

"(*c*) Because the act is not capable of universal enforcement, and creates unequal burdens.

"(*d*) Because the act is incapable of uniform enforcement as against all property in the District of Columbia."

The first objection was not expressed in the petition nor

made in the lower courts, and we might therefore decline to entertain it. At best, defendant in error can only be heard against "the evidential effect of the mere existence of an improvement," because her property does not come within the category of unimproved property. Her improvements are dwelling houses, and their mere existence indicated the necessity for drainage. That they may sometimes be vacant is unimportant. What rights owners of lots differently improved or owners of unimproved property may have is of no concern of defendant in error. Her contention, therefore, that the act deprives her of due process of law is unsound.

The other objections expressed the same fundamental idea, to wit, that the act discriminates between resident and nonresident owners of property, and because it does it is void. The Court of Appeals yielded to this contention, following the authority of *McGuire* v. *District of Columbia*, 24 App. D. C. 22.

The defendant in error asserts this discrimination and argues its consequences at some length, but does not refer to any provision of the Constitution of the United States which prohibits Congress from enacting laws which discriminate in their operation between persons or things. If there is no express prohibition of such power, may prohibition be implied from our form of government? Upon that proposition we need not express an opinion. If prohibition exists it must rest on all the powers conferred by the Constitution. This court, however, has just held, in the case of *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, that Congress may in the exercise of the powers to regulate commerce among the States, discriminate between commodities and between carriers engaged in such commerce. And it was said that the assertion that "injustice and favoritism" might "be operated thereby," could "have no weight in passing upon the question of power." In the case at bar we are dealing with an exercise of the police power, one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.

However, the question of the power of Congress, broadly considered, to discriminate in its legislation is not necessary to decide, for whether such power is expressly or impliedly prohibited, the prohibition cannot be stricter or more extensive than the Fourteenth Amendment is upon the States. That Amendment is unqualified in its declaration that a State shall not "deny to any person within its jurisdiction the equal protection of the laws." Passing on that Amendment, we have repeatedly decided—so often that a citation of the cases is unnecessary—that it does not take from the States the power of classification. And also that such classification need not be either logically appropriate or scientifically accurate. The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world and assigning them to their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws. *Billings* v. *Illinois*, 188 U. S. 97; *Heath & Milligan Manufacturing Co. et al.* v. *Worst*, 207 U. S. 338. In the light of these principles the contentions of defendant in error must be judged. The act in controversy makes a distinction in its provision between resident and non-resident lot owners, but this is a proper basis for classification. Regarded abstractly as human beings, regarded abstractly as lot owners, no legal difference may be observed between residents and non-residents, but regarded in their relation to their respective lots under regulating laws, the limitations upon jurisdiction, and the power to reach one and not the other, important differences immediately appear. We said in *St. John* v. *New York*, 201 U. S. at pages 633, 637, not only the purpose of a law must be considered, but the means of its administration—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. This was in effect repeated in *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, where a privilege to protest

against a street improvement given by the statute assailed to resident property owners and denied to non-resident property owners, was sustained, and the statute held not to violate the equality clause of the Fourteenth Amendment. See *Travellers Ins. Co.* v. *Connecticut*, 185 U. S. 364.

It is not contended that the act of Congress is not impartial within the classes. The act treats all resident lot owners alike and all non-residents alike. It is contended that there is a difference in the procedure prescribed in case of default, and non-resident lot owners are thereby discriminated against, though they stand in the same relation to the purpose of the law as resident lot owners. In other words, non-resident lot owners are not treated the same as resident owners in like situation, because against resident owners the coercion of the law is by criminal punishment, while against non-resident owners the remedy is by civil proceedings, the District does the work that the non-resident owners neglect and charges the expense thereof on their property. This is a distinction, a discrimination it may be called, but it has even more justification than that sustained in *Field* v. *Barber Asphalt Co., supra.* The statute under consideration in the case at bar enjoins a duty on both resident and non-resident lot owners, a duty necessary to be followed to preserve the health of the city. There is a difference only in the manner of enforcing it, a difference arising from the different situation of the lot owners, and therefore competent for Congress to regard in its legislation. In other words, under the circumstances presented by this record the distinction between residents and non-residents is a proper basis for classification. It might not be under other circumstances. *Blake* v. *McClung*, 172 U. S. 239; *S. C.*, 176 U. S. 59; *Sully* v. *American National Bank*, 178 U. S. 289.

That the remedy in the statute under consideration against non-resident owners may be more efficient—more completely fulfill the purpose of the law—than that against resident owners, is beside the question. Indeed, the fact may be disputed. Usually the most emphatic and efficient enforcement

of a law is through criminal prosecution. At any rate, it is hard to believe that there will be many resident lot owners whose delinquency under the statute will be so resolute that it will stand against repeated charges of crime and the consequent penalties. But, be that as it may, it was for Congress to decide whether such possibility should be risked rather than incur the greater possibility of more delinquents in so numerous a class as resident lot owners if the District was to first bear the expense of the drainage and collect it afterward by civil proceedings.

Other criticisms are made of the law to display what is alleged to be its lack of uniformity. For instance, a supposition is made of tenants in common, some of whom are residents and the others non-residents, and the possible difficulties that may arise from such ownership under the act, and it is asked if the property belongs to resident minors or insane persons, or persons under legal disabilities, can the act be enforced against them or against their property? To these suppositions and questions we answer that it will be time enough to reply when a case arises in which they are presented, and to determine then the operation of the act upon the persons enumerated.

Judgment reversed with directions to reverse the judgment of the Supreme Court, quashing the tax, and to dismiss the petition.

MR. JUSTICE WHITE did not hear the argument and took no part in the decision.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* EASTIN & KNOX.

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

No. 177. Argued April 23, 1909.—Decided May 17, 1909.

The right of a defendant who has petitioned for removal of a case to the Federal court cannot be extended beyond what is necessary to defend the case; he cannot deny the jurisdiction after invoking it for affirmative relief.

A defendant's right to remove to the Federal court is amply protected. He may file his record in the Circuit Court and thereby completely take jurisdiction from the state court.

Even though a defendant's petition to remove is wrongfully denied by the state court, and in his answer he protests against the right of the state court to retain jurisdiction, if he asserts an affirmative remedy in the state court, as in this case in which he brought in a third party for liability over, he submits his whole case and cannot attack the action of the state court in denying his petition for removal in this court on writ of error.

100 Texas, 556, affirmed.

THIS action was instituted by defendant in error against plaintiff in error, the Texas and Pacific Railway Company, hereinafter called the Texas and Pacific Company, and J. M. Tucker, its agent, for wrongfully billing and shipping 712 head of cows and calves via one road, though they were requested to be shipped via another, whereby they were required to go twice as far, and were seriously injured and damaged thereby.

It is alleged in the original petition that plaintiffs in the action, defendants here, were residents of the county of Jack, State of Texas; that Tucker resided in the county of Palo Pinto in said State, and that the Texas and Pacific Company "is a body corporate, duly incorporated under the Federal statutes, with an office and station in the counties of Palo Pinto and Parker, in the State of Texas."

The Texas and Pacific Company filed an answer, and at the same time filed a petition and bond to remove the cases to the Circuit Court of the United States for the Northern District of Texas, sitting at Fort Worth. The petition alleged as the ground of removal that Tucker was improperly and wrongfully joined with the company for the sole and only purpose of preventing it from removing the case to the United States Circuit Court. That the suit against the company was a suit arising under the laws of the United States, and more especially under the law of the United States constituting the charter of the company, under which it was incorporated. Tucker adopted the statements of the petition and joined in the application for removal. The application was denied, and an exception was entered to the ruling. The Texas and Pacific Company, protesting against the right of the court to hear and determine the suit, filed its amended original answer, among other defenses alleging that "it carried and delivered the cattle to Paris, Texas, safely and carefully on reasonable time," and further alleging that the St. Louis and San Francisco Company was duly incorporated and operated its line of railway in Lamar County, Texas, and had a local agent at Paris, and that most of the damage complained of by defendant (plaintiff in error) occurred on the line of that road. The Texas and Pacific Company asked that the St. Louis and San Francisco Railroad Company be made a party defendant, and that citation be served on it; that it be required to answer in the case, and that if plaintiff should recover against the Texas and Pacific Company the latter have judgment against the St. Louis and San Francisco Company for all such damages as were caused by it.

Subsequently, a second amended original answer was filed by the Texas and Pacific Company, in which it enlarged its defenses, and in what it called a "special and separate answer," averred its careful transportation of the cattle, and again averred the negligence of the St. Louis and San Francisco Company, and that but for such negligence, the damages of

which plaintiffs complain would not have occurred. The prayer of the answer was as follows:

"Wherefore, this defendant prays that citation be issued to the said St. Louis and San Francisco Railroad Company, by service upon its local agent herein aforesaid as the law directs, and that upon hearing hereof that the damages and injuries sustained by plaintiffs in the shipment of said cattle be according to law apportioned between the defendant and the St. Louis and San Francisco Railroad Company, and that this defendant be held liable only for such damages as occurred to said cattle while the same were in its possession, and that such damages and injuries as accrued to said cattle while same were in the possession of the St. Louis and San Francisco Railroad Company and its connecting carriers be charged to it. But if this defendant be mistaken in this, then it prays that upon hearing hereof that it have judgment over and against the said St. Louis and San Francisco Railroad Company for the full amount of any judgment that may be rendered against this defendant upon the trial hereof, and that it recover its costs in this behalf expended, as it will ever pray, etc., and for such general and special relief in law or equity, as it may be entitled to under the law and the facts."

A citation was issued in accordance with this prayer, and the St. Louis and San Francisco Company was summoned to appear "to answer the said amended answer of the Texas and Pacific Railway Company filed as aforesaid on the seventh day of April, A. D. 1904." The citation was duly served, together with certified copies of plaintiff's original petition and the amended answer of the Texas and Pacific Company, as directed by the citation. The St. Louis and San Francisco Company appeared in the action. In what is called its first amended original answer it demurred "generally to the answer and cross action" of the Texas and Pacific Company, on the ground that the same failed to show a cause of action. The answer also denied all the allegations of the "said pleadings of the Texas and Pacific Company," set up other defenses,

and alleged that if the cattle were damaged by delay in shipment "that the fault or liability" was that "of the Texas and Pacific Railway Company in not routing said cattle as requested by the plaintiffs and as demanded by the exigencies of the shipment," and "prayed to be hence dismissed with its costs." The issue thus made up was tried by the court and resulted in a judgment against the Texas and Pacific Company and Tucker for $3,600, and a judgment against the St. Louis and San Francisco Company in favor of the Texas and Pacific Company for $1,800. All the defendants appealed to the Court of Civil Appeals for the Second Judicial District, sitting at Fort Worth. That court reversed the decision and remanded the case, holding that the trial court erred in overruling the application for removal, and entertaining jurisdiction of the case. A motion for rehearing was made and denied and the plaintiffs (defendants in error here) applied to the Supreme Court of Texas for a writ of error, which was dismissed for want of jurisdiction, but was, on motion for rehearing, granted, and on the second of May, 1906, the Supreme Court reversed the Court of Civil Appeals, deciding that the case was not removable, and remanded the case for decision on the other questions.

On the return of the case to the Court of Civil Appeals, that court, on the sixteenth of June, 1906, affirmed the judgment of the District Court. A motion for rehearing was denied, and on writ of error to the Supreme Court the latter court affirmed the judgment of the Court of Civil Appeals.

Mr. Rush Taggart and *Mr. W. L. Hall*, with whom *Mr. John F. Dillon* was on the brief, for plaintiffs in error:

The Texas and Pacific Railway Company being a corporation chartered by Congress, when sued alone in the state court for an amount exceeding $2,000, exclusive of interest and costs, has the right to remove the cause to the Federal court, and when sued with a local defendant to establish a joint liability of all defendants it is a suit arising under the Constitution

and laws of the United States, and if all defendants join in the application to remove, the cause should be removed to the United States court. See charter, 16 Stat. 573; §§ 1 and 2, act of March 3, 1875, c. 137, amended by acts of 1887 and 1888; *Osborn* v. *United States Bank*, 9 Wheat. 738; *Smith* v. *Union Pacific Railway*, 2 Dillon, 278; *Pacific Removal Cases*, 115 U. S. 200, 222; *Texas & Pacific Railway* v. *Cody*, 166 U. S. 606; *Re Dunn*, 212 U. S. 374.

Where the facts presented in a petition for removal show a cause of action properly removable from a state to a Federal court, the state court must take the facts as stated in the record and petition, and has no jurisdiction to pass upon any such questions. The right to pass upon the issues of fact made by the petition for removal is one for the Federal court, it having the exclusive province of passing upon such questions of fact. Black's Dillon on Removal, § 191; *Kounts* v. *B. & O. Ry.*, 104 U. S. 5; *Stone* v. *South Carolina*, 117 U. S. 430; *Burlington Ry. Co.* v. *Dunn*, 122 U. S. 513; *Daugherty* v. *K. C. & Ft. S. Ry.*, 138 U. S. 298.

Mr. Thomas D. Sporer, with whom *Mr. H. C. McClure* was on the brief, for defendants in error:

The plaintiff in error, after filing its petition and bond for removal, waived its right to remove by voluntarily appearing in the state court, and filing what it called its first amended original answer, by which it voluntarily impleaded and made the St. Louis & San Francisco Railway a party defendant and sought to recover a judgment over against it for damages and by recovering judgment against that defendant for $1,800. This latter proceeding was an affirmative action on its own part by which it elected to retain defendants in error in the state court, not for the purpose of defending itself, but to have the matter litigated and, at the same time, to prosecute its rights and enforce them, by obtaining a judgment of the state court against the St. Louis & San Francisco Railway Company—a party whom defendants in error had not sued.

While it is true that if the state court refused to order a removal, and retains its jurisdiction, and the petitioner is compelled to remain in the state court, he does not have to remain inactive and allow judgment by default to go against him. He has a right to remain and defend the suit against him. But there is this distinction. He can only defend. If he seeks to take affirmative action and appeal to the court for relief in order to better his condition, that is, asks for something independent of and alien to the plaintiff's case, he elects to submit to the jurisdiction of the court. After making this election he cannot insist on his removal proceeding and insist that the court has no jurisdiction to try the case. The Federal courts will not permit him to experiment with the courts or speculate with his cause of action.

He must be consistent. *C. I. & N. P. Ry. Co.* v. *Minn. & N. W. Ry. Co.*, 29 Fed. Rep. 337, 341. See also: *Manning* v. *Amy*, 140 U. S. 137; *Removal Cases*, 100 U. S. 457, 473; *Hudson River R. R. & Term. Co.* v. *Day*, 54 Fed. Rep. 545; *Case* v. *Olney*, 106 Fed. Rep. 433; *First National Bank of Wason* v. *Conway*, 67 Wisconsin, 210.

Mr. Justice McKenna, after stating the facts as above, delivered the opinion of the court.

The assignments of error present the question of the right of the Texas and Pacific Company to a removal of the case to the Circuit Court of the United States, (1) Because, being a corporation chartered under an act of Congress, the suit was one arising under the laws of the United States, and that this character was not taken from it by joining a local defendant when it was an action to establish a joint liability. (2) Where the facts stated in the petition for removal show a cause properly removable from a state to a Federal court, the state court has no jurisdiction to pass finally upon them; that right is one for the Federal court, it having the exclusive province of passing upon such questions of fact.

The first proposition is sustained in the *Matter of Dunn*, 212 U. S. 374; tne second proposition is sustained in *Chesapeake and Ohio Railway* v. *Emma R. McCabe, Administratrix*, 213 U. S. 207. The latter case also decides that if an application for removal be denied the petitioner loses no right by being compelled to stay in the state court. In other words, that the petitioner may stay in the state court and defend the action against him, and if the judgment go against him bring the case to this court and have the question of removal determined. But plaintiffs in error did not defend only against the cause of action. They instituted a cause of action against the St. Louis and San Francisco Railroad Company, in which the defendant in error had no concern, and recovered a judgment against that company in the sum of $1,800. By doing so they invoked the jurisdiction of the state court on their own account and for their own purpose, and the case is brought within the ruling in *Merchants Heat & L. Co.* v. *Clow & Sons*, 204 U. S. 286.

The single question in this court in that case was the jurisdiction of the Circuit Court, from which the case came. The Merchants Heat & Light Company, an Indiana corporation, contended that no jurisdiction had been obtained over it by the service which was made upon one Schodd, who, it was asserted by the plaintiff in the action, was an agent of the company. A motion to quash the return of service was made and overruled, and thereupon the company, after excepting, appeared as ordered and pleaded the general issue, and also a recoupment or set-off of damages under the same contract sued upon, and overcharges in excess of the amount ultimately found due to the plaintiff. There was a finding for the plaintiff of $9,082.21.

Whether the company was doing business in the State of Illinois within the meaning of the statutes of that State under which service was made, this court did not decide, but it did decide that the company, "by setting up its counter-claim became a plaintiff in its turn, invoking the jurisdiction of the

court in the same action, and, by invoking, submitted to it." And this, notwithstanding the counter-claim arose, as it was said, "out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set-off proper." It was further said: "There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits." And the Texas and Pacific Company was an actor against the St. Louis and San Francisco Company upon a cause of action upon which it was its own choice to bring into the suit. On that cause of action it obtained a judgment against the St. Louis and San Francisco Company, and succeeded in having it affirmed by the Supreme Court of the State.

It would be carrying too far the right of a party who has petitioned for removal of a case to extend it beyond what is necessary to defend against the cause of action asserted against him. He should not be permitted to invoke the jurisdiction for affirmative relief and deny it afterwards. It must be remembered how amply his right of removal is protected. He may file the record in the Circuit Court of the United States and thereby completely take jurisdiction from the state court.

Judgment affirmed.

MR. JUSTICE PECKHAM and MR. JUSTICE DAY dissent.

DUPREE v. MANSUR.

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

No. 124. Argued April 6, 7, 1909.—Decided May 17, 1909.

Where it is established law of a State, as it is of Texas, that when a debt is barred by limitations an action to foreclose a lien or mortgage given as security for it is barred also, the law must be enforced in the courts of the United States, whether sitting in law or in equity.

Whether or not the statute of limitation bars a suit to foreclose is a question of substantive law, created by the State and not by the United States, and not one of procedure or jurisdiction; and the Federal court should be governed by the decisions of the State where the land lies. *Slide & Spur Mines* v. *Seymour*, 153 U. S. 509.

The Federal courts cannot declare it wrong or inequitable for a debtor to rely upon a state statute of limitations, as that would be to declare wrong or discreditable what the legislature of the State declares to be right.

THE facts are stated in the opinion.

Mr. J. J. Darlington for petitioners:

A sale of property under judicial proceeding concludes no one who is not party to those proceedings, *United Lines Tel. Co.* v. *Boston Trust Co.*, 147 U. S. 431, 448; *Pittsburg R. R. Co.* v. *Long Island Trust Co.*, 172 U. S. 493, 515; *Meyer* v. *Construction Co.*, 100 U. S. 457, and, therefore, Mrs. Dupree not being a party cannot be bound by the decree.

Whatever title the law gives, the purchaser takes, no more and no less; and he must govern himself accordingly. *Waples* v. *United States*, 110 U. S. 630, 633.

Under the decree in question, the law gave, and Duke took, simply the title to the notes which Slayden endorsed to the receiver for the purposes of sale and he acquired no rights except those which resulted from the endorsement of the notes to him.

It was also error to hold that the respondent was entitled, under his cross-bill or otherwise, to foreclosure of the vendor's lien retained by Bailey in his deed of December 31, 1894.

The Texas statute of limitations, as construed by its courts, does not bar the claim of the vendor of land under an express vendor's lien reserved in the deed of sale. Notwithstanding the fact that the deferred purchase money notes are barred by the statute, the vendor may still retake the land if the notes are unpaid; but this right is one personal to himself, and does not pass to an assignee or endorsee of the notes. *Elliott* v. *Blanc*, 54 Texas, 216, 218; *Hale* v. *Baker*, 60 Texas, 217; *Stephens* v. *Matthews' Heirs*, 69 Texas, 341–344.

The identical proposition relied upon by the petitioners in this case is recognized in *Ewell* v. *Daggs*, 108 U. S. 147, as follows: "If a debt secured by the lien of a mortgage is barred by the statute of limitations, then, according to the law in Texas, the foreclosure suit is barred, but not otherwise; for the mortgage is a mere incident of the debt." *Eborn* v. *Cannon's Admr.*, 32 Texas, 231, held that the mortgage was but an incident of the debt, and the incident in law, as in logic, must abide the fate of the principal.

Upon such questions, the law, as held by the Supreme Court of Texas, must furnish the rule of decision. *Cordova* v. *Hood*, 17 Wall. 9.

The cause of action being the debt, and its recovery the sole purpose sought to be accomplished, the case is one of concurrent jurisdiction between the courts of law and of equity, and, therefore, one in which the statute of limitations is binding in the latter forum. *Bank* v. *Daniel*, 12 Pet. 32, 56; *Bacon* v. *Howard*, 20 How. 22, 26. Even if the respondent's cause of action were based upon a purely equitable right, the statute would be applied by analogy and would be equally conclusive. *Miller's Heirs* v. *McIntyre*, 6 Pet. 61, 66–67; *Willard* v. *Wood*, 1 App. D. C. 44, 59–60, affirmed 164 U. S. 502, 520.

Mr. Hannis Taylor, with whom *Mr. J. M. McCormick* was on the brief, for respondent:

The effect of the decree of June 30, 1897, was to keep alive the indebtedness evidenced by the Slayden notes and the liens on the realty.

The decree did not merge the notes so that the payment to Slayden operated to extinguish the debt and liens. A court of equity can decree that a lien which otherwise would be merged or extinguished, shall not be, or that what would ordinarily amount to payment shall not have this effect. The provision for the sale of the notes and interest coupons by the receiver shows beyond controversy that the court was of opinion there was something to sell. See *Alston* v. *Muneford,* Fed. Cas. No. 267; *Williams* v. *Washington,* 16 N. E. Rep. 137; *Durham* v. *Rhodes,* 23 Maryland, 233; *Ross* v. *Duggan,* 5 Colorado, 85; *Jenness* v. *Robinson,* 10 N. H. 215; *Tarver* v. *L. M. Bk.,* 27 S. W. Rep. 40; *Fears* v. *Albea,* 69 Texas, 437.

Equitable merger is always a question of intent. See 20 Am. & Eng. Enc. of Law, 588, and under "Waiver" in 29 Am. & Eng. Enc. of Law, 1095. In this case the decree declares in express terms that the parties did not intend a merger but a subrogation.

A vendor's lien is for all of the purchase money and for every part of it until paid. It is not merely security for notes that may be given for the consideration, but is for the debt of which the notes were evidence. The lien is not affected by taking a new note, for that is but a change of the evidence, and not a payment of the debt. See *De Cordova* v. *Hood,* 17 Wall. 1, holding that, in Texas, an assignment of the notes given for purchase money carries with it the vendor's lien to the assignee. See also *Lewis* v. *Hawkins,* 23 Wall. 119.

Federal courts adopt state statutes of limitation, as such, only so far as they regulate remedies on the common-law side of the court. They do not follow a state statute of limitations when thereby manifest wrong and injustice would be wrought. 1 Foster's Fed. Practice (3d ed.), 15, 16, citing *Fogg* v. *St.*

Louis, H. & K. R. Co., 17 Fed. Rep. 871, 873; Story's Eq. Jur., § 1521. See *Kirby* v. *Lake Shore R. R. Co*, 120 U. S. 130, citing *Payne* v. *Hook*, 7 Wall. 430, holding that if legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their courts, it is not so with equitable. In his note on this case, Rose, in demonstrating that "Federal courts' equity jurisdiction is not subject to limitation by States," cites *Burdon Central Co.* v. *Ferris Mfg. Co.*, 78 Fed. Rep. 422, where, under facts, equitable lien was allowed, although laws of State in which court was sitting would give no lien; *Gregg* v. *Sanford*, 65 Fed. Rep. 157; *S. C.* 28 U. S. App. 313, and *Brown* v. *French*, 80 Fed. Rep. 169, reaffirming the rule. See also *Slide & Spur Gold Mines* v. *Seymour*, 153 U. S. 517, holding that such a lien is one which appeals strongly to the favorable consideration of a court of equity, and *Fisher* v. *Shropshire*, 147 U. S. 133. To the enforcement of this purely equitable right, over which a court of law cannot have concurrent jurisdiction, the statute of limitations can never be applied. The only question involved is one of laches.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill brought by the petitioner to quiet title to a lot of land in Waco, Texas. A cross-bill was filed by the respondent to establish and foreclose a vendor's lien and mortgage upon the same land. The facts, so far as necessary to a decision, are these. One Bailey conveyed one undivided half of the land in question to William E. Dupree, partly in consideration of five notes, for nine hundred dollars each, maturing in one, two, three, four and five years respectively, from December 31, 1894, the date of the conveyance. By the words of the deed, "the vendor's lien is hereby reserved on the said property to secure the above described notes." On the same date Dupree made a mortgage in the form of a trust deed of one undivided half of the premises to secure the same notes. These deeds were recorded the next year and later Dupree conveyed the land to his wife, whose title is not assailed ex-

cept as subject to the lien for the notes. Then Dupree conveyed other property in trust for creditors in three classes, in the first of which was included one Slayden in respect of the above-mentioned notes, of four of which he had become the holder. Forthwith certain creditors brought a bill to get the benefit of other securities held by one of the preferred creditors and for a receiver. Neither the petitioner nor Slayden were made parties, nor was this property mentioned in the bill. On the same day another similar bill was brought by W. B. Belknap & Company, unsecured creditors, in which Slayden was one of the defendants. The petitioner also was joined in respect of a vendor's lien on other land, which she was alleged fraudulently to assert. It was ordered that on the trial the two suits should be consolidated, the same person having been appointed receiver in each. Then Slayden answered and intervened for three of the notes, one having been paid. By the final decree made on June 30, 1897, it was decided that the plaintiffs in the Belknap bill, to which the petitioner was a party, take nothing by their bill; but, among many other things, the claim of Slayden on his intervention was allowed, it was adjudged that he recover the amount of Dupree and be paid out of the funds in the hands of the court, and it was ordered that thereupon he should endorse the notes, described as secured by vendor's lien on the land in question, to the receiver, without recourse, and that the receiver should sell them and pay the net proceeds into court to be applied with the other funds. The decree was carried out and the notes were sold to one Duke for $300. He afterwards sold them to Mansur, the respondent, who attempted by proceedings unnecessary to state to have the land sold. Then this bill was filed. The Circuit Court granted an injunction. This decree was reversed, and a decree of foreclosure in favor of the respondent ordered by the Circuit Court of Appeals.

The Circuit Court of Appeals proceeded upon the ground that the decree was conclusive upon the petitioner, though for what purposes or with what results is not entirely clear

and is not necessary to inquire. We shall assume that the purchaser took the notes as unpaid, with the vendor's lien attached to the same extent as if Slayden had sold them without coming into court. That certainly is the most that can be attributed to the decree. But since the date of that decree, and before the date of the bill, the notes have been barred by the Texas statute of limitations. It is established law in Texas that when a debt is barred an action to foreclose a lien or mortgage given as security for it is barred also. *Hale* v. *Baker*, 60 Texas, 217; *Goldfrank* v. *Young*, 64 Texas, 432, 434; *Stephens* v. *Mathews*, 69 Texas, 341, 344; *Davis* v. *Andrews*, 88 Texas, 524; *Brown* v. *Cates*, 99 Texas, 133. The former decree afforded no possible ground for not applying the Texas law in the present case.

The respondent argues that the vendor's lien is equitable; that the statute of limitations does not govern equitable proceedings, and that a court of equity will not be governed by the analogy of the statute unless it seems equitable to follow it; that the equity jurisdiction of the United States is not to be affected by state laws; that therefore the United States courts are unincumbered by the Texas decisions, and that they ought to say that it is inequitable to deny a remedy on the security when a suit is barred upon the debt. We will not consider in how many points we disagree with this argument, but will confine ourselves to what we deem a sufficient answer.

A vendor seems to have greater rights than are enjoyed by a purchaser of notes for the price of land, to which a vendor's lien is attached. If not inequitable, the vendor may resolve the sale for non-payment, whereas a later holder of the notes only can have the lands sold and the proceeds applied in satisfaction, and this right is lost when the notes are barred. *Stephens* v. *Mathews*, 69 Texas, 341, 344. (These notes, it will be remembered, had been sold by the vendor long before the sale under the decree.) In one case a lien expressly reserved seems to be regarded as equivalent to a mortgage. *Wilcox* v. *National Bank*, 93 Texas, 322, 331. Whether this be true or

not, we hardly see how a court of law could disregard an express reservation of security, or how a lien so reserved can be called a purely equitable right. But equitable or not it is a creation not of the United States, but of the local law of Texas. If that law should declare the words in Bailey's deed purporting to reserve a lien unavailing, it would not be for the courts of the United States to say otherwise when sitting in equity any more than when sitting at law. It appears to us equally their duty, when the local law decides that the words create a right, to take the measure of that right from the same source. The notes are barred, as well in equity as at law. By the law of Texas the security is incident to the note and does not warrant a foreclosure when the note does not warrant a judgment. This is not a matter of procedure or jurisdiction, but of substantive rights concerning land. It seems to us that it should be governed by the decisions of the State where the land lies. See *Slide & Spur Gold Mines* v. *Seymour*, 153 U. S. 509, 516.

We should add as an independent consideration that it cannot be admitted for a moment that for a debtor to rely upon the statute of limitation is inequitable of itself without some special circumstance wanting here. That would be for courts, and in this case courts of a different power, to undertake to declare wrong or discreditable what the proper authority, the legislature of the State, had declared right. There are other questions in the case, but we deem the foregoing reasons sufficient to show that the decree must be reversed.

Decree reversed.

June 1, 1909, MR. JUSTICE HOLMES. To prevent misapprehension there should be added to the opinion at the end the following words:

We have considered only the question of the foreclosure on the cross-bill. The case will be remanded to the Circuit Court for further proceedings in accordance with the opinion, without prejudice to the question whether the bill can be maintained.

UBARRI *v.* LABORDE.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 137. Argued April 7, 8, 1909.—Decided May 17, 1909.

Judgment reversed on the facts, it being based on allegations of fraud and corruption which this court holds were not sustained by the evidence.

The effect under the law of Porto Rico of an heir waiving the benefit of inventory is to make him personally liable for the debts of the succession without limit, as under the early law of Rome, of England and of France; but, after the inheritance is divided, the liability of the succession is at an end and gives place to personal liability of each heir for the whole debt to the extent of the assets received by him, if accepted with benefit of inventory, or otherwise in full.

Whether or not an heir in Porto Rico waives benefit of inventory is a pure question of fact; and, if the complaint is silent, the court will not presume that there was such a waiver.

3 Porto Rico, 163, reversed.

THE facts are stated in the opinion.

Mr. Walter D. Davidge and *Mr. Clifford S. Walton* for plaintiff in error.

Mr. Willis Sweet and *Mr. George H. Lamar* for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action by children of one Jacinto Lopez against one of the heirs of one Pablo Ubarri, alleging fraud on the part the said Pablo in dealing with the estate of Lopez. It is alleged that as the result Pablo Ubarri became the owner of more than 4,000 acres of land that had belonged to Lopez, and

otherwise damaged and defrauded the estate to the extent of over $150,000. There was a trial and a verdict and judgment for the plaintiffs, the defendants in error. Many errors were alleged by exception and otherwise, and the case was brought by writ of error to this court.

The facts relied upon as establishing fraud are as follows: Pablo Ubarri received from the widow of Lopez a power of attorney to administer the estate, and appointed as his substitute one Tomas Caballero. The probate proceedings went on amicably, the heirs were declared and the estate was appraised and apportioned to them, the widow receiving property that by valuation was sufficient to pay the scheduled debts in addition to her personal share. Among these debts was one to Pablo Ubarri of $24,000. When the probate proceedings were ended this debt was disputed by the widow, who asked for documentary evidence; Ubarri thereupon showed some irritation and wrote to her in a manner that might be taken to imply a threat. She persisting, he began a suit with an attachment, the above-named Caballero being his procurador. Before and afterward some of the property was attached for taxes and ultimately it was sold. Ubarri became the purchaser, no other bidders appearing at the sale. Then his action went to judgment, and, finally, the land belonging to the estate, or a large part of it, was adjudicated to him upon execution. Ubarri was the richest, and, politically, the most powerful man in Porto Rico. Circumstances are stated suggesting the inference that even the judges might have been afraid of him. It is said that the representative of the minor heirs, the appraisers of the estate, and pretty much every one concerned in the probate proceedings were in such relations to him as to be likely to be his tools, that the appraisal was much too low, that the sale for taxes brought a wholly inadequate price, that the attachment tied up the estate so that no money could be got to pay any debt, and that he was an official superior of the municipal authorities ordering the collection of the taxes, and practically the head of those

affairs. The inference sought to be drawn from his powers and the result is that he pressed the collection of the taxes after he had made it impossible for the estate to pay them; that no one would dare to oppose when it was made known that he wished to buy, and that by his pressure at both ends he was able ultimately to appropriate and exhaust an estate, appraised by his own appointees at $123,000, for a claim of $24,000 and a comparatively small debt for taxes. It seems to have been argued at the trial that he helped out this result by causing the property attached to be appraised at too low a value, and thus enabling himself to bid it in, as he did, at two-thirds of that valuation, under Arts. 1497, 1502, of the Code of Civil Procedure then in force.

As a further circumstance it was alleged and proved that the widow was proceeded against criminally for cutting a few trees from the estate after Ubarri's attachment, and was acquitted in the court of first instance, but that Ubarri, as private prosecutor, took the case to a higher court, being represented there by the above-named Caballero, and got a sentence of fine or imprisonment imposed upon her. We do not perceive the relevancy of the fact, except possibly as showing the animus with which Ubarri pressed his rights.

On the other side we start with the fact that the debt to Ubarri is admitted, and that in the argument it was stated that no objections have been made to the probate proceedings. Certainly no ground appears for suggesting that anything in those proceedings contributed in any way to the alleged fraud. But if this be so, any special duty or burden of proof arising out of confidential relations disappears. We have simply the case of a creditor enforcing his debts after the division of the estate. He had to bid at the tax sale in order to save his attachment. There is no evidence except the fact of his power to show that other bids were deterred, and none to show that he tried to deter them. On the contrary, it appears that some of the personal property, at least, was bought by another. So as to the sale on execution. Both transac-

tions were regular in form. It seems from the correspondence, that so far from his having stirred up the collection of the taxes, they were in arrears for some time, and that the officials had been pressing for them before it reasonably could be imagined that he had any hand in what was done. The widow had shown a readiness to suspect him, without grounds so far as appears, two years before his suit was begun, and he had expressed his willingness to have her withdraw the power of attorney whenever she pleased. When the suit was brought they were at arms' length. It was argued that he procured the property attached to be appraised at too low a value, as we have said. But there is no evidence that he did; no sign of any protest on the part of the appraiser that the debtor was authorized to appoint; nothing to show that the judge did not do his duty in appointing a third competent and disinterested man. Arts. 1481, 1482, 1492. The appraisal seems to have agreed with that in the probate proceedings. It is said that that was fraudulent. But it appears that all the parties, after discussion, agreed to the appraisers appointed and to the appraisal, and it does not appear that they were misled in any way. Neither does it appear that the appraisal before execution was not the result of independent judgment, whether it agreed with the former appraisal or not. The whole property was sold by the heirs of Ubarri between 1898 and 1902 for little more than the amount of the judgment. In short, on questionable evidence as to the value of the estate and the fact that Ubarri was a man of great power and influence and bought the land, when sold for taxes and on execution, at much less than the value set by the plaintiffs, the case was sent to the jury with liberty for them to find upon suspicion that judges, mayors, appraisers and possible purchasers all were frightened or corrupt. We are of opinion that this was wrong, and that the exceptions taken by the plaintiffs in error should be sustained.

It is not likely that we shall hear of this case again, and therefore we leave many points untouched that would have

to be considered seriously before the judgment could be sustained, but we shall advert to one other matter. The court instructed the jury that because the defendant had not shown the contrary, it was to be presumed that the heirs of Pablo Ubarri took without benefit of inventory, and that therefore service upon one of them authorized the court to give judgment against the succession for whatever the verdict might be. In the light of this instruction and the prayer of the complaint, which was for judgment against the succession, it would seem that the judgment should be construed to follow the prayer. It reads that the plaintiffs "recover of and from the defendant Buenaventura Ubarri Yramategui of the succession of Pablo Ubarri," &c. This is ambiguous, but we assume it to be against the succession. But if so, we do not perceive the bearing of the presumed waiver of the benefit of inventory. The effect of such a waiver was to make the heir personally liable without limit, as he was in the early law of Rome, of England, and of France. Civil Code of 1889, Art. 1084; Glanville, Lib. 7, c. 8; Viollet, Hist. du droit civil Français, 2d ed., 829, 830. But as this was a suit against the succession that was immaterial, so far as the form or scope of the judgment was concerned. It was material, however, with reference to the nature of the suit. For unless we entirely misunderstand the meaning of the Code of 1889 and of the proceedings under the civil law in case of succession, after the inheritance has been divided the liability of the succession is at an end, and gives place to a personal liability of each heir for the whole debt to the extent of the assets received by him if he has accepted with benefit of inventory, or, otherwise, in full. Arts. 1003, 1023, 1084. It is for this reason, we presume, that creditors "recognized as such" were given the right to oppose the division until they were paid or secured. Art. 1082. If this suit is to be regarded as we have supposed and as the defendants in error say, it seems to be misconceived. If on the other hand it should be regarded as a suit against Buenaventura Ubarri personally, in respect of a liability of his ancestor, the complaint

does not allege that he inherited any property, or how much, or that the inheritance had been divided, or whether it was accepted with or without benefit of inventory. If we assume a division to have taken place, we see no ground for presuming that the defendant accepted his share without benefit of inventory or is liable for anything beyond the unascertained value of what he received. Whether he waived the benefit of inventory or not, is a pure question of fact. It was not material to a suit against the succession and therefore was not mentioned in the pleadings. Even the division of Pablo's inheritance was mentioned only incidentally in the evidence, and it does not appear whether it took place under the Code of 1889 or that of 1902. But if the supposed waiver were to be considered we know of no reason for presuming what probably is the exception not the rule to have happened in this case. For the foregoing reasons also the judgment was wrong.

Judgment reversed.

LABORDE *v.* UBARRI.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 194. Argued April 30, 1909.—Decided May 17, 1909.

In the courts of the United States attachment is but an incident to a suit and falls unless the suit can be maintained, *Ex parte Railway Co.*, 103 U. S. 794; and, unless the court has jurisdiction over the person of the defendant, the suit cannot be maintained.

Ubarri v. *Laborde*, *ante*, p. 168, followed to effect that after a succession in Porto Rico has been divided the liability of the heirs is personal; and, even if the suit can be maintained against the succession, private property of the heirs cannot be attached to answer for the judgment.

THE facts are stated in the opinion.

Mr. Willis Sweet and *Mr. George H. Lamar* for plaintiffs in error.

Mr. John Maynard Harlan for defendant in error Pablo Ubarri.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is the same suit that has been decided already. *Ubarri* v. *Laborde*, *ante*, p. 168. There is presented here a subordinate question as to the right of the plaintiffs in error, who were also the plaintiffs below, to retain an attachment against property alleged to belong to two non-resident heirs of Pablo Ubarri. The District Court ordered the complaint to be dismissed as to these heirs and the attachment against any of their property to be dissolved, on the principle that has been laid down more than once by this court, that in the courts of the United States "attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall." *Ex parte Railway Co.*, 103 U. S. 794, 796. "Unless the suit can be maintained" means, of course, unless the court has jurisdiction over the person of the defendant. See further *Toland* v. *Sprague*, 12 Pet. 300, 330, 336; *Chaffee* v. *Hayward*, 20 How. 208; *Clark* v. *Wells*, 203 U. S. 164.

It was admitted at the argument before us that if the suit against the other defendant should fail, as it has, there was no need to decide this case. But it must be disposed of in some way, and we are of opinion that the judgment below should be affirmed. The suit purports to be against the succession. Yet the property sought to be attached is alleged in the petition to belong to the defendants, and is not alleged even to have belonged to the succession in the past. It seems from what was admitted at the argument that a part at least never did. But if it had belonged to the succession, we gather from incidental testimony in the main case, from the allegations of separate titles in the petition for attachment, and from admissions at the bar, that it had been divided, and thereafter the liability of the heirs, if any, was personal, as explained in the

other case. Even if a suit still could be maintained against the succession when there was no property left in the inheritance, the private property of the heirs could not be held to answer the judgment. On the other hand, if this could be regarded as a suit to enforce personal liability of such heirs as could be caught, it would fail for reasons stated in *Ubarri* v. *Laborde*. In view of the disposition of that case we deem it needless to say more.

Judgment affirmed.

LEECH *v.* STATE OF LOUISIANA.

ERROR TO THE SUPREME COURT OF LOUISIANA.

No. 152. Submitted April 15, 1909.—Decided May 17, 1909.

The Mississippi river is a boundary between Mississippi and Louisiana from below the port of Natchez as far north as Louisiana extends; but below Natchez all the river is wholly within Louisiana, and that State, subject only to the paramount power of Congress, has exclusive jurisdiction over pilotage in the river between points south of Natchez.

Section 4236, Rev. Stat., act of March 2, 1837, c. 22, 5 Stat. 153, allowing the master of vessels coming in or going out of ports on boundary rivers to employ any pilot licensed by either State, does not apply to pilotage to ports on a river below the point where it becomes a boundary river; and a pilot licensed only by Mississippi has no right to pilot a vessel from the Gulf of Mexico to New Orleans.

Quære whether under § 4236 a pilot licensed only by Mississippi can pilot a vessel from the Gulf to Natchez.

Neither continuity of water nor identity of name will make a river a boundary river except where it flows between the States it separates for a part of its course; it ceases to be a boundary river wherever it is wholly within one State.

119 Louisiana, 522, affirmed.

THE facts are stated in the opinion.

Mr. George H. Terriberry for plaintiff in error:

A regulation of pilots is a regulation of commerce, within

the grant of power to Congress in the Constitution of the United States. *Cooley* v. *Wardens of Philadelphia*, 12 How. 299.

The act of August 7, 1789, 1 Stat. 54, is not a grant of power to the States to pass pilot laws, but a legislative recognition that the power is concurrent in the States and the United States until exercised by the latter. *The Panama*, Fed. Cas. No. 10,702; *S. C.*, 1 Deady, 27.

The navigable waters of the former Territories of Orleans and Louisiana are public waterways of the Nation, subject to common use. Act of March 3, 1811, c. 46, 2 Stat. L. 666.

The provisions of a state law, regulating pilots and pilotage, which are in direct and manifest conflict with the act of March 2, 1837, concerning pilots, are inoperative and void. *The South Cambria*, 27 Fed. Rep. 525.

A pilot licensed by the State of Delaware is entitled to recover for services in piloting a vessel up the Delaware Bay and river to Philadelphia, notwithstanding a law of Pennsylvania prohibiting any one from acting as such pilot without a Pennsylvania license. *The Clymene*, 9 Fed. Rep. 164; *S. C.*, 12 Fed. Rep. 346.

The act of March 2, 1837, authorizing the master of a vessel bound to, or from, a port situate on waters which are the boundary between two States, to employ a pilot licensed by the laws of either State, applies to the laws of coterminous States situate upon a navigable river which is not a separating boundary between them. *The Clymene, supra.*

A statute of Louisiana purporting to give to that State absolute authority over the subject of pilots and pilotage on the Mississippi River to the exclusion of other States bordering thereon is inoperative and void for the reason that it conflicts with the act of March 2, 1837. *The Glenearne*, 7 Fed. Rep. 604; *The Clymene*, 9 Fed. Rep. 164; *S. C.* 12 Fed. Rep. 346; *The Chas. A. Sparks*, 16 Fed. Rep. 480; *The Abercorn*, 26 Fed. Rep. 877; *The South Cambria*, 27 Fed. Rep. 525; *The Alcalde*, 30 Fed. Rep. 133; *Dryden* v. *Commonwealth*, 55 Kentucky, 598; *Cribb* v. *State*, 9 Florida 409.

Mr. Walter Guion, Attorney General of the State of Louisiana, *Mr. J. R. Beckwith* and *Mr. N. H. Nunez* for defendant in error:

The act of March 2, 1837, does not apply to the case at bar, where the pilotage held to be unlawful was done upon waters wholly within the State of Louisiana and over which the State of Mississippi has no rights whatever. To come within the terms of the statute, the vessel must be coming into or going out of a port of entry situated upon waters which are the boundary line between two States at the point where the port is situated, and the statute cannot be made by construction to cover or relate to ports situated on waters which, at the locality where the port is located, have both banks or shores within the body and dominion of a single State. Cases cited by plaintiff in error discussed and distinguished.

Mr. Justice Holmes delivered the opinion of the court.

This is an information charging the plaintiff in error with piloting a foreign vessel from the Gulf of Mexico to New Orleans, the port to which she was bound, he not being a duly qualified pilot under the laws of Louisiana. He was convicted after a trial, and the Supreme Court of the State pronounced the judgment correct. 119 Louisiana, 522. By demurrer, motion to quash and motion in arrest of judgment he raised the objection that the power of Louisiana was not exclusive, and that a license from the Board of Pilot Commissioners for the Harbor of Natchez, Mississippi, was a sufficient authority under the act of Congress of March 2, 1837, c. 22, 5 Stat. 153. Rev. Stat., § 4236.

The Mississippi River, it will be remembered, is a boundary between Mississippi and Louisiana from below the port of Natchez as far north as Louisiana extends. On the other hand, all the southernmost portion of the river is wholly within Louisiana. The destination of the vessel which the plaintiff in error undertook to pilot was to a point within this southernmost portion, New Orleans, as the information charged.

For the purposes of decision it may be assumed, although it is disputed, that the State of Mississippi has attempted to authorize the plaintiff in error to do what he did, while Louisiana has made his conduct criminal if it has power to do so under the United States law.

The section of the Revised Statutes reads as follows: "The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessels to or from such port."

The case for the plaintiff in error depends upon the assumption that the "waters which are the boundary between two States" are, in this case, the whole Mississippi River so far as navigable. We are of opinion that the assumption is wrong, and that the limit of the waters referred to is the point at which they cease to be a boundary between two States. Neither continuity of water nor identity of name will carry them beyond that point. If the plaintiff in error had undertaken to pilot from the Gulf to Natchez, a different question would have been presented, and it may be that in that case the Mississippi license would have been good. But New Orleans, although upon the Mississippi, is not situate upon waters which are the boundary between two States, and therefore the section relied upon does not apply. That being out of the way, Louisiana had power to pass her local regulations. Rev. Stat., § 4235. Act of August 7, 1789, c. 9, § 4. 1 Stat. 54.

Judgment affirmed.

CITY OF DES MOINES *v.* DES MOINES CITY RAILWAY COMPANY.

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

No. 171. Argued April 21, 22, 1909.—Decided May 17, 1909.

A resolution of a municipal council, directing a street railway company to remove and replace tracks and wires, and, in case of failure to comply, instructing the City Solicitor to take such action as he deems advisable to enforce the resolution, amounts only to direction to bring a suit; and, even if contract rights should be violated if the resolution were enforced, the resolution does not of itself amount to an ordinance or law impairing the obligation of contracts and the Circuit Court has no jurisdiction of a suit to enjoin its enforcement.

THE facts are stated in the opinion.

Mr. William H. Baily, Mr. Howard J. Clark and *Mr. William H. Bremner*, with whom *Mr. R. O. Brennan* was on the brief, for appellant:

The United States Circuit Court was without jurisdiction to hear and determine this cause. The question of jurisdiction precedes any inquiry into the merits. *Oregon* v. *Hitchcock*, 202 U. S. 60, 68; *Whitney* v. *Dick*, 202 U. S. 132, 135.

The question of jurisdiction was clearly raised and decided in the court below, and while not referred to in the assignment of errors, is before this court, and would be even if it had not been suggested in the court below. Act of March 3, 1875, § 5; *Briggs* v. *Traders' Company*, 135 Fed. Rep. 254, 257; *Hartog* v. *Memory*, 116 U. S. 588; *Williams* v. *Nottawa*, 104 U. S. 209–211.

Whether a case presents a Federal question must be determined from the allegations of fact in the bill, giving them their natural and logical meaning and application, without regard to the arguments, conclusions and surmises stated. *Devine* v. *Los Angeles*, 202 U. S. 313, 333; *Houston & T. C. R. Co.*, v. *Texas*, 177 U. S. 66, 78; *St. Joseph & G. I. R. Co.* v. *Steele*,

167 U. S. 659, 662; *Chappell* v. *Waterworth*, 155 U. S. 102–108; *Arkansas* v. *Kansas & T. Coal Co.*, 183 U. S. 185, 188; *Western Union Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 243; *Hamblin* v. *Western Land Co.*, 147 U. S. 531, 532; *Galveston & S. A. R. Co.* v. *State of Texas*, 170 U. S. 226, 236; Simpkins' Suit in Equity, p. 95.

If it appears from the entire record that a case does not really and substantially involve a dispute or controversy within the jurisdiction of the Circuit Court, jurisdiction must be denied. *Morris* v. *Gilmore*, 129 U. S. 315; *Wetmore* v. *Rymer*, 169 U. S. 115, 120; *Barrie* v. *Edmunds*, 116 U. S. 550; *Deputron* v. *Young*, 134 U. S. 241; *Simon* v. *House*, 46 Fed. Rep. 317; *Maxwell* v. *A., T. & S. F. R. Co.*, 34 Fed. Rep. 286; *Holden* v. *Utah M. & M. Co.*, 82 Fed. Rep. 209; *Bank of Arapahoe* v. *David Bradley & Co.*, 72 Fed. Rep. 867.

The resolution of the City Council does not infringe the provisions of § 10, Art. I of the Constitution, which is aimed at the legislative power of the State, and to come within its inhibition there must be a law of the State or an enactment from some source to which the State gives the force of law. *N. O. Water Co.* v. *Louisiana Sugar Co.*, 125 U. S. 18, 32, 38; *Iron Mountain Ry. Co.* v. *Memphis*, 96 Fed. Rep. 113; *Williams* v. *Bruffy*, 96 U. S. 176, 183; *Lehigh Water Company* v. *Easton*, 121 U. S. 388, 392.

If an enactment is susceptible of two meanings, one in conflict with the Constitution and the other not, the court should adopt the latter. *State* v. *Stevens*, 112 Wisconsin, 170; *Wheeler* v. *Herbert*, 92 Pac. Rep. (Cal.), 353, 358; *Munn* v. *Illinois*, 94 U. S. 113, 123; *C. & N. W. Ry. Co.* v. *Dey*, 35 Fed. Rep. 866, 874; *Fletcher* v. *Peck*, 6 Cranch, 87, 128; *Sweet* v. *Rechel*, 159 U. S. 393; *United States* v. *Boyer*, 85 Fed. Rep. 430; *Thorn* v. *San Francisco*, 4 California, 159.

The resolution is not a law. Code of Iowa, 1897, § 680; *Cascaden* v. *Waterloo*, 106 Iowa, 673, 681, 682; *Martin* v. *Oskaloosa*, 126 Iowa, 680, 685; *Shelby* v. *Burlington*, 125 Iowa, 343; *Jones* v. *McAlpine*, 64 Alabama, 512; *Blanchard* v. *Bussell*, 11 Ohio

St. 96–103; *City* v. *Sears*, 2 Colorado, 588; 21 Am. & Eng. Ency. Law (2d ed.), 947; *Chicago Ry. Co.* v. *Chicago*, 174 Illinois, 439; *San Antonio* v. *Mickeljohn*, 89 Texas, 79; *People* v. *Mount*, 186 Illinois, 560, 571; *Cape Girardeau* v. *Foufeu*, 30 Mo. App. 511, 556; *Fairchild* v. *St. Paul*, 49 N. W. Rep. 325; *State* v. *Bayonne*, 35 N. J. Law, 335; McQuillin, Municipal Ordinances, § 2; Dillon on Municipal Corporations (4th ed.), 236; *Eckert* v. *Walnut*, 117 Iowa, 629; *Zalesky* v. *Cedar Rapids*, 118 Iowa, 774.

The resolution was not enacted in the manner required for the enactment of an ordinance, and, therefore, cannot be construed to be an ordinance. Code of Iowa, 1897, §§ 681, 682; *Cape Girardeau* v. *Foufeu*, 30 Mo. App. 511, 556; *City of Alma* v. *Guaranty Savings Bank*, 19 U. S. App. 622–628; *State* v. *Bayonne*, 35 N. J. Law, 335; *Iron Mountain Ry.* v. *Memphis*, 96 Fed. Rep. 113; Dillon on Mun. Corp. (4th ed.) 436; McQuillin, Mun. Ord., § 2; *Strohm* v. *Iowa City*, 47 Iowa, 42.

The contract of the complainant, if it has one, is set forth in the ordinance, and an ordinance cannot be amended or repealed except by an ordinance, and the resolution is therefore void as a matter of state law. Code of Iowa, 1897, § 681; *Cascaden* v. *Waterloo*, 106 Iowa, 673, 681; *People* v. *Mount*, 186 Illinois, 560, 571.

If the effect of the resolution would be to impair the obligation of contracts, or to deny due process of law or equal protection of law, it contravenes the constitution of Iowa and is void as a matter of state law. Const. Iowa, Art. I, §§ 9, 21.

If an attempt to legislate is void under the state law no Federal question arises under it for it is not a law. *Gas Light Co.* v. *Hamilton*, 146 U. S. 258, 266; *Munway* v. *Charleston*, 96 U. S. 432, 440; *Williams* v. *Bruffy*, 96 U. S. 176, 183; *Water Company* v. *Easton*, 121 U. S. 388, 392; *N. O. Water Works* v. *Louisiana Sugar Co.*, 125 U. S. 31, 38; *Shreveport* v. *Cole*, 129 U. S. 36.

The resolution was not a legislative act, but was passed for administrative and executive purposes only. *Cumberland* v. *Evansville*, 77 Indiana, 542, 551; *St. Paul Gas Light Com-*

pany v. *St. Paul*, 181 U. S. 142; *Cape May* v. *Cape May Ry. Co.*, 60 N. J. Law, 224.

The resolution does not deny due process of law.

Law in its regular course of administration is due process and when secured by the law of the State the constitutional requirement is satisfied. 2 Kent, Com., 13; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hurtado* v. *People*, 110 U. S. 516; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Merchant* v. *Railroad Company*, 153 U. S. 280; *Land Company* v. *Laidley*, 159 U. S. 103; *Orient Insurance Co.* v. *Daggs*, 176 U. S. 557; *Caldwell* v. *Texas*, 137 U. S. 692, 697; *Lepper* v. *Texas*, 139 U. S. 462, 468.

The resolution shows that the city only intended to proceed by due process of law. *Cape May* v. *Cape May Ry. Co.*, 60 N. J. Law, 224.

The intention of the council in passing the resolution was to cause proceedings to be instituted in a court of competent jurisdiction.

Mr. Nathaniel T. Guernsey, with whom *Mr. William L. Read*, *Mr. George H. Carr*, *Mr. Alonzo C. Parker* and *Mr. William E. Miller* were on the brief, for appellee:

This case presents a Federal question and the jurisdiction is clear. See *Northern Pacific R. Co.* v. *Duluth*, 208 U. S. 583, which is exactly in point. See also *Mercantile Trust Co.* v. *Columbus*, 203 U. S. 311, 322; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 507; *Saginaw Gas Light Co.* v. *Saginaw*, 28 Fed. Rep. 529; *Water Works Co.* v. *Vicksburg*, 185 U. S. 65; *Pacific Electric Ry. Co.* v. *Los Angeles*, 194 U. S. 117; *City Ry. Co.* v. *Citizens' Ry. Co.*, 166 U. S. 562; *Walla Walla* v. *Water Co.*, 172 U. S. 1; *Iron Mountain R. Co.* v. *Memphis*, 96 Fed. Rep. 113; *Riverside Ry. Co.* v. *Riverside*, 118 Fed. Rep. 736.

The resolution is a law and its effect is to destroy the appellant's rights. The argument that this enactment should be by ordinance and that it is merely administrative, is beside the point as is the argument that the city did not mean what it said. *Old Colony Trust Co.* v. *Wichita*, 123 Fed. Rep. 779.

The effect of this resolution, if it were permitted to stand, would be to render unlawful the exercise by the complainant of its rights under this contract.

There is jurisdiction in equity. Resort to equity is proper, because of the cloud upon the complainant's title, to avoid a multiplicity of suits, to prevent interference with necessary extensions, and because damages at law would be clearly inadequate. *Blair* v. *Chicago,* 201 U. S. 400, 449; *Detroit* v. *Detroit Citizens' R. Co.,* 184 U. S. 368; *Cleveland* v. *City R. Co.,* 194 U. S. 531; *Water Works Co.* v. *Vicksburg,* 185 U. S. 65; *Iron Mountain R. Co.* v. *Memphis,* 96 Fed. Rep. 131; *Water Co.* v. *Omaha,* 147 Fed. Rep. 1.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill brought in the Circuit Court by an Iowa corporation against a city of Iowa. The ground of jurisdiction is that a resolution of the City Council of that city is a law impairing the obligation of contracts within the meaning of the Constitution of the United States, and if carried out will take the property of the corporation without due process of law, contrary to the Fourteenth Amendment. The Circuit Court granted an injunction against the enforcement of the resolution, and the defendant appealed to this court.

The plaintiff, the appellee, sets up, under a certain ordinance, a right unlimited as to time to construct, maintain and operate an electric street railway in and over the streets, alleys and bridges of Des Moines. The resolution alleged to impair these rights is as follows:

"Whereas: Questions have been raised as to the rights of the Des Moines City Railway Company and the Interurban Railway Company to maintain their tracks and operate their lines upon and along and over the streets and bridges and public places of the City of Des Moines; and

"Whereas: It is essential to the preservation of the rights of the City of Des Moines that such questions be determined as speedily as possible.

"Be it Resolved by the City Council of the City of Des Moines: That said companies be and they are hereby ordered to remove all of their tracks, poles and wires from the streets, bridges and public places of the City of Des Moines, and to restore and repair the surface and pavement where paved of all of the streets along which they are now operating their lines, and said companies are hereby ordered to commence said removal within twenty-five days after the passage of this resolution.

"Be it Further Resolved: That should the said Railway Companies fail to commence such removal within the time above specified, the City Solicitor be and he is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution.

"Be it Further Resolved: That the City Clerk be and he is hereby instructed to serve a certified copy of this resolution upon the Des Moines City Railway Company and the Interurban Railway Company forthwith."

We are of opinion that this is not a law impairing the rights alleged by the appellee, and therefore that the jurisdiction of the Circuit Court cannot be maintained. Leaving on one side all questions as to what can be done by resolution as distinguished from ordinance under Iowa laws, we read this resolution as simply a denial of the appellee's claim and a direction to the City Solicitor to resort to the courts if the appellee shall not accept the city's views. The resolution begins with a recital that questions as to the railway company's rights have been raised, and ends with a direction to the City Solicitor to take action to enforce the city's position. The only action to be expected from a City Solicitor is a suit in court. We cannot take it to have been within the meaning of the direction to him that he should take a posse and begin to pull up the tracks. The order addressed to the companies to remove their tracks was simply to put them in the position of disobedience, as ground for a suit, if the city was right.

Decree reversed, with direction to dismiss the bill.

PECK, PETITIONER, v. TRIBUNE COMPANY.

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

No. 191. Argued April 29, 30, 1909.—Decided May 17, 1909.

The publication of a portrait with a statement thereunder imports that the original of the portrait makes the statement even if another name be attached to the statement. *Wandt* v. *Hearst's Chicago American*, 129 Wisconsin, 419; *Morrison* v. *Smith*, 177 N. Y. 366, approved on this point.

Publication of the portrait of one person with statements thereunder as of another, by mistake, and without knowledge of whom the portrait really is, is not an excuse. A libel is harmful on its face, and one publishing manifestly hurtful statements concerning an individual does so at his peril; and, if there is no justification other than that it was news or advertising, he is liable if the statements are false or are true only of some one else. See *Morasse* v. *Brochu*, 151 Massachusetts, 567.

An unprivileged falsehood need not entail universal hatred to constitute a cause of action; to be libellous a statement need not be that the person libelled has done or said something that every one, or even a majority of persons in the community, may regard as discreditable; it is sufficient if the statement hurts the party alluded to in the estimation of an important and respectable part of the community.

A woman, whose portrait is published in connection with an endorsement of a brand of whiskey may be seriously hurt in her standing with a considerable portion of her neighbors and she is entitled to prove her case and go to the jury.

Quære and not decided whether the unauthorized publication of a person's likeness is a tort *per se*.

154 Fed. Rep. 330, reversed.

THE facts are stated in the opinion.

Mr. S. C. Irving, with whom *Mr. Rufus S. Simmons* and *Mr. Frank J. R. Mitchell* were on the brief, for petitioner:

The article declared upon was libellous and actionable *per se*.

For cases in which a picture was held libellous, see *Morrison* v. *Smith*, 177 N. Y. 366, 368; *Pavesich* v. *New England Life Ins. Co.*, 122 Georgia, 190; *De Sando* v. *N. Y. Herald Co.*, 85 N. Y. Supp. 111; *Farley* v. *Evening Chronicle Co.*, 113 Mo. App. 216, 223; *Rose Ball* v. *The Tribune*, 123 Ill. App. 235; *Wandt* v. *Hearst's Chicago American*, 129 Wisconsin, 419, 421, 422; *Sheibley* v. *Ashton*, 130 Iowa, 195, 197, 200.

Words must be construed in their ordinary meaning. *Peake* v. *Oldham*, Cowper's Rep. 275, 278; *Woolnoth* v. *Meadows*, 5 East, 463, 473; 2 Erskine's Speeches, 91.

The publication which imputes to a person language known to those among whom she lives to contain false statements is libellous. For definition of libel see *White* v. *Nicholls*, 3 How. 439, 449, 450; Odger, Libel & Slander, ed. from 2d Eng. ed., 293. For effect of pleading general issue, see *Sheahan* v. *Collins*, 20 Illinois, 325.

To charge a person with being a liar is libellous *per se*. *Prewitt* v. *Wilson*, 128 Iowa, 198; *Hake* v. *Brames*, 95 Indiana, 161; *Monson* v. *Lathrop*, 96 Wisconsin, 386; *Lindley* v. *Horton*, 27 Connecticut, 58.

It is the province of the jury to decide under proper instructions from the court whether the article was libellous. *Culmer* v. *Canby*, 101 Fed. Rep 195, 197; *Pfitzinger* v. *Dubs*, 64 Fed. Rep. 696; Townshend's S. & L. (4th ed.) 576; *McDonald* v. *Woodruff*, 2 Dill. 244.

A witness may be asked what impression the alleged libellous words made upon him. *Nelson* v. *Borchenius*, 52 Illinois, 236, 238; *Chiatovitch* v. *Hanchett*, 96 Fed. Rep. 681, 686.

Introduction of a libellous article in evidence and proof of publication establishes the cause of action. *Kraus* v. *Sentinel Co.*, 60 Wisconsin, 425, 430.

Even though the libel does not name the person injured it is sufficient if it can be shown that it refers to him.

Evidence of falsity of defamatory matter may be offered to enhance damages even though the falsity of the publication is admitted by the pleadings.

Though plea of general issue admits falsity as to words of publication, plaintiff may nevertheless prove that words are false as to her when her name is not mentioned in the publication. *Alliance Review* v. *Valentine*, 9 C. C. Rep. (Ohio) 387; *S. C.* 6 Ohio C. Dec. 323.

Though plaintiff's name was not mentioned, still the words of the publication may clearly refer to the plaintiff. *Pavesich* v. *New Eng. Life Ins. Co.*, 122 Georgia, 190; *Barron* v. *Smith*, 19 So. Dak. 50, 54; *Morrison* v. *Smith*, 177 N. Y. 366; *Palmer* v. *Bennett*, 31 N. Y. Supp. 567.

Mistake is no excuse for the publication of a libel as suggested by the opinion in the Court of Appeals. The alleged mistake in this case was an unwarranted assumption of a fact not proved.

Even if proved mistake is no excuse for publishing libel. Mr. Justice Holmes in *Hanson* v. *Globe Newspaper*, 159 Massachusetts, 293, 299; *The King* v. *Woodfall*, Lofft's Rep. 776, 782, Lord Mansfield; Mr. Justice Story in *Dexter* v. *Speare*, 4 Mason, 115; Judge Taft in *Post Publishing Co.* v. *Hallan*, 59 Fed. Rep. 530, 536; *Clark* v. *North American Co.*, 203 Pa. St. 346, 351; *Ransom* v. *McCurley*, 140 Illinois, 626, 636.

But if offered in mitigation of damages it must be pleaded. *Fenstermaker* v. *Tribune*, 35 L. R. A. 611, 615.

Mr. John Barton Payne, with whom *Mr. William G. Beale* was on the brief, for respondent:

The publication of the advertisement, together with the picture of the petitioner, was not libellous *per se*. *White* v. *Nicholls*, 3 How. 266; *Pollard* v. *Lyon*, 91 U. S. 225; *Commonwealth* v. *Clap*, 4 Massachusetts, 168; *Sterling* v. *Judgenheimer*, 69 Iowa, 210; *Broughton* v. *McGrew*, 39 Fed. Rep. 672; *Stone* v. *Cooper*, 2 Denio, 293; *Goldberger* v. *Philadelphia Grocer Pub. Co.*, 42 Fed. Rep. 42; *Walker* v. *Tribune Co.*, 29 Fed. Rep. 827.

The advertisement not being libellous *per se*, petitioner cannot maintain an action for the publication of her picture, because it violates her alleged right of privacy. *Schuyler* v.

Curtis, 147 N. Y. 436; *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538; *S. C.*, 89 Am. St. Rep. 828, and footnote, p. 844; *Atkinson* v. *Doherty*, 121 Michigan, 372; *Moser* v. *Press Publishing Co.*, 109 N. Y. Supp. 963; *Owen* v. *Partridge*, 82 N. Y. Supp. 248.

Mr. Justice Holmes delivered the opinion of the court.

This is an action on the case for a libel. The libel alleged is found in an advertisement printed in the defendant's newspaper, The Chicago Sunday Tribune, and so far as is material is as follows: "Nurse and Patients Praise Duffy's—Mrs A. Schuman, One of Chicago's Most Capable and Experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating, Life-Giving and Curative Properties of Duffy's Pure Malt Whiskey. . . ." Then followed a portrait of the plaintiff, with the words "Mrs. A. Schuman" under it. Then, in quotation marks, "After years of constant use of your Pure Malt Whiskey, both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all weak and run-down conditions," &c., &c., with the words "Mrs. A. Schuman, 1576 Mozart st., Chicago, Ill.," at the end, not in quotation marks, but conveying the notion of a signature, or at least that the words were hers. The declaration alleged that the plaintiff was not Mrs. Schuman, was not a nurse, and was a total abstainer from whiskey and all spirituous liquors. There was also a count for publishing the plaintiff's likeness without leave. The defendant pleaded not guilty. At the trial, subject to exceptions, the judge excluded the plaintiff's testimony in support of her allegations just stated, and directed a verdict for the defendant. His action was sustained by the Circuit Court of Appeals. 154 Fed. Rep. 330; *S. C*, 83 C. C. A. 202.

Of course the insertion of the plaintiff's picture in the place and with the concomitants that we have described imported that she was the nurse and made the statements set forth, as

rightly was decided in *Wandt* v. *Hearst's Chicago American*, 129 Wisconsin, 419, 421. *Morrison* v. *Smith*, 177 N. Y. 366. Therefore the publication was of and concerning the plaintiff, notwithstanding the presence of another fact, the name of the real signer of the certificate, if that was Mrs. Schuman, that was inconsistent, when all the facts were known, with the plaintiff's having signed or adopted it. Many might recognize the plaintiff's face without knowing her name, and those who did know it might be led to infer that she had sanctioned the publication under an alias. There was some suggestion that the defendant published the portrait by mistake, and without knowledge that it was the plaintiff's portrait or was not what it purported to be. But the fact, if it was one, was no excuse. If the publication was libellous the defendant took the risk. As was said of such matters by Lord Mansfield, "Whatever a man publishes he publishes at his peril." *The King* v. *Woodfall*, Lofft, 776, 781. See further *Hearne* v. *Stowell*, 12 A. & E. 719, 726; *Shepheard* v. *Whitaker*, L. R. 10 C. P. 502; *Clark* v. *North American Co.*, 203 Pa. St. 346, 351, 352. The reason is plain. A libel is harmful on its face. If a man sees fit to publish manifestly hurtful statements concerning an individual, without other justification than exists for an advertisement or a piece of news, the usual principles of tort will make him liable, if the statements are false or are true only of some one else. See *Morasse* v. *Brochu*, 151 Massachusetts, 567, 575.

The question, then, is whether the publication was a libel. It was held by the Circuit Court of Appeals not to be, or at most to entitle the plaintiff only to nominal damages, no special damage being alleged. It was pointed out that there was no general consensus of opinion that to drink whiskey is wrong or that to be a nurse is discreditable. It might have been added that very possibly giving a certificate and the use of one's portrait in aid of an advertisement would be regarded with irony, or a stronger feeling, only by a few. But it appears to us that such inquiries are beside the point. It may

be that the action for libel is of little use, but while it is maintained it should be governed by the general principles of tort. If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote.

We know of no decision in which this matter is discussed upon principle. But obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number and will lead an appreciable fraction of that number to regard the plaintiff with contempt is enough to do her practical harm. Thus if a doctor were represented as advertising, the fact that it would affect his standing with others of his profession might make the representation actionable, although advertising is not reputed dishonest and even seems to be regarded by many with pride. See *Martin* v. *The Picayune*, 115 Louisiana, 979. It seems to us impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if had been permitted to persuade them, if it could, to take a contrary view. *Culmer* v. *Canby*, 101 Fed. Rep. 195, 197; *Twombly* v. *Monroe*, 136 Massachusetts, 464, 469. See *Gates* v. *New York Recorder Co.*, 155 N. Y. 228.

It is unnecessary to consider the question whether the publication of the plaintiff's likeness was a tort *per se*. It is enough for the present case that the law should at least be prompt to recognize the injuries that may arise from an unauthorized use in connection with other facts, even if more subtilty is needed to state the wrong than is needed here. In this instance we feel no doubt.

Judgment reversed.

CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* McDONALD, ADMINISTRATOR.

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

No. 158. Argued April 19, 1909.—Decided May 17, 1909.

The Federal question must be properly and seasonably set up in the state court in order to give this court jurisdiction to review under § 709, Rev. Stat.

Where the state statute provides that an appeal from an order refusing to remove a cause to the Federal court must be taken within two years, and no appeal is taken, and the highest court of the State decides that an appeal from the judgment in the case taken more than two years after entry of the order refusing to remove does not bring up that order for review, the Federal question has not been properly preserved, and this court has no jurisdiction.

A Federal constitutional objection may be waived so far as having the right of review of a judgment in the state court is concerned where the question is not made in the state court by proper procedure. *Harding* v. *Illinois*, 196 U. S. 78.

31 Ky. L. R. 500, affirmed.

THE facts are stated in the opinion.

Mr. E. L. Worthington, with whom *Mr. W. H. Wadsworth*, *Mr. W. D. Cochran* and *Mr. LeWright Browning* were on the brief, for plaintiffs in error.

Mr. A. D. Cole, with whom *Mr. T. R. Phister*, *Mr. R. D. Wilson* and *Mr. W. T. Cole* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

The defendant in error, J. W. McDonald, as administrator of Nancy J. Wilson, deceased, on March 23, 1900, brought

suit in the Lewis Circuit Court of Kentucky against the Chesapeake and Ohio Railway Company and the Maysville and Big Sandy Railroad Company, and certain employés of the former, to recover damages for the alleged wrongful death of Nancy J. Wilson. On May 29, 1900, the Chesapeake and Ohio Railway Company, a corporation of Virginia, filed a petition for removal of the case to the United States Circuit Court for the Eastern District of Kentucky, and an order of removal was made accordingly. On September 3, 1902, the case having been remanded by the United States Circuit Court, it was redocketed in the state court. On January 19, 1903, the plaintiff discontinued the action as against the five individual defendants. On January 21, 1903, the Chesapeake and Ohio Railway Company filed another petition to remove the case to the United States Circuit Court on the ground of separable controversy. This motion for removal was overruled by the Lewis Circuit Court, and, thereafter, on May 19, 1904, the case went to trial in the Lewis Circuit Court, and that court directed a verdict for the railroad companies. Upon appeal to the Court of Appeals of Kentucky that judgment was reversed. 27 Ky. L. R. 778.

A second trial of the case in the Lewis Circuit Court, on September 27, 1906, resulted in a verdict and judgment for the defendant in error. From that judgment an appeal was taken to the Kentucky Court of Appeals and it was there affirmed. 31 Ky. L. R. 500.

The Federal question attempted to be presented grows out of the alleged error in refusing, upon the second application, to remove the cause from the Lewis Circuit Court to the United States Circuit Court for the Eastern District of Kentucky.

The right to review a judgment of a state court by error proceedings in this court is regulated by § 709 of the Revised Statutes of the United States. To lay the foundation for such right of review it is necessary to bring the Federal question in some proper manner to the consideration of the state court whose judgment it is sought to review; if this is not done, the Federal question cannot be originated by assignments of error

in this court. The Federal right asserted in this case comes within the third class named in § 709 of the Revised Statutes, wherein a right, title, privilege or immunity is claimed under the United States, and the decision is against such right, title, privilege or immunity. In this class of cases the statute requires that such right or privilege must be specifically set up and claimed in the state court, and in any of the classes of cases mentioned in § 709 it is essential that the record disclose that the Federal question involved was decided, or that the judgment necessarily involved the Federal right and decided it adversely to the claim of the plaintiff in error. *Columbia Water Power Co.* v. *Columbia Street Ry.*, 172 U. S. 475; *Fowler* v. *Lamson*, 164 U. S. 252; *Clarke* v. *McDade*, 165 U. S. 168, 172; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248. In the latter case this court said:

"It is well settled that this court, on error to a state court, cannot consider an alleged Federal question, when it appears that the Federal right thus relied upon had not been by adequate specification called to the attention of the state court and had not been by it considered, not being necessarily involved in the determination of the cause. *Green Bay & Miss. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 52, 67; *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648, 654, 655, and cases cited."

In the opinion of the Kentucky Court of Appeals in this case the question of the correctness of the order of removal is not considered, nor is there anything in the record to indicate that the alleged error in refusing to remove the case on the second application was brought to the attention of the Kentucky Court of Appeals. In this court the assignments of error concern the alleged error in refusing to remove the case upon the second application, and avers that the Kentucky Court of Appeals erred in holding, in substance and effect, that the plaintiff in error had no such right of removal. But, as we have said, the assignments of error in this court cannot enlarge the right of review. Moreover it is apparent that if the question of the right of removal was brought before the Ken-

tucky Court of Appeals upon the judgment to which this writ of error is prosecuted, it would not have considered the question. The refusal to remove upon the second application was in January, 1903. The judgment, which was taken to the Court of Appeals for review in the present case was rendered on September 27, 1906.

The Kentucky Civil Code of Practice provides that an appeal from judgments and final orders, which includes such orders as the one now under consideration (*Hall & Long* v. *Ricketts*, 9 Bush [Ky.], 366, 370), shall not be granted except within two years after the right of appeal first accrued. No appeal was taken from the order refusing to remove within two years. At the time when the appeal in the present case was made to the Kentucky Court of Appeals it was too late to review the order refusing to remove. In the case of *M. & B. S. R. R. Co.* v. *Willis*, 104 S. W. Rep. 1016, 1018, the Court of Appeals of Kentucky, dealing with the question, said:

"It is further insisted that it was error not to grant the request of appellant to remove the action to the Federal court. This motion was based upon the ground that the original petition did not state a good cause of action either against the Chesapeake and Ohio Railway Company, which is a foreign corporation, or the resident defendant, the Maysville and Big Sandy Railroad Company. . . . The action of the lower court refusing to transfer the action was made and entered in July, 1903, and it is now too late to raise any question as to the regularity of this ruling. In fact, this appeal is prosecuted alone from the judgment rendered in October, 1906, and under no state of case could this court review the error of the character complained of committed in 1903."

It is contended, however, that if the case were a removable one the effect of filing a petition and bond was to divest the jurisdiction of the state court, and this has been said in decisions of this court upon the subject. This does not mean, however, that the right to review the judgment of a state court only by proper proceedings under § 709 of the Revised Statutes

is in anywise altered or modified. When the state court upon the second application refused to remove the case it was the privilege of the railroad company to take a transcript of the record and make an application to file it in the Federal Circuit Court, and if that court sustained its jurisdiction it might have protected the same by injunction against further proceedings in the state courts, or, if the latter court refused to surrender the record, a writ of certiorari could issue to require its transfer to the Circuit Court of the United States, *Chesapeake & Ohio R. R. Co.* v. *McCabe*, 213 U. S. 207 or remaining in the state court after that court refused to remove, it might, after final judgment, have brought the case here for review, but this does not mean that it could have a review of the judgment of the state court when it has failed to invoke the judgment of that court within the time prescribed by the statute of the State for the review of such orders. Under the statute in Kentucky the review of the order refusing to remove could only be had within two years. Within that time the plaintiffs in error could have taken the question to the Kentucky Court of Appeals, and, if the ruling was against it, after final judgment, could have brought the case here for review. But it could not remain in the state court, without any attempt to have the order refusing the removal reviewed within the statutory period, and escape its judgment on the ground that it was void, if against it, because the case was a removable one.

In *Harding* v. *Illinois*, 196 U. S. 78, it was held that a Federal constitutional objection might be waived, so far as having the right of review of a judgment in a state court was concerned, where the record in the case disclosed that the question was not made in the state court by proper procedure or argument in support of the assertion of the Federal question, and the state court had for that reason held the right to review the Federal question waived.

We are of opinion that this case presents no valid exception to the ruling of the state court upon a Federal question duly reserved by some proper form of procedure, as is required by

§ 709 of the Revised Statutes of the United States, in order to be reviewable here.

It follows that the writ of error must be dismissed.

Dismissed.

ROGERS *v.* JONES.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 196. Submitted April 27, 1909.—Decided May 24, 1909.

Where the disposition of a Federal question is not necessary to the determination of the cause and the judgment is based on a distinct non-Federal ground broad enough to sustain it the writ of error cannot be maintained.

Where an act of Congress providing for sale of real estate by a marshal does not define a good and valid description, the question of sufficiency of description is one of general law; and so held in regard to § 4 of the act of February 16, 1839, c. 27, 5 Stat. 317, referring to time and place for making judicial sales in Mississippi; and further held that even if the time and place of sale were wrong under the statute, this court had no jurisdiction as the judgment rested on plaintiff's failure to deraign a title and other non-Federal questions sufficient to sustain it.

THIS was a bill in equity brought by Rogers and others, plaintiffs in error, November 11, 1903, in the Chancery Court for Harrison County, Mississippi, to remove certain alleged clouds from the title to lands situated in that county, and to be put in possession of said lands, against J. T. Jones, Harrison County, and the persons constituting the board of supervisors of the county, as individuals and as composing that board.

Defendants demurred, and the demurrer was overruled by the Chancellor. An appeal was taken from this decree to the Supreme Court of Mississippi, where the decree of the lower court was reversed and the cause remanded. *Jones* v. *Rogers*,

85 Mississippi, 802. Thereupon plaintiffs in error filed an amended bill. To the amended bill Jones and the county severally filed demurrers and also answers denying certain allegations of fraud. On hearing the Chancellor sustained the demurrers, and plaintiffs in error, refusing to amend or plead further, the amended bill was dismissed December 23, 1905. From this decree plaintiffs in error appealed to the state Supreme Court, where it was affirmed October 22, 1906, and from this judgment plaintiffs in error have prosecuted the pending writ of error.

The material averments of the amended bill were that plaintiffs in error claimed title to certain lands described in the bill, by virtue of a purchase of said lands by "their ancestor," John Martin, at a sale of said lands on October 28, 1839, made by the United States marshal under an execution on a judgment of the United States Circuit Court for the Southern District of Mississippi, against one James McLaren.

That plaintiffs in error are the "legal descendants and sole surviving heirs at law of John Martin, deceased, who died intestate in the city of New Orleans, and State of Louisiana, during the year 1848." That Martin, at the time of his death, was seized and possessed of, in fee simple, in addition to other lands, certain described lands or parcels of land, which include the lands in controversy, situated in the town of Gulfport, county of Harrison (Hancock County at the time of the sale), and State of Mississippi. That plaintiffs in error are tenants in common, and all derived their title "from their common ancestor, John Martin, by descent." That James McLaren acquired said lands by sales from the United States Government, dated December 11, 1834, and a patent dated January 5, 1841.

That at the sale of the land under an execution on the judgment against McLaren, Martin became the highest and best bidder at and for the sum of $760, and the same was knocked off to him by the United States marshal, and the purchase money was then and there paid by Martin to the marshal, and

he was then and there put into possession, and so remained until his death, in the year 1848.

The amended bill further averred that the land was in Harrison County, Mississippi, and that John Martin never sold nor made any disposition of any kind of the lands; that plaintiffs in error have been all the while in constructive possession of the lands since the death of John Martin, in 1848, and that no person or persons ever went into actual possession of the lands until the county of Harrison or the board of supervisors thereof took possession under deed of June 4, 1902, from J. T. Jones.

The bill alleged upon belief that at the sale a deed to the lands was made by the marshal to John Martin, and in this connection the bill further alleged that another sale of lands was made on the same execution, and that deeds were made by the marshal to the purchasers at said sale.

That McLaren died intestate, leaving no heirs at law, either lineal or collateral, and that the lands never escheated to the State of Mississippi.

The bill further alleged that while plaintiffs in error were minors the administrator of McLaren procured a certified copy of the judgment and execution and proceedings of the sale, and, with the purpose of depriving plaintiffs in error of their legal right and title to the lands, organized a company to take charge of the lands, concealing the facts of the said sale. That the company kept the facts of the real ownership from the plaintiffs in error, and sold some of the lands without knowledge of their legal rights to said property until the last four or five years. That as soon as the facts of the purchase and ownership of the lands by John Martin was made known to them, plaintiffs in error at once began to take the necessary legal steps to begin suit to establish the claim.

The bill also alleged that defendants in error had full notice of the claim to the title of plaintiffs in error, but they accepted the gift of the land in controversy from J. T. Jones, and had full knowledge of the fraud that had been practiced upon them from its beginning to the present time. That on June 4, 1902,

Jones conveyed by deed the land in Gulfport, as a gift, to the board of supervisors of Harrison County, with the condition that should the county of Harrison at any time cease to use the lands for the court house they should revert to Jones.

The bill further stated that if the Supreme Court of Mississippi should decide against the validity of the marshal's sale under the judgment and execution, plaintiffs in error "claim the right and benefit of an appeal from the final decree to the Supreme Court of the United States."

The original bill had averred, "*par parenthesis*, that they are claiming their rights and title to this property under a marshal's sale made under and by virtue of the laws and Constitution of the United States of America, and they now and here desire to lay the proper predicate, so that they may have these proceedings in this case revised and reviewed by the Supreme Court of the United States, in case the decision of the Supreme Court of the State of Mississippi is adverse to their lawful, just, and *bona fide* claim, having derived the same from the patentee of these lands."

The answers of the supervisors and of Jones denied notice or knowledge of any fraud on complainants, and having answered the bill for the purposes of that denial prayed the judgment of the court on the demurrers.

Mr. Frank Johnston and *Mr. A. Y. Harper* for plaintiffs in error:

The writ of error will lie in this case as the Supreme Court of Mississippi erroneously held that the judicial sale, made by the United States marshal under which the plaintiffs in error claim title to the lands in controversy was irregular and void and conferred no title. *Avery* v. *Popper*, 179 U. S. 305, 310, citing and reviewing the following cases: *Collier* v. *Stanbrough*, 6 How. 14; *Erwin* v. *Lowry*, 7 How. 172; *Clements* v. *Berry*, 11 How. 398; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Etheridge* v. *Sperry*, 139 U. S. 266; *Bock* v. *Perkins*, 139 U. S. 628; *Day* v. *Gallup*, 2 Wall. 97; *Dupasseur* v.

Rochereau, 21 Wall. 130; *McKenna* v. *Simpson*, 129 U. S. 506; *O'Brien* v. *Weld*, 92 U. S. 81; *Factors & Traders' Ins. Co.* v. *Murphy*, 111 U. S. 738; *Stanley* v. *Schwalby*, 162 U. S. 255; *Pitts. & Cin. Railroad* v. *Long Island L. & T. Co.*, 172 U. S. 493; *Tulloch* v. *Mulvane*, 184 U. S. 497, 507, citing: *Avery* v. *Popper*, 179 U. S. 305; and *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141; *Meyers* v. *Block*, 120 U. S. 206; *Commercial Pub. Co.* v. *Beckwith*, 188 U. S. 567, 569; *Sharpe* v. *Doyle*, 102 U. S. 686, 688; *McNulta* v. *Lochridge*, 141 U. S. 327, 331; cited in: *Nutt* v. *Knut*, 200 U. S. 12, 19; *Ill. Cent. R. R. Co.* v. *McKendree*, 203 U. S. 514, 526.

A Federal question is sufficiently set up or claimed when it appears that the contentions involving it were raised by the pleadings or called to the attention of the court in some proper way. *Tulloch* v. *Mulvane*, 184 U. S. 497, 503; *Sayward* v. *Denny*, 158 U. S. 180; *Chouteau* v. *Gibson*, 111 U. S. 200; *Yates* v. *Jones National Bank*, 206 U. S. 158, 167.

The non-Federal question of the statute of limitations, which was decided by the Supreme Court of Mississippi on the first appeal, has been eliminated from the case by the amended bill and the answer of the defendants in error thereto; and also by a subsequent decision in another case overruling that part of the opinion.

The decision of the Supreme Court of Mississippi on the first appeal, *Rogers* v. *Jones*, 85 Mississippi, 802, has been expressly overruled in the subsequent case of *Kennedy* v. *Sanders*, 90 Mississippi, 524, which held that the real ground of the decision was the question of the validity of the title of plaintiffs in error, and that that part of the opinion in respect to the statute of limitations was a mere dictum, and, furthermore, was incorrectly decided.

If, therefore, the question of the statute of limitations were in this case (which we deny) the decision of it by the Supreme Court on the first appeal would have to be held by this court to be palpably erroneous. *Johnson* v. *Risk*, 137 U. S. 300, 307; *Murdock* v. *Memphis*, 20 Wall. 590; *Maguire*

v. *Tyler*, 8 Wall. 650, 664, 665; *Berea College* v. *Kentucky*, 211 U. S. 45, 53.

A certificate of a court of last resort may serve to elucidate the determination whether a Federal question exists. *Ill. Cent. R. R. Co.* v. *McKendree*, 203 U. S. 514, 525.

Where on error to the Supreme Court of the State, the record shows a decision of the state court on a Federal question properly presented, and of which this court could take jurisdiction, and shows also the decision of the local question, the writ of error will not be dismissed on motion in advance of the hearing. The parties are entitled to be heard on the soundness of the decision below on the Federal question, on the sufficiency of that question to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the judgment, even if the Federal question was erroneously decided. *Railroad Co.* v. *Maryland*, 20 Wall. 643.

It is the duty of the state courts to decide Federal questions; if errors supervene, the remedy is open to the aggrieved party. *Arkansas* v. *Kansas &c. Coal Co.*, 183 U. S. 185, 190; *Water Co.* v. *Defiance*, 191 U. S. 184, 193; *Robb* v. *Connolly*, 111 U. S. 624.

Mr. James H. Neville and *Mr. W. A. White* for defendants in error:

The bare averment of a Federal question is not sufficient; there must at least be color or ground for such averment. *Hamlin* v. *Western Land Co.*, 147 U. S. 531.

The only color, or reasons for the averment in the instant case are, first, that plaintiffs claimed under a sale by a United States marshal—a Federal officer. Secondly, that they derived their rights from the patentee of the United States.

The fact that a party to a suit is a receiver of a United States court does not necessarily create a Federal question authorizing a review of the case by the Supreme Court of the United States. *Bausman* v. *Dixon*, 173 U. S. 113; *Lincoln Bank* v. *First Nat. Bank*, 172 U. S. 425.

Nor does the fact that plaintiffs in error claim lands under a patentee of the United States create such Federal question. *Blackburn* v. *Mining Co.*, 175 U. S. 571; *McStay* v. *Friedman*, 92 U. S. 723; *Little York Gold Co.* v. *Keys*, 96 U. S. 199; *Shoshone Mining Co.* v. *Rutler*, 177 U. S. 505.

There was no question before the Supreme Court of Mississippi in this case as to the validity of the patent from the United States to James McLaren, nor as to the nature or extent of the estate it conveyed. All parties to the suit concede that the patent vested a fee simple title in McLaren. The controversy is who now holds that title. Therefore the pleadings in this case wholly failed to state any question of a Federal nature which the Mississippi courts could have determined adversely to plaintiffs in error.

The determination by a state court of a Federal question adversely to the plaintiff in error will not sustain the jurisdiction of the Supreme Court of the United States, if another question not Federal was also raised and decided against him and the decision thereof is sufficient, notwithstanding the Federal question to sustain the judgment. *Harrison* v. *Morton*, 171 U. S. 38; *Bacon* v. *Texas*, 163 U. S. 207; *Egan* v. *Hart*, 165 U. S. 188; *Castillo* v. *McConnico*, 168 U. S. 674; *Pierce* v. *Somerset R. R. Co.*, 171 U. S. 641; *Chappell Chemical Co.* v. *Sulphur Mines Co.*, 172 U. S. 465; *Brooks* v. *Missouri*, 124 U. S. 394; *Union Nat. Bank* v. *Louisville R. R. Co.*, 163 U. S. 325.

It is not enough to give the Supreme Court of the United States jurisdiction over the judgment of a state court, for the record to show that a Federal queston was argued or presented to that court for decision. It must appear that such Federal question was necessary to the determination of the cause and that it was actually decided, or that the judgment could not have been given without deciding it. *Moore* v. *Mississippi*, 21 Wall. 636; *Bolling* v. *Lersner*, 91 U. S. 594; *Brown* v. *Atwell*, 92 U. S. 327; *Citizens' Bank* v. *Board of Liquidation*, 98 U. S. 140; *Endowment Assn.* v. *Kansas*, 120 U. S. 103; *Marrow* v. *Brinkley*, 129 U. S. 178; *Church* v. *Kelsey*, 121

U. S. 282; *DeSaussure* v. *Gaillard,* 127 U. S. 216; *Blount* v. *Walker,* 134 U. S. 607; *Johnson* v. *Risk,* 137 U. S. 300; *Cook County* v. *Calumet Canal Co.,* 138 U. S. 635; *Wood Mach. Co.* v. *Skinner,* 139 U. S. 293.

Where one of the points decided in the Supreme Court of a State against the plaintiff in error would be a sufficient ground for the exercise of jurisdiction by the Supreme Court of the United States, yet if the decree is also based on another and distinct ground over which the National Court has no jurisdiction—as the statute of limitations of the State—the decree is beyond the revisory power of the Supreme Court of the United States. *Rector* v. *Ashley,* 6 Wall. 142.

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

In entering the decree of December 23, 1905, the Chancellor manifestly proceeded on the decision of the Supreme Court of Mississippi, reported in 85 Mississippi, 802, as did the Supreme Court in affirming, October 22, 1906, the Chancellor's decree. To this decree the pending writ of error was allowed and issued September 18, 1907.

The contention is that, in determining the rights of plaintiffs in error, the Mississippi Supreme Court put a wrong construction upon the special act of Congress of February 16, 1838, referring to the time and place for the making of judicial sales in Mississippi, in that it held that the marshal's sale relied on as the foundation of title was made at the wrong place. But the Supreme Court made other and decisive rulings, as well as that in reference to the place of the alleged sale.

In the first place, that court held that the alleged return on the writ of *fieri facias* did not describe the lands in controversy, and therefore could not confer title, even though regular and valid. The act of Congress of February 16, 1839, did not attempt to define what is and what is not a good and valid description of real estate, or to make any rule by which a purchaser at a marshal's sale could take possession of lands other

than those specifically described in the process. The question of a sufficient description was a question of general law.

In the second place, the court held that under the Mississippi statute authorizing suits of the character then before the court, plaintiffs in error had not deraigned a title to the lands in controversy, which, under the Mississippi statute under which the suit was instituted, was a fatal objection to the bill.

In the third place, the court held that the claim of plaintiffs in error was barred by the Mississippi statute of limitations, in that it failed to show possession by the plaintiffs, or their ancestor, during the sixty-four years that intervened between the marshal's sale and the bringing of the suit, and did not, as required by the rules of practice in courts of equity in Mississippi, show that it was the defendants or those in privity with them who had fraudulently concealed from plaintiffs the evidence of their claim.

It is true that the Supreme Court of Mississippi in the subsequent case of *Kennedy* v. *Sanders*, 90 Mississippi, 524, decided May 20, 1907, overruled the ruling in *Jones* v. *Rogers*, applying the ten-year statute of limitations, and quoting what the court then observed in that regard, said that "this announcement was not necessary to the decision in *Jones* v. *Rogers*, for the court had already held that the complainants in that case had deraigned no title." And it will have been perceived that this writ of error runs to the judgment of the Supreme Court of October 22, 1906.

The result is, therefore, that this writ of error comes within the rule that where the disposition of a Federal question was not necessary to the determination of the cause and the judgment is based on a distinct ground or grounds broad enough to sustain it, over which this court has no jurisdiction, the writ of error cannot be maintained.

Writ of error dismissed.

MR. JUSTICE WHITE took no part in the consideration and disposition of this case.

STATE OF WASHINGTON *v.* STATE OF OREGON.

ON PETITION FOR REHEARING.

No. 3, Original. Petition filed March 8, 1909.—Decided May 24, 1909.

Washington v. *Oregon*, 211 U. S. 127, reaffirmed on rehearing.

Although the volume of water and depth of a channel have constantly diminished, if it all results from process of accretion, or, as in this case, possibly from jetties constructed by governmental authority, that channel still remains the boundary line, the precise line of separation being the varying center thereof.

The settlement of boundaries is generally attended with difficulties and it is wise for adjacent States to adjust their boundaries by boundary commissions and agreements as has been done with the consent of Congress in several instances.

THE facts, which involve the boundary between the States of Washington and Oregon as the same was determined by this court in this action, 211 U. S. 127, are stated in the opinion.

The State of Washington filed a petition for a rehearing herein, upon the following points:

I. The court erred in finding and holding that the present ship channel at the entrance to the Columbia River was the old south channel.

II. The court erred in finding and holding that the former north channel still subsisted to the northward of Sand Island, and that the boundary between the States of Washington and Oregon was to the northward of said Sand Island.

III. The court erred in not finding and holding that the present single channel at the entrance to the mouth of the Columbia River was as much the former north channel of the entrance to said river as it was the former south channel, and in not giving effect as a matter of law to the said combined single channel as the boundary between the two States.

IV. The court erred in finding and holding that the Columbia

River inside the entrance was not divided by islands and in finding and holding that the testimony failed to show anything calling for consideration in respect to the ownership of the said islands.

Mr. George Turner, Mr. E. C. Macdonald, Mr. W. P. Bell, Attorney General of the State of Washington, and *Mr. S. H. Piles,* for complainant, in support of the petition for rehearing:

Complainant in its petition for rehearing accepts the decision of this court to the effect that the north ship channel of the Columbia River is the channel fixed by the act of Congress as the north boundary of the State of Oregon, but with all deference, begs leave to present some considerations which make against the correctness of that decision, in the hope that the court may see fit to reverse it.

It is necessary, in discussing the subject, to determine the initial starting point of the Oregon line. According to the Oregon enabling act that point must be "due west and opposite the middle of the north ship channel of the Columbia River." Does this language mean due west of that channel at a point where the channel's flow crosses a line drawn from Point Adams to Cape Disappointment, which is assumed to be the mouth of the river, or does it mean due west and opposite that channel at its mouth or sea end? Oregon claims the former, and Washington claims the latter.

The sea end of the north channel in 1851 and 1854 was within three miles of the mouth of the Columbia River. See abstract, U. S. Coast Survey Charts, 1851 and 1854; Record, p. 68. It was then within territorial waters, and if that channel was to be employed through any part of its course as a boundary between Oregon and the prospective State of Washington to the north, it was as important that it be thus employed from its sea end to its entrance into the river proper, as it was that it be employed inside the entrance. The same local territorial jurisdiction, with some unimportant qualifications, would exist over it out to the three mile limit as would exist

over it within the river banks, and the same policy which would make the channel inside the river banks the boundary would require the channel to be continued as the boundary out to its sea end. This seems clear. *Iowa* v. *Illinois*, 147 U. S. 1, 13, holding that the controlling consideration in this matter is that which preserves to each State equality in the right of navigation in the river.

The only permissible construction of the law is, that the line commences due west and opposite the middle of the north ship channel at its sea end, and that it extends thence easterly to the middle channel of the river inside the mouth of the river. Such a line would divide the river mouth almost equally between Oregon and Washington and give each of them, in 1859, an equally good ship channel into the river, considertions which it may be presumed would have moved Congress. See Chart A, 211 U. S. 133. The designation of such a line would also provide an explicable rule for continuing the dividing line up the river to Fort Walla Walla. The term, "middle channel," as used in the law, is not materially different in meaning from the term, "mid-channel," which latter term we are told by Mr. Justice Field in *Iowa* v. *Illinois*, *supra*, is used interchangeably in international law with the term "middle of the river," "middle of the main channel," "the deepest channel of the river," etc. The line we contend for, starting from the point we contend for, would not strike or follow any channel until it reached the mouth of the river proper, but would cut across the middle sands, which is an objection to it; but it is not more objectionable in that respect than the line contended for by Oregon, starting from the point it contends for, which, likewise, does not follow any channel until it reaches the mouth of the river and which cuts across Peacock Spit in order to reach that point. Considerations of reason and propriety, addressing themselves to Congress, would all move the adoption of a line such as that we now contend for rather than the Oregon line, and we may add that the language of the law as actually passed by Congress agrees with that line in

every particular and cannot be made to agree with the Oregon line in any particular.

If the north channel is the channel contemplated by the law as the boundary, then the north ship channel inside the river, that is, the channel to the north and east of Sand Island, ceased to exist about the year 1881, or sooner; the volume of water formerly passing through that channel and constituting it, cut a new channel for itself through the middle sands south of Sand Island, and this new channel then became in fact, as well as in law, the north channel of the river. See Report of Board of Engineers for the Permanent Improvement of the Mouth of the Columbia River, October 13, 1882. Record, pp. 23, 24, 28, 29. Report of Board of Engineers on Project for Improvement of Mouth of Columbia River, dated January 24, 1903. Record, pp. 53, 54.

In the rule of law applicable to such a change in the position of a navigable channel constituting a boundary between States, there is no room for the application of the doctrine of avulsion. That doctrine applies only where the entire stream seeks a new bed. It has no application to changing channels within the original banks of the stream.

The true rule is that the middle thread of the channel must be followed wherever the channel may have shifted within the banks of the stream. *Nebraska* v. *Iowa*, 143 U. S. 359; *Iowa* v. *Illinois*, 147 U. S. 1; *Missouri* v. *Nebraska*, 196 U. S. 23; *Louisiana* v. *Mississippi*, 202 U. S. 1. It is also the rule of international law. See statement of Dr. Twiss, quoted in *Iowa* v. *Illinois*, 147 U. S. 1, 9.

The stretch of river involving all the islands and sands in controversy excepting Sand Island, extends from the mouth of the river eastward up to Three Tree Point, a distance of approximately twenty-five miles. There are only two islands in the entire lot (Desdemona Sands and Snag Island), the remainder being entirely submerged and only visible at low tide.

In determining the controversy as to these islands and sands

up the river, it will be necessary to take up and construe portions of the act of 1859 not before considered by this court.

The language of the act now to be considered is as follows: "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."

It cannot be supposed that there are three channels extending from the mouth of the river to Fort Walla Walla. Therefore the words "middle channel" cannot be given their literal meaning. It cannot be supposed that the north channel at the mouth of the river extends as far as Fort Walla Walla. Therefore, that channel, even if the court adheres to its former decision that that channel is the one by which the line enters the mouth of the river, cannot be the dividing line east of Sand Island. The meaning of the words "middle channel" must be the same as "mid-channel" or the middle of the main navigable channel of the river. But the phraseology changes when the law comes to deal with stretches of the river which are divided by islands. Then the language is, "up the middle of the widest channel thereof." Even here there must be a channel, so that the law does not mean the widest expanse of water between shore and island. There must also be islands in the true sense, which means bodies of land surrounded by water and above water at all times; so that there is no room for the application of the term "widest channel" except where there are such islands.

The middle of the widest channel of the river may well be construed to mean the middle of the best channel of the river. Congress would not adopt the main navigable channel of the river as the boundary between the two States throughout most of its course, and adopt a different rule for stretches of the river which are divided by islands. While in the law the term "middle channel" and "widest channel" appear to be used in opposition to each other and to mean different things, this opposition would be lessened by the interpolation of the words "of the" between the words "middle" and "channel"

so as to make the law read, "up the middle of the channel," and this is permissible, because it is evidently what the lawmakers meant.

As to the channel south of Desdemona Sands, shown on Washington exhibit "H," there never has been a time from 1859 down to the present day, when that channel has not been the main channel of the river at that point, the channel which commerce has followed. Both Jussen and Hegardt, accomplished engineers, prepared test maps which were accurate reproductions of the several maps issued by the Government, commencing with that of 1851, and according to those maps, their hydrography, topography, sailing directions, and aids to navigation marked thereon, such as beacons and buoys, the main navigable channel of the river inside the entrance of the river was now and always had been the line in red and marked in green on Washington's exhibit "H," "Channel line, 1851." This line ran to the south of Desdemona Sands. On the question of the continuance of the old north channel up along the north bank of the river, both of them testified that while there was deep water along the north bank as far up as Knappton, it dissipated itself in shoals and shallows immediately above that point, and that there never had been a channel for ocean-going vessels, along the north bank above Knappton. And further that the said middle channel was not now and had never been of sufficient depth to admit the passage of ocean-going vessels and had never been so used.

With reference to the last stretch of the river, the evidence is that from the earliest times until about 1869, the 1859, or Woody Island channel, was the only channel used for deep draft ocean-going vessels and that the better channel of the present day, was only obtained as the result of extensive dredging. The old Woody Island channel is the true boundary between the two States. It was so in 1859 and remained so until 1869. The action of the public authorities in diverting that channel cannot be permitted to have the effect of diverting the boundary line. Congress could not do that by enact-

ment, and what Congress cannot do directly a mere engineer officer cannot do indirectly. If this position be sound, then Snag Island is on the Washington side of the line and belongs to Washington. The same thing is true of most of the submerged sands in controversy, although their location is not sufficiently fixed by the evidence, with reference to the line, to enable us to identify them accurately. However, that does not seem material at this time. If the rehearing be granted and Washington's contention as to the true line be then established, the practice is that this court, on proper application, will order a survey to identify and fix, with reference to the line, all disputed points.

Mr. A. M. Crawford, Attorney General of the State of Oregon, *Mr. I. H. Van Winkle, Mr. Harrison Allen, Mr. C. W. Fulton* and *Mr. A. M. Smith,* for defendant *contra* the petition for rehearing:

Petitioner contends that "when the north channel has been closed and the waters diverted elsewhere, one of two results follows as a matter of law. The waters which flowed through that channel, which created and constituted it, must be followed wherever they may have been diverted within the banks of the river, and still must be treated as the north ship channel; or the north ship channel must be treated as having ceased to exist, and on the doctrine of avulsion, the boundary between Oregon and Washington must be established on the line which that channel followed in 1859."

In the case at bar, Congress, in the Oregon enabling act, 1859, fixed the boundary between the States, parties to this suit, at the point in controversy, in the middle of the north ship channel. The United States and the State of Oregon were the only sovereignties having any interest in the matter at that date, and the said act of Congress is just as binding on States formed out of territory then owned by the Federal Government, as the agreement between Kentucky and Missouri. Construed in *Missouri* v. *Kentucky,* 11 Wall. 395. In

that case this court held that if the river had subsequently turned its course, the status of the parties was not altered by it, for the channel which the river abandoned remained the boundary between the States and the island in controversy did not, in consequence of this action of the water, change its owner.

Again in the case at bar the testimony shows beyond question that Sand Island was in the territorial limits of Oregon when the State was admitted into the Union. Washington not only is bound by the Oregon enabling act of 1859, but by her legal representatives, and agents, she agreed that the boundary at the point in dispute was in the north channel, and that such agreement was ratified by the vote of the people in adopting her constitution. This being so, if the north ship channel had, as petitioner contends, so shoaled in 1889, that ocean-going vessels could neither enter nor depart from the river through it, then Washington practically agreed to the boundary being north of Sand Island, after the north channel had ceased to be a ship channel as far as large ships, or even those of moderate size, are concerned.

While in early times it may be doubtful whether Sand Island was above high water at all seasons of the year, it cannot be questioned that it has been almost continually occupied by people actually living thereon for some time prior to the admission of Washington to the present time.

The construction of a jetty changing the course of a channel should not change the boundary between States, and take an island out of one sovereignty and place it in another, when the natural washing away of the banks of a stream will not have that effect. See *Base* v. *Russel*, 86 Missouri, 209; *Nebraska* v. *Iowa*, 143 U. S. 359.

Relative to the second proposition in the petition for rehearing, there are no islands shown to exist in or near the north channel of the Columbia River, after Sand Island is passed, within that portion of the river involved in this controversy. There are sand bars in or near the south channel, and a few in

or near the north channel, partially bare at low water, but nothing coming within the definition of an island as the term is usually understood.

In discussing the meaning of the clause of that portion of § 1 of the Oregon enabling act, defining the boundary, reading as follows: "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," etc., petitioner evidently attempts to show that the widest channel is south of Sand Island, on the theory that the act means the widest deep water, but such is not the true construction of the language employed. If the line starts as the decision herein holds, in the north channel, then it remains there, in the middle of said channel until we arrive at some point where the same is divided by islands, then up the widest channel, even if up the widest deep channel as petitioner urges, it does not bring its case within the rule it invokes. South of Sand Island, the ruling depth is not to exceed fourteen or fifteen feet, while north it is much more, and the width several times greater.

Petitioner insists that the court misconceived the facts, but does not controvert the propositions of law announced by the court in its opinion herein. The physical facts relative to Sand Island, heretofore referred to, render impossible the application of any other rule than that of the Kentucky-Missouri case, and the facts relative to Snag Island, its location, the main ship channel always having been near the north shore, the same being the north ship channel, called for in the enabling act of Oregon, and the constitution of Washington, and it being the widest channel as well as the north ship channel, and the further fact that since long prior to the admission of Washington, no attempt has been made to use the so-called Woody Island channel, but that the same was abandoned in 1881 or 1882, and that large vessels never used the same, considered with the history and surrounding circumstances preclude all suggestion of a misconception of the facts by the court, and no rehearing should be granted.

MR. JUSTICE BREWER delivered the opinion of the court.

This case was decided on November 16, 1908, substantially in favor of the State of Oregon. 211 U. S. 127. On February 17 of this year a petition for rehearing was presented by the State of Washington. On examination of that petition we entered an order directing that the parties have leave to file briefs upon the questions. They have done so, and we have reëxamined the case with great care.

There are practically two matters presented; one, whether the boundary near the mouth of the Columbia River was and is the channel north of Sand Island. We held that it was, and with that conclusion we are still satisfied. It is unnecessary to restate the reasons therefor. We may, however, refer to *Missouri* v. *Kentucky*, 11 Wall. 395, as much in point. That was a controversy between those two States as to the title of Wolf Island. The treaty between France, Spain and England in February, 1763, stipulated that the middle of the Mississippi should be the boundary between the British and French territories on the continent of North America. This was recognized by the treaty of peace with Great Britain in 1783, and different treaties since then. The boundaries of Missouri when she was admitted into the Union as a State in 1820 were fixed on this basis. Kentucky had succeeded in 1792 to the right and possession of Virginia, which, by virtue of the treaties referred to, extended to the middle of the bed of the Mississippi. The main channel of the Mississippi had been up to at least 1820 west of the island. There was testimony that since then it had changed to the east side. Nevertheless the court held that the island remained still a part of Kentucky, saying (p. 401):

"It follows, therefore, that if Wolf Island in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the

river abandoned remains, as before, the boundary between the States and the island does not, in consequence of this action of the water, change its owner."

So whatever changes have come in the north channel, and although the volume of water and the depth of that channel have been constantly diminishing, yet, as all resulted from processes of accretion, or, perhaps, also of late years from the jetties constructed by Congress at the mouth of the river, the boundary is still that channel, the precise line of separation being the varying center of that channel. *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178; *Nebraska* v. *Iowa*, 143 U. S. 359; *Iowa* v. *Illinois*, 147 U. S. 1; *Missouri* v. *Nebraska*, 196 U. S. 23; *Louisiana* v. *Mississippi*, 202 U. S. 1.

The other question arises in this way. The act admitting Oregon, after naming as the commencement of the boundary "a point due west and opposite the middle of the north ship channel of the Columbia River," adds "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." With reference to this we said: "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." Now, it is alleged that there is set forth in the bill of complaint and admitted in the answer that a controversy has arisen as to the boundary lines, and that both of said States claim and assume to exercise jurisdiction over numerous islands and sands in said Columbia River, sixteen of which are enumerated by name.

While sixteen islands and sands are mentioned, yet in the brief filed by the plaintiff on the application for a rehearing it is stated that, outside of Sand Island, the title to which is, as shown in the former opinion settled by the decision of the first question, only two, Desdemona Sands and Snag Island, can be called islands, the remainder being entirely submerged and only visible at low tide. These two, therefore, are all that can come within the definition in the boundary.

That speaks of "the middle channel of said river," and counsel contend that there is no pretense of three channels, and therefore the language should properly be construed as the middle of the main channel of said river, and we are inclined to think that that is the true construction. But it must be remembered that the boundary in the first instance passes around the north of Sand Island, in what was known as the north channel, and it does not strike any channel which deserves to be called the main channel until it has passed to the eastward of Sand Island. While the testimony is not satisfactory as to the point, at the time of the admission of the State of Oregon, at which this north channel, after passing Sand Island, touched any other channel, we are of the opinion that it must have been at a point east and north of Desdemona Sands. Of course, in considering this matter we assume that the contention of the State of Washington is correct, that Desdemona Sands could have then properly been termed an island.

With reference to Snag Island, the question is a difficult one. We agree with counsel that the term "widest channel" does not mean the broadest expanse of water. There must be in the first instance a channel—that is, a flow of water deep enough to be used and in fact used by vessels in passing up and down the river; but it does not mean the deepest channel but simply the widest expanse of water which can reasonably be called a channel. Now, close to Snag Island there appear several channels, the principal ones being Woody Island channel and Cordell channel, both used at different times by vessels navigating the river. The Cordell channel runs to the north of Snag Island, the Woody channel to the south, while the boundary claimed by the State of Oregon runs in a channel far to the north of both Woody Island and Cordell channels.

Further, it appears that in December, 1877, the State of Oregon conveyed Snag Island, in consideration of the sum of $143.75, to J. W. and V. Cook. While of course this is not conclusive, yet taken in connection with the fact that the

State of Washington has never attempted to interfere with the jurisdiction of the State of Oregon over Snag Island, and the doubt that hangs about the position and depth and width of the various channels in the vicinity at the time of the admission of the State of Oregon, we hold that that island is within its territorial limits.

It must be borne in mind that an inquiry of this kind is attended with much difficulty. Here is a river of great width, three miles or so at certain places, whose bed is largely of sand, and whose channels have been naturally affected by the flow of the water, and also of late years by the jetties constructed by the Government in order to facilitate navigation. Congress, evidently recognizing the difficulty which attended the location of the exact boundaries, provided that the States of Washington and Oregon should have concurrent "jurisdiction in civil and criminal cases upon the Columbia River." Yet this provision does not determine the boundaries between the two States, and has proved insufficient to settle the disputes between them as to things done upon the Columbia River. *Nielsen* v. *Oregon*, 212 U. S. 315.

We may be pardoned if, in closing this opinion, we refer to the following:

> "Joint Resolution To enable the States of Mississippi and Arkansas to agree upon a boundary line and to determine the jurisdiction of crimes committed on the Mississippi River and adjacent territory.
>
> '*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the consent of the Congress of the United States is hereby given to the States of Mississippi and Arkansas to enter into such agreement or compact as they may deem desirable or necessary, not in conflict with the Constitution of the United States, or any law thereof, to fix the boundary line between said States, where the Mississippi River now, or formerly, formed the said boundary line and to cede respectively each to the other such

tracts or parcels of the territory of each State as may have become separated from the main body thereof by changes in the course or channel of the Mississippi River and also to adjudge and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of said States upon the waters of the Mississippi River.

"Approved January 26, 1909."

Similar ones have passed Congress in reference to the boundaries between Mississippi and Louisiana and Tennessee and Arkansas. We submit to the States of Washington and Oregon whether it will not be wise for them to pursue the same course, and, with the consent of Congress, through the aid of commissioners, adjust, as far as possible, the present appropriate boundaries between the two States and their respective jurisdiction.

The petition for rehearing is

Denied.

ADAMS EXPRESS COMPANY *v.* COMMONWEALTH OF KENTUCKY.

ERROR TO THE CIRCUIT COURT OF HART COUNTY, STATE OF KENTUCKY.

No. 144. Argued April 8, 1909.—Decided May 24, 1909.

Where the state court denied the contention of plaintiff in error, defendant below, that a state statute as applied to transportation of an article from one State to another was in conflict with the commerce clause of the Constitution, a Federal question is involved and this court has jurisdiction. *Western Turf Association* v. *Greenberg*, 204 U. S. 359.

However obnoxious and hurtful, in the judgment of many, liquor may be, it is a recognized article of commerce, *Leisy* v. *Hardin*, 135 U. S. 100; and a state law denying the right to send it from one State to another is in conflict with the commerce clause of the Constitution of the United States. *Vance* v. *Vandercook Co.*, No. 1, 170 U. S. 438.

Transportation of an article in interstate commerce is not completed until the article is delivered to the consignee; and the Wilson Act of August 8, 1890, c. 728, 26 Stat. 313, does not cause state laws to attach to an interstate shipment until the completion of the transit by delivery to the consignee. *Rhodes* v. *Iowa*, 170 U. S. 412.

Generally speaking, the police power belongs to, and is to be exercised by, the State, but it must yield to Congress wherever it conflicts with the powers belonging exclusively to Congress.

Congress has by § 5258, Rev. Stat., authorized every railroad company in the United States to carry all passengers and freight over its road from one State to another State and receive compensation therefor; and any exercise of state authority directly regulating interstate commerce is repugnant to the commerce clause of the Constitution. *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328.

Section 1307 of the Statutes of Kentucky of 1903 making it an offense to furnish, sell or give liquor to any person who is an inebriate, as applied to a common carrier bringing the liquor to such a person from another State, is an attempted regulation of interstate commerce, and, as such, is in conflict with the commerce clause of the Constitution of the United States and void.

124 Kentucky, 182, reversed.

SECTION 1307, Kentucky Statutes, 1903, provides:

"Any person who shall sell, lend, give, procure for or furnish spirituous, vinous or malt liquors, or any mixture of either, knowingly, to any person who is an inebriate or in the habit of becoming intoxicated or drunk by the use of any such liquors, or who shall suffer or permit any such person to drink any such liquors in his barroom, saloon or upon the premises under his control or in his possession, shall be fined, for each offense, fifty dollars," etc.

The Adams Express Company was prosecuted in the Circuit Court of Hart County for a violation of that statute. The facts were agreed upon. It was a company engaged in the express business. W. G. Tharp was a resident of Hart County, Kentucky, who bought and paid for liquor in Nashville, Tennessee, and New Albany, Indiana. The sellers were licensed dealers in those places, and shipped the liquors to him, by the defendant, prepaying the express charges. Tharp was in the habit of becoming intoxicated, and the defendant's agent in

Hart County knew of this fact when he delivered the liquors. On the trial the court ruled "that the said transportation and delivery of said liquor to said Tharp by defendant did not constitute interstate commerce within the meaning of the clause of the Federal Constitution, which gives to the Congress of the United States power to regulate commerce between the States, and that the defendant is guilty of knowingly furnishing liquor to an inebriate, as charged in the information herein."

The defendant prayed an appeal to the Court of Appeals of Kentucky, which was denied, and thereupon the case was brought here directly from the Circuit Court of Hart County, the highest court of the State in which a decision could be had. Ky. Stat. 1903, § 1307, p. 579; Id. § 950, p. 482· § 347 Crim. Code, p. 567.

Mr. Lawrence Maxwell, with whom *Mr. Joseph S. Graydon* was on the brief, for plaintiff in error:

This court has jurisdiction.

The Federal question was duly raised and overruled in the trial court. The case is brought here direct because the Circuit Court of Hart County is the highest court of the State in which a decision can be had. The information was based on § 1307, Ky. Stat. 1903, which fixes the only penalty at a fine of fifty dollars. Under § 347, Criminal Code, and Ky. Stat. 1903, § 950, the trial court properly refused an appeal to the Court of Appeals of Kentucky, and allowed the writ from this court with supersedeas.

This proposition that the transaction was interstate commerce is well settled. Tharp lawfully bought and paid for the liquor in another State from dealers duly licensed there to sell it. The only connection of the defendant with the transaction was to carry the liquor to Kentucky and there deliver it to the consignee. This it did in discharge of its duty as a common carrier engaged in interstate transportation, under the laws of the United States, and in pursuance of a lawful contract entered into in another State with the shipper, who there paid

defendant its carrying charges. It is not competent for the State of Kentucky to declare such a contract unlawful, or to punish defendant for performing it, or to regulate its performance by forbidding delivery to the consignee on the claim that he is a person who is in the habit of becoming intoxicated. If such regulation of interstate commerce is deemed advisable it must proceed from Congress. The States cannot interfere until the interstate transportation has been completed by delivery to the consignee. The court has so construed the Wilson Act repeatedly. *American Exp. Co.* v. *Iowa*, 196 U. S. 133; *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *Vance* v. *Vandercook Co.* (*No.* 1), 170 U. S. 438; *Adams Express Co.* v. *Kentucky*, 206 U. S. 129; *Rhodes* v. *Iowa*, 170 U. S. 412, 426.

The Kentucky statute is an illegal regulation of interstate commerce. A state statute which compels a carrier to know the contents of his packages, and to ascertain at his peril whether the consignees of all interstate shipments of intoxicating liquor are in the habit of becoming intoxicated, and which denies the right to deliver to such persons an article of commerce in course of transportation from another State, is a plain regulation of interstate commerce. *Wabash, St. L. & P. Ry. Co.* v. *Illinois*, 118 U. S. 557; *Vance* v. *Vandercook Co.* (*No.* 1), 170 U. S. 438, 444; *Leisy* v. *Hardin*, 135 U. S. 100–110; *Atlantic Coast Line R. R. Co.* v. *Wharton*, 207 U. S. 328, 334; *Central of Georgia Ry. Co.* v. *Murphey*, 196 U. S. 194; *Houston & T. C. R. R. Co.* v. *Mayes*, 201 U. S. 321; *McNeill* v. *So. Ry. Co.*, 202 U. S. 543.

No counsel appeared for defendant in error.

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

The jurisdiction of this court is not open to dispute. Defendant contended that the Kentucky statute as applied to

the transportation of liquor from State to State was in conflict with the section of the Federal Constitution vesting jurisdiction in Congress over interstate commerce. This contention was denied by the state court, and thus a question arose under the Federal Constitution decided adversely to the plaintiff in error. *Western Turf Association* v. *Greenberg*, 204 U. S. 359.

Liquor, however obnoxious and hurtful it may be in the judgment of many, is a recognized article of commerce. *License Cases*, 5 How. 504, 577; *Leisy* v. *Hardin*, 135 U. S. 100, 110.

In *Vance* v. *Vandercook Company* (*No.* 1), 170 U. S. 438, 444, Mr. Justice White, delivering the opinion of the court, said:

"Equally well established is the proposition that the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States."

That the transportation is not complete until delivery to the consignee is also settled.

In *Rhodes* v. *Iowa*, 170 U. S. 412, 426, it was held that the Wilson Act "was not intended to and did not cause the power of the State to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

This legislation is in the exercise of the police power, a power which, generally speaking, belongs to the State, and is an attempt in virtue of that power to directly regulate commerce, but in case of conflict between the powers claimed by the State and those which belong exclusively to Congress, the former must yield, for the Constitution of the United States and the laws made in pursuance thereof are "the supreme law of the land."

Section 5258 of the Revised Statutes of the United States provides:

"Every railroad company in the United States . . . is hereby authorized to carry upon and over its road . . . all passengers . . . freight, and property on their way from any State to another State, and to receive compensation therefor." *New Orleans Gas Company* v. *Louisiana Light Company,* 115 U. S. 650; *Wabash, St. Louis & Pacific Railway Company* v. *Illinois,* 118 U. S. 557.

In *Atlantic Coast Line Railroad Company* v. *Wharton,* 207 U. S. 328, 334, it was declared "that any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution."

In *Adams Express Company* v. *Kentucky,* 206 U. S. 129, 135, it was said:

"The testimony showed that the package, containing a gallon of whiskey, was shipped from Cincinnati, Ohio, to George Meece, at East Bernstadt, Kentucky. The transaction was therefore one of interstate commerce, and within the exclusive jurisdiction of Congress. The Kentucky statute is obviously an attempt to regulate such interstate commerce. This is hardly questioned by the Court of Appeals, and is beyond dispute under the decisions of this court."

Clearly within the cases above cited the statute before us as applied to transportation from State to State cannot be sustained.

The judgment of the Circuit Court of Hart County, Kentucky, is reversed, and the case remanded to that court for further proceedings not inconsistent with the views expressed in this opinion.

MR. JUSTICE HARLAN dissents.

CABRERA *v.* AMERICAN COLONIAL BANK.

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

No. 136. Submitted April 7, 1909.—Decided May 24, 1909.

The provisions of the Spanish Civil Code, which was in force in Porto Rico until 1902, to the effect that the obligations of a contract must be complied with according to their terms and that evidence cannot be introduced to vary them are practically the same as the principles of the common law and are subject to similar well-recognized exceptions.

The face of an instrument is not always conclusive of its purpose; and, in equity, extrinsic evidence is admissible to show that a conveyance, absolute in form, is intended as security; and in this case testimony addressed to the consideration of the bill of sale, and showing that although on its face the vendee agreed to give up its debt the real consideration was to help the vendor and give the vendee additional security, would be admissible under our own, as well as the Spanish, law; and *quære* whether the Spanish law does not permit oral testimony, as to all the terms of a contract upon an equal footing with the written instrument itself, to an extent beyond that which our own law permits.

One guaranteeing a loan by mortgage is not released from the guaranty because the loan is subsequently further secured by a bill of sale of other property, absolute on its face but in fact given as additional security, by the principal debtor.

In Porto Rico one can mortgage an interest in a succession after it has accrued notwithstanding it has not been actually assigned or delivered to the mortgagor; this is not prohibited by articles 108 of the mortgage law, nor are articles 110, 111 of that law applicable thereto.

The liability of one who binds himself with others for the whole debt extends to the whole and not to a part of the debt.

3 Porto Rico, 14, affirmed.

THIS is a suit to foreclose a mortgage given by the appellant, Maria de las Nieves Cabrera y Pruna, to the appellee bank, executed by her on certain property in Porto Rico, to secure a promissory note for 8,000 pesos, provincial money, made

in favor of the bank by a mercantile firm in San Juan, known as Successores de J. M. Suarez y Compania, as principals, and the appellant above named as surety. The Banco Territorial y Agricola was also made a party, but as it disclaimed any interest in the controversy, no further proceedings were taken against it. Magdalena de la Cruz Cabrera y Pruna was made a party because, as it is alleged in the bill, the property mortgaged was conveyed to her by Maria de las Nieves Cabrera y Pruna, who was her sister, for the purpose of depriving the plaintiff (appellee here) of the benefit of its security, and that the conveyance was made without consideration. She answered, denying the allegations, and averred that the conveyance was made upon certain valuable considerations, which were set out.

The answer of Maria de las Nieves Cabrera y Pruna set up that her signature to the mortgage had been obtained by fraud, and that Suarez & Co. had paid the debt secured thereby, that the original note signed by her had been renewed without her knowledge or consent, that the bank had accepted a bill of sale of the stock of merchandise belonging to Suarez & Co. in full payment of the indebtedness, and had executed a public document acknowledging the same. She also averred the good faith of the conveyance to her sister.

The principal contention of appellants in this court turns entirely on the truth of the allegation that the bank had accepted the bill of sale of the stock of Suarez & Co. in full payment of the indebtedness. Of this bill of sale we may say at the outset that the District Court found, and we concur in that finding, that it was not executed with such intention. Appellants, therefore, are limited to the proposition that it had such effect by operation of law. They so contend, insisting that it was a conveyance of property on its face, and that it could not be varied or changed by parol testimony. The District Court having admitted such testimony, it is further contended, committed error. The ruling that parol evidence will not be received to vary a written instrument is elementary,

but the inquiry is, is that ruling so far imperative in Porto Rico that an instrument, though an absolute conveyance on its face, may not be shown as only intended for security?

A statement of some of the facts will exhibit the situation of the parties and their relations to the indebtedness. Previous to the year 1900 Jose Maria Suarez carried on a mercantile business in San Juan, Porto Rico. Shortly before that date he died, and two of his brothers, including his widow, Maria de las Nieves Cabrera y Pruna, one of the appellants, continued the business under a partnership, organized in the early part of 1900, under the firm name and style of Successores de J. M. Suarez y Compania. Suarez had bought the store with his wife's private funds, and owed her at the time of his death 8,000 pesos, and she became a silent partner to that extent, but took no part in the management generally. The partnership being in need of money, borrowed from appellee, on the twenty-first of February, 1900, the sum of 8,000 pesos, equivalent to $4,800 in United States currency, and gave its promissory note to secure the sum, payable in six months, at 9 per cent interest. The note was in the following words:

"$8000.00 Pesos
"$4800.00 Dollars } Either on demand.

San Juan, Porto Rico, February 21, 1900.

"Six months after date, for value received, we promise to pay to the American Colonial Bank of Porto Rico, at the office of the said company, in the city of San Juan, eight thousand pesos M. C. or forty-eight hundred dollars U. S. cy., having deposited with said company as collateral security for payment of this or any other liability or liabilities of ours to said company, now existing, or which hereafter may be contracted, the following property, viz:

"A cession of all the interests of the signers of this in the estate of Nieves Pruna y Vanrosi, and a mortgage on house on Sol street. This note can be renewed with the consent of the cashier of the American Colonial Bank, without prejudice to

the security or collateral, with full power and authority to said company to sell, assign and deliver the whole, or any part thereof, or any substitutes therefor, or any additions thereto, at any broker's board, or at any public or private sale, at the option of said company, or its president, or treasurer, or its or their or either of their assigns, on the non-performance of this promise, or the non-payment at maturity of any of the other liabilities aforesaid, or at any time or times thereafter, without demand of payment, advertisement or notice of sale, which are hereby expressly waived; and after deducting all costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale, or sales, to pay any or all of said liabilities to said company, or its assigns, as its president or treasurer, or assigns, shall deem proper, returning the overplus to the undersigned; and upon any sale at public auction or at broker's board the holder thereof may purchase the whole or any part of such securities, discharged from any right of redemption. And the undersigned agrees to be and remain liable to the holder hereof for any deficiency.

"The company is hereby given a lien upon all moneys held by it on deposit or otherwise, to the credit of the undersigned, and is authorized at any time to appropriate all of said moneys to the payment of whatever may be due on this note, or any other obligations of the undersigned now existing or hereafter contracted, whether the same be then due or not due.

"In case of depreciation in the market value of the security hereby pledged, or which may hereafter be pledged for this loan, a payment is to be made on account, so that the said market value shall always be at least —per cent more than the amount unpaid of this note. In case of failure to do so this note shall be due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the company may immediately reimburse itself by sale of the security as hereinbefore provided.

"(Sgd.) MARIA DE LAS NIEVES DE SUAREZ.

"(Sgd.) SUC. DE J. M. SUAREZ & CO."

The note was signed by her as a principal, but the bill alleges that the firm signed as principal, and that she signed as surety, and, to further secure the note, that she executed the mortgage in this suit. It is recited in the mortgage that the note was given by the firm "as direct debtors," and that she executed the mortgage as surety "for the debtors and principal guarantor of the debtors." The mortgage was recorded.

On the thirteenth of March, 1901, a bill of sale upon which the controversy in the case turns was executed before a notary. The instrument recites that it was made by the Mercantile Society, Ltd., doing business under the firm name and style of Successores de J. M. Suarez y Compania, owner of the establishment, the bazaar "Europa," Don Manuel and Ramon Suarez y Cordero, represented by its managing and active partners as parties of the first part, and Mr. Edwin L. Arnold, cashier of the American Colonial Bank of Porto Rico, party of the second part. The bill of sale further recites as follows:

"First. The Society Successores de J. M. Suarez y Cia now is debtor to the American Colonial Bank of Porto Rico in the sum of four thousand eight hundred dollars, due on the 21st of August, last, according to the promissory note which they executed, and not being able to deliver the amount thereof, have offered to make payment thereof in mercantile stocks, according to the detailed inventory which they exhibit, subscribed by the society, and which they take with them bearing my signature and seal, and to which the creditor bank has manifested its conformity.

"Second. That carrying into effect the sale of the stocks set forth in the inventory exhibited, Messrs. Suarez y Cordero in the representation, by which they act, transfer all of the said effects set forth in the said inventory to the creditor bank for the sum of four thousand eight hundred dollars, leaving the same in the possession of the bank, in payment of the said amount of the promissory note above mentioned.

"Third. Mr Edwin L. Arnold accepts this deed; receives the inventory above mentioned and in consequence thereof

says that he leaves in the said establishment of the sellers the 'Bazaar Europa' all the stock and goods which such persons have sold to him in payment for the four thousand eight hundred dollars which they owe to the American Colonial Bank, in order that, for the account and commission of the latter they proceed to realize from the said goods, prices not to be less than those fixed in the inventory, and they are obliged to present to the bank weekly account of sales they may make, together with the value in cash thereof, until the complete realization of the same takes place."

It was signed by Ramon Suarez y Cordero, Manuel Suarez y Cordero and Edwin L. Arnold, cashier.

The District Court found, as we have already said, that the bill of sale was taken as additional security, and that there was no agreement or understanding that it should be considered as full payment of the main loan or debt; that Arnold never saw the stock of goods or any part of it, nor went to the store of the firm, and that the firm retained possession of the goods. Neither of the appellants took part in the execution of the instrument, and, it is found, that no testimony was offered charging them or any of the members of the company with fraudulent conduct. It is also found by the District Court that subsequently the firm went into bankruptcy, that the stock of goods was scheduled as part of the assets of the firm, and that the bank received no part of the assets collected by the trustee in bankruptcy, and distributed among the general creditors of the firm. The District Court adjudged that the bank was entitled to foreclose its mortgage, and entered a decree accordingly.

Mr. Francis H. Dexter for appellants.

Mr. N. B. K. Pettingill for appellee.

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

Appellants, to sustain their contention that the bill of sale

was an absolute conveyance and accomplished payment of the debts to the bank, quote provisions of the Spanish Civil Code which, it is said, was in force in Porto Rico until 1902, which provides that the obligations of contracts must be complied with according to their terms, that their provisions when clear and explicit must control, and that there can be no evidence of the terms of the agreement other than the contents of the writing, unless "a mistake or imperfection of the writing is put in issue by the pleadings" or its "validity" is the fact in dispute.[1]

But these are also the principles of the common law, and absolutely necessary if the written instrument is to be given a distinctive sanction of the agreement of the parties. But there are well-recognized exceptions. The face of an instrument is not always conclusive of its purpose. In equity, extrinsic evidence is admitted to show that a conveyance absolute on its face was intended as security. The rule regards the circumstance of the parties and executes their real intention, and prevents either of the parties to the instrument committing a fraud on the other by claiming it as an absolute conveyance, notwithstanding it was given and accepted as security. In other words, the real transaction is permitted to be

[1] "Obligations arising from contracts have legal force between the contracting parties, and must be fulfilled in accordance with their stipulations." Article 1091.

"Contracts shall be binding, whatever may be the form in which they may have been executed, provided the essential conditions required for their validity exist." Article 1278.

"If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed." Article 1281.

"Commercial contracts shall be executed and complied with in good faith according to the terms in which they were made and drafted, without evading the honest, proper and usual significance of the written or spoken words with arbitrary interpretations, nor limiting the effects which are naturally derived from the manner in which the contractors may have explained their wishes and contracted their obligations." Article 57, Code of Commerce, 1897, p. 24.

proved. This court said in *Peugh* v. *Davis,* 96 U. S. 332, 336, and repeated it in *Brick* v. *Brick,* 98 U. S. 516: "As the equity upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible." The rule which excludes parol testimony, the court further said, has reference to the language used by the parties and does not forbid an inquiry into their object in executing and receiving the instrument. *Hughes* v. *Edwards,* 9 Wheat. 489; *Russell* v. *Southard,* 12 How. 139; *Babcock* v. *Wyman,* 19 How. 289. In *Morgan's Assignees* v. *Strum,* the rule of equity was enforced against the bill of sale of a vessel, though it was enrolled and also insured in the name of the transferee. See *Livingston* v. *Story,* 11 Pet. 351.

It is not contended that the equitable rule is explicit in the Porto Rican code; but it is contended that the power to enforce the rule is given by § 34 of the act of Congress of April 12, 1900, which conferred upon District Courts of Porto Rico, "in addition to the ordinary jurisdiction of Districts Courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States," and that they should "proceed therein in the same manner as a Circuit Court." The deduction from this is that the District Court, having the "ordinary jurisdiction" of both Circuit and District Courts, may "proceed in the consideration of any case within that jurisdiction on the same principles," depending on the nature of the case, as those courts may.

Appellee, however, says that it is not necessary to insist upon that proposition because the question presented is the "kind of evidence" which the court was entitled to receive and consider, and the case of *Horton et al.* v. *Robert,* 3 Castro's Decisiones de Puerto Rico, 410, 415, is adduced to sustain the decision of the District Court in admitting evidence to explain the bill of sale in controversy. The English translation of the decision, given by the appellee, is as follows:

"It seems that the defendant believes, and his whole con-

tention is based on this belief, that for a mortgage to be declared usurious the usury must appear from the document itself. Such an affirmation would convert the law of usury into a dead letter, and is directly in conflict with section 25 of the Law of Evidence of Porto Rico. The appellee also presumes that the object of a written contract cannot constitute the subject of investigation by a court, upon examining into its validity, but that the court must presume that it has been stated correctly in the contract itself. This presumption of the appellee is contrary to the second subdivision of section 101 of the Law of Evidence of Porto Rico and to the law established by the American courts. No matter what motive or consideration is expressed in a written contract, the truth of its provisions is not conclusively presumed, but the same can always be the subject of investigation before a court, and therefore proof can always be proposed and received in order to demonstrate what was the true motive or consideration of the obligation which may be established. See also paragraph 38 of section 102 of the Law of Evidence of Porto Rico."

The law of evidence referred to is inserted in the margin.[1]

Horton v. *Robert* seems to interpret the code as permitting

[1] SEC. 25. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dispute.

But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section twenty-eight, or to explain an intrinsic ambiguity, or to establish illegality or fraud. The term "agreement" includes deeds and wills, as well as contracts between parties.

SEC. 28. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that

the application of the equitable rule, and defines the word "consideration" in § 101 to comprehend the *motive* or *purpose* of the instrument. If there is any decision or statute which militates with this conclusion, we feel sure that appellants would have cited it. But we need not distinguish between motive and consideration. The testimony was addressed to the consideration of the bill of sale in its strictest sense. On the face of the instrument the bank engaged to give up its debt for the stock of goods. This then constituted the consideration as expressed, but the testimony explaining it showed that it was not the real consideration, that the real consideration was to keep Suarez & Co. a going concern, and to give the bank additional security. More than this it is not necessary to decide, and we shall not consider, therefore, the contention of appellee and the citations to support it, that the law of Spain "permits what our own does not—the admission of oral

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the judge be placed in the position of those whose language he is to interpret.

"SEC. 101. The following presumptions, and no others, are deemed conclusive: . . .

"2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital or a consideration. . . .

"SEC. 102. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions and may be controverted by other evidence. The following are of that kind: . . .

"38. That there was a good and sufficient consideration for a written contract. . . .

"SEC. 107. No evidence shall be considered as conclusive or unanswerable, unless so declared by this act. Laws of Porto Rico, 1905, pages 73, 74, 87, 88, 90."

In the same connection should be considered Article 1186 of the Civil Code of Porto Rico, which reads as follows:

"Public instruments are evidence even against a third person of the fact which gave rise to their execution and of the date of the latter.

"They shall also be evidence against the contracting parties and their legal representatives with regard to the declarations the former may have made therein." Revised Statutes and Codes of Porto Rico, 1902.

testimony regarding all the terms of a contract upon equal footing with the writing which evidences it."

It is, however, contended that, if it should be held that the bill of sale did not pay or discharge the debt, appellant Maria de las Nieves was (*a*) but a guarantor, and her liability must be determined as such. (*b*) The deed of sale was but a novation. (*c*) It constituted under all the circumstances a modification of the security and released her, the guarantor.

All these objections seem (we say seem, because the argument to support them is somewhat involved) to rest on the contention that the bill of sale was not taken as an additional security, and is, therefore, answered by what has been said. Whether she was a guarantor or not, that could not make a mortgage of her real estate any less effective or make the bill of sale something other than what it was. *Joyce* v. *Auten*, 179 U. S. 591.

It is next contended by appellants that the bank "acquired no specific right or interest in the inheritance or participations of appellant Maria de las Nieves Cabrera y Pruna, in the estate of her deceased mother," because, as it is further contended, "that her interest in the estate of her mother had not yet been divided or assigned." There was an allegation in the bill that such interest was covered by the mortgage, which was not denied. Besides, it does not appear that the point was made in the lower court, and counsel say here, after quoting some very general provisions of the Civil Code of Porto Rico, and articles 110 and 111 of the mortgage law, "As we more confidently rely upon the other points in this case, we do not enter into a discussion of the law bearing on this point." We leave the point where counsel has left it. We do not feel called upon to compare the provisions which he has cited with those cited by counsel for appellee, which, it is contended, have a contrary effect, and establish that an heir or devisee has an interest in the inheritance, before the division, which he may sell or mortgage.

It is enough to say that the provisions quoted by appellants

do not sustain their contention. They quote article 1874 of the Civil Code, in force at the time the mortgage was given, as confining a mortgage contract to real property and to rights in real estate which can be alienated according to law. There is no attempt to define such rights other than to quote article 108 of the mortgage law as follows:

"Article 108. The following are not mortgageable:

* * * * * * * *

"(5) The property right in things which, although they will be owned in the future, are not yet recorded in the name of the person who will have a right to own them."

But the interest of Maria de las Nieves in her mother's estate had accrued, and, because it was an undivided interest, did not make it a "property right" to be "owned in the future."

Articles 110 and 111 of the mortgage law are clearly not applicable. They only refer to what incidents of an estate the mortgage of it extends, as improvements, crops, rents, &c.

It is finally contended that if Maria de las Nieves is responsible at all it is only for a part of the debt. This contention is answered in effect by what we have already said. Whether as principal or surety, she bound herself to the bank for the whole debt—mortgaged her property for the whole debt, and her liability extends to the whole debt.

Decree affirmed.

BONG, PLAINTIFF IN ERROR, *v.* ALFRED S. CAMPBELL ART COMPANY.

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

No. 150. Argued April 15, 1909.—Decided May 24, 1909.

Under § 4952, Rev. Stat., as amended by the act of March 3, 1891, c. 565, 26 Stat. 1106, the assignee of an author of a painting is not entitled to copyright unless the author is a citizen of a country to the citizens of which reciprocal copyright privileges have actually been extended by proclamation of the President in conformity with § 13 of the act of March 3, 1891. The fact that the assignee is a citizen of such a country does not entitle him to copyright.

An assignee within the meaning of the copyright statute is one who receives a transfer not necessarily of the painting but of the right to multiply copies thereof, and such right depends not only upon the statute but is derived also from the painter, who must have the right to copyright in order to assign it.

A citizen of a country not in copyright relations with the United States under § 13 of the act of 1891 is not entitled to avail of the copyright because his country is a member of the Montevideo Union.

The provision in § 13 of the act of 1891, providing that the President on determining certain conditions extend the privileges of copyright to citizens of countries which are parties to a copyright union to which the United States may become a party is not directory and confers no rights independent of the President's proclamation.

Where a statute contemplates reciprocity of rights the President is the best fitted officer to determine whether the conditions on which reciprocity depends exist; and this court approves the construction given by the State Department and the Librarian of Congress to the copyright statutes as denying copyright protection to Peru, no proclamation extending copyright to the citizens of that country having ever been made by the President.

Where the head of a department of the Government is authorized to make regulations in aid of a law, he cannot make regulations which defeat it. *Williamson* v. *United States*, 207 U. S. 425.

The practice of disposing of cases on the opening of counsel is generally an unsafe method of procedure; the case should be developed by the evidence. *Hoffman House* v. *Foote*, 172 N. Y. 348, approved.

155 Fed. Rep. 116, affirmed.

THE facts, which involve the construction of the international and reciprocity provisions of the Copyright Act, are stated in the opinion.

Mr. Max J. Kohler for plaintiff in error:

The plain and unambiguous language of the act of March 3, 1891, confers copyright where the person applying for the same as proprietor or assign of the author or proprietor is a subject of a country with which we have copyright relations, whether the author be a subject of one of those countries or not.

Section 13 of the act of 1891 is satisfied if the "proprietor" or "assign" taking out the copyright is a citizen of a country with which we have copyright relations.

Section 4952, as amended in 1891, authorizes either the "author" or "proprietor" of a work or his "assigns," to copyright the same. The only limitation is in § 13, which provides that this shall only "apply to a citizen or a subject of a foreign state" as to which the President has issued his proclamation. There is no suggestion of any limitation to citizenship of country of production, and the only statute that had contained any such limitation, § 4971, was expressly repealed. The limiting of statutory copyright to work of Americans (*Yuengling* v. *Schile*, 12 Fed. Rep. 97) was expressly abandoned by Congress. *Werckmeister* v. *Pierce*, 63 Fed. Rep. 445; *Merriam Co.* v. *Dictionary Co.*, 146 Fed. Rep. 354; aff'd 208 U. S. 260; *Oliver Ditson Co.* v. *Littleton*, 62 Fed. Rep. 597.

The only case which seems to have considered the branch of the statute here involved is *Britannica Co.* v. *Werner Co.*, 135 Fed. Rep. 841, where Judge Lanning, in a case involving a book, paraphrased the statute as here contended for.

Since § 4952 was first enacted in the revision of July 8, 1870, the "proprietor" or "assign" of the author, as well as the author himself, has been permitted to take out a copyright in his own name. The act of 1870, expressly interpolated the word "proprietor" when paintings were first made copyrightable. 16 Stat. 212; Solberg on Copyright, 46; *Am. Tobacco*

Co. v. *Werckmeister*, 207 U. S. 284, 296, 299; affi'g 146 Fed. Rep. 375; *Werckmeister* v. *Pierce*, 63 Fed. Rep. 445, 449; *Werckmeister* v. *Springer Co.*, 63 Fed. Rep. 808; *Werckmeister* v. *Am. Lith. Co.*, 142 Fed. Rep. 827,830; aff'd 146 Fed. Rep. 377; *Mifflin* v. *White Co.*, 190 U. S. 260; *Lawrence* v. *Dana*, 4 Cliff. 1; *Parton* v. *Prang*, 3 Cliff. 537; *Callaghan* v. *Myers*, 128 U. S. 617, 658.

The copyright law contains at present no limitation as to country of production of the work and § 13 has nothing to apply to except the provisions of § 4952, amended at the same time this statute was adopted, and establishing the rights of persons to take out copyrights, either as "author," "proprietor" or "assign," and it seems obvious that the law requires merely that the person taking out the copyright must be a citizen of such country, irrespective of the nationality of the author.

The experience and legislation of the rest of the civilized world, antedating the framing of this act, led to the adoption by them of a policy protecting works published in a country, as well as those by native authors or artists, and it was undoubtedly the purpose of Congress to adopt such policy.

Public policy does not require a strict construction of our copyright protection to citizens or "proclaimed" authors. In fact it is the consensus of opinion abroad that it is unwise to pursue a retaliatory policy in copyright matters and certainly the United States cannot afford to welcome such policy. The British copyright commission of 1878 advised against such course with particular reference to the United States.

Something was said on the trial as to an alleged construction by the Librarian of Congress of our copyright laws against recognizing rights based upon assignments from authors who are citizens of countries not covered by proclamations. The fact of such construction is challenged; to counsel's own knowledge a copyright was granted after consideration of this question in 1901, some years before the copyright proclamation as to China, for a work by a Chinese author, the manuscript of

which had been assigned to an American, A. S. Taylor. The copyright bureau in fact has stated that the question is a doubtful one requiring determination. (Report on copyright legislation by the Register of Copyrights for the year ending June 30, 1903, pp. 10, 11). If there be any such construction it is obviously wrong and is not uniform, long established nor reasonable, so as to be entitled to any weight as an alleged departmental construction. *United States* v. *Graham*, 110 U. S. 219; *United States* v. *Tanner*, 147 U. S. 661. Nor, as he himself conceded, is the Librarian of Congress given any discretionary power, but he is a mere ministerial officer (Report cited, *supra*, pp. 31, 32).

Even before the international copyright law amendment of 1891, the proprietor of a painting who was himself a citizen or resident of the United States, could have secured a copyright, even though the artist may have been a non-resident alien, but the rule was different as to books and other articles enumerated in § 4971, because of the express provisions of that section.

But defendant argued below, chiefly on the assumption that Mr. Hernandez's assignment to Mr. Bong passed nothing, because Mr. Hernandez himself could not have secured a copyright under our statutes, under the act of March 3, 1891, because a Peruvian, and such is the reasoning of the Circuit Court of Appeals.

In the light of the laws of foreign countries and the Berne convention, which were carefully studied by the lawmakers, it seems obvious that the removal of an alien's lack of capacity to copyright was cured by assignment or descent from the alien; disability by assignment was expressly intended by Congress in the international copyright act, just as had been done in terms in foreign countries, where the limitation to native "authors" had been abolished.

The language of our copyright law is unmistakable and unambiguous in making right to copyright turn simply on the citizenship of the person taking out the copyright.

Mr. Bong, before he sought his Federal copyright, and published the painting under those limitations in photogravure reproductions, could have enjoined defendant's infringement as a violation of his common-law copyright rights, and in the Federal court, because of jurisdiction based on his alienage. The copyright act in exchange for publication, gave him a statutory copyright for a limited period, upon compliance with its terms.

The common-law copyright rights, before publication, of the painter or owner of a painting or other copyrightable objects, are of course well established. *Werckmeister* v. *Am. Lith. Co.*, 134 Fed. Rep. 321; aff'd 207 U. S. 284; *Parton* v. *Prang*, 3 Cliff. 537; *Werckmeister* v. *Am. Lith. Co.*, 142 Fed. Rep. 827; aff'd 146 Fed. Rep. 377; *Turner* v. *Robinson*, 10 Ir. Ch. Rep. 121, 510; *Oertel* v. *Wood*, 40 How. Pr. 10; *Prince Albert* v. *Strange*, 2 De Gex & Smale, 652; *Press Pub. Co.* v. *Monroe*, 73 Fed. Rep. 196; appeal dismissed, 164 U. S. 105; *Palmer* v. *De Witt*, 47 N. Y. 532; *Thomas* v. *Lennon*, 14 Fed. Rep. 849; *Iolanthe Case*, 15 Fed. Rep. 439; *Mikado Case*, 25 Fed. Rep. 183; *Globe Co.* v. *Walker*, 210 U. S. 356.

See also *Mansell* v. *Valley Printing Co.* (1908), 1 Ch. 198; aff'd (1908) 2 Ch. 441, in which the English court has held that as to paintings, the common-law copyright subsisted until publication, unlike printed books.

This rule of law as to common-law copyright is not limited in any way under the American authorities, to productions by American authors or painters. 7 Am. & Eng. Ency. of Law, 519; *Palmer* v. *De Witt*, 47 N. Y. 532; *Crowe* v. *Aiken*, 2 Biss. 208; *Keene* v. *Wheatly*, 14 Fed. Cas. 7,644; *Thomas* v. *Lennon*, 14 Fed. Rep. 849; *Tompkins* v. *Halleck*, 133 Massachusetts, 32; *French* v. *Maguire*, 55 How. Pr. 471; *Shook* v. *Daly*, 49 How. Pr. 366.

The convention with Germany referred to in the President's proclamation, specified in the complaint, requires a liberal construction in favor of the German assignee's rights.

The court's argument below that because colorable assign-

ments might be resorted to, the statute should be construed to deny copyright to works produced by citizens of countries outside the President's copyright proclamation, is untenable. *Carte* v. *Evans*, 27 Fed. Rep. 861; *Black* v. *Allen Co.*, 42 Fed. Rep. 618.

The direction of a verdict was not based, nor is it sustainable, on the theory that plaintiff, apart from the alienage question, had no copyrightable interest in the painting.

A transfer of common-law copyright in a painting entitles the transferee to take out a copyright, though he does not own the physical painting. This question was still doubtful when this case was tried below. *Am. Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 296–299; aff'g 146 Fed. Rep. 375.

An assignee of the American copyright rights is entitled in his own behalf to copyright the painting. Cases cited, *supra*, and *Goldmark* v. *Kreling*, 35 Fed. Rep. 651; *Merriam Co.* v. *United Dictionary Co.*, 146 Fed. Rep. 354; *Werckmeister* v. *Springer Co.*, 63 Fed. Rep. 808; *Palmer* v. *De Witt*, 47 N. Y. 541.

Such is the usual course with respect to transfer of American rights. Even if the copyright were held in part by him for the benefit of persons other than plaintiff, he would be entitled to take out the copyright in his own name. *Press Pub. Co.* v. *Folk*, 59 Fed. Rep. 324; *Lawrence* v. *Dana*, 15 Fed. Cas. 8,136; *Wooster* v. *Crane* 147 Fed. Rep. 515; *Goldmark* v. *Kreling*, 35 Fed. Rep. 661; 7 Am. & Eng. Ency. of Law, 2d ed., 545; *Mifflin* v. *White Co.*, 190 U. S. 260; *Ford* v. *Blaney Co.*, 148 Fed. Rep. 642; *Harper* v. *Donohue & Co.*, 144 Fed. Rep. 491, 494; *Osgood* v. *Felsenheld* (Imperial Court of Germany).

The construction placed by the State Department on § 13 of the act of March 3, 1891, is erroneous, and even Hernandez, as a subject of Peru, which country belongs to the Montevideo International Copyright Union, was entitled to a statutory copyright in his own right. *Morrill* v. *Jones*, 106 U. S. 466; *Campbell* v. *United States*, 107 U. S. 407, 410; *United States* v. *Dominci*, 78 Fed. Rep. 334; *Buttfield* v. *Stranahan*, 192 U. S. 470, 496; *Williamson* v. *United States*, 207 U. S. 425, 461.

Mr. George Ryall for defendant in error:

Hernandez, being a citizen and subject of Peru, could not have obtained a copyright in this country, and most assuredly he could not assign a right which never existed. *Werckmeister* v. *Springer Lith. Co.*, 63 Fed. Rep. 808; *Werckmeister* v. *Am. Lith. Co.*, 142 Fed. Rep. 827.

The Librarian of Congress has always construed our statute as denying to citizens of Peru copyright protection, and that the assignee of one who could not obtain a copyright could not obtain one; and it is respectfully submitted that this construction of the statute is most reasonable, well established, and entitled to great weight as a departmental construction. *United States* v. *Graham*, 110 U. S. 219; *United States* v. *Tanner*, 117 U. S. 661.

In answer to the first point on the brief of the plaintiff in error, the defendant calls attention again to the fact that the artist, Hernandez, when he assigned to the plaintiff Bong, had no assignable interest and that consequently the assignee Bong took nothing by the assignment. This position stands out clearly in *Werckmeister* v. *Pierce & Bushnell*, 63 Fed. Rep. 445–449.

Mr. Justice McKenna delivered the opinion of the court.

This is an action under the copyright statutes to recover penalties and forfeitures for the infringement of a copyright of a painting.

The complaint shows the following facts: Plaintiff in error (as he was plaintiff in the trial court we shall refer to him hereafter as plaintiff, and to defendant in error as defendant) was a citizen and subject of the German Empire and resident of the city of Berlin, that nation being one which permits to citizens of the United States the benefit of copyright on substantially the same basis as its own citizens. It is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may at its pleasure become a party, the existence of

which condition has been determined by the President of the United States by proclamation duly made. April 15, 1892, 27 Stat. 1021. The defendant is a New Jersey corporation doing business in New York under the laws of the latter State.

In 1899 one Daniel Hernandez painted and designed a painting called "Dolce far niente," he then being a citizen and subject of Spain, which nation permits the benefit of copyright to citizens of the United States on substantially the same basis as its own citizens, as has been determined by the proclamation of the President of the United States. July 10, 1895, 29 Stat. 871. Prior to November 8, 1902, plaintiff became the sole proprietor of said painting by due assignment pursuant to law. About said date plaintiff applied for a copyright, in conformity with the laws of the United States respecting copyrights, before the publication of the painting or any copy thereof. Plaintiff inscribed, and has kept inscribed, upon a visible portion of the painting the words "Copyright by Rich Bong," and also upon every copy thereof. By reason of the premises, it is alleged, plaintiff became and was entitled for the term of twenty-eight years to the sole liberty of printing, reprinting, publishing and vending the painting. A violation of the copyright by defendant is alleged by printing, exposing for sale and selling copies of the painting under the name of "Sunbeam," by Hernandez, and that defendant has in its possession over 1,000 copies. By reason of the premises, it is alleged, and under § 4965 of the Revised Statutes of the United States, as amended by the act of March 2, 1891, defendant has forfeited the plates on which the painting is copied and every sheet thereof copied or printed, and $10 for every copy of the same in its possession and by it sold or exposed for sale, not more, however, than $10,000, whereof one-half shall go to plaintiff and the other half to the United States. Judgment of forfeiture is prayed.

Defendant answered, admitting that it was a corporation as alleged, and was doing business in New York. It denied, either absolutely or upon information and belief, all other allegations.

The court directed a verdict for the defendant, counsel for the plaintiff having stated in his opening, as it is admitted, that he would offer no evidence to establish the citizenship of Hernandez, and would not controvert the statement made by the defense that he was a citizen of Peru (it was alleged in the complaint that he was a citizen of Spain), as to which country the President had issued no copyright proclamation. It is also admitted that plaintiff never owned the "physical painting." There was introduced in evidence a conveyance of the right to enter the painting for copyright protection in America and the exclusive right of reproduction in colors and of engraving, etching, lithography, in black and in colors. The right of photography and reproduction by all photographic monochrome processes was reserved.

The ruling of the District Court, and that of the Court of Appeals sustaining it, were based on the ground that Hernandez, being a citizen of Peru and not having the right of copyright in the United States, could convey no right to plaintiff. Plaintiff attacks this ruling and contends that the act of March 3, 1891, "confers copyright where the person applying for the same as proprietor or assign of the author or proprietor is a subject of a country with which we have copyright relations, whether the author be a subject of one of those countries or not."

Whatever strength there is in the contention must turn upon the words of the statute conferring the copyright. Section 4952 of the Revised Statutes, as amended by the act of March 3, 1891 (c. 565, 26 Stat. 1106, 1 Sup. Rev. St. 951), reads as follows:

"The author, inventor, designer or proprietor of any book, map, chart, . . . painting . . . and the executors, administrators and assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same," etc.

Other sections prescribe the proceedings to be taken to secure copyright, and § 13 provides as follows (26 Stat. 1110):

"That this act shall only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own citizens, or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may at its pleasure become a party to such agreement. The existence of either of the conditions aforesaid shall be determined by the President of the United States by proclamation made, from time to time, as the purposes of this act may require." 1 Sup. Rev. St. p. 954.

Plaintiff urges that he is "the 'assign' of the author and proprietor of the painting . . . and being himself a 'citizen or subject of a foreign nation' with which we have copyright relations," the condition of the statute is satisfied, and his copyright is valid, though Hernandez was not such citizen or subject. In other words, though the author of a painting has not the right to copyright, his assignee has if he is a citizen or subject of a foreign state with which we have copyright relations, these being, it is contended, the conditions expressed in § 13. Counsel's argument in support of this contention is able, but we are saved from a detailed consideration of it by the decision of this court in *American Tobacco Company* v. *Werckmeister*, 207 U. S. 284. In that case we said that "the purpose of the copyright law is not so much the protection and control of the visible thing, as to secure a monopoly, having a limited time, of the right to publish the production, which is the result of the inventor's thought." In considering who was entitled to such right under the statute we defined the word "assigns," as used in the statute. We said: "It seems clear that the word 'assigns' in this section is not used as descriptive of the character of the estate which the 'author, inventor, designer or proprietor' may acquire under the statutes, for the 'assigns' of any such person, as well as the persons themselves, may, 'upon complying with the provisions

of this chapter, have the sole liberty of printing, publishing and vending the same.' This would seem to demonstrate the intention of Congress to vest in 'assigns,' before copyright, the same privilege of subsequently acquiring complete statutory copyright as the original author, inventor, dealer or proprietor," and there was an explicit definition of the right transferred as follows: "While it is true that the property in copyright in this country is the creature of the statute, the nature and character of the property grows out of the recognition of the separate ownership of the right of copying from that which inheres in the mere physical control of the thing itself, and the statute must be read in the light of the intention of Congress to protect these intangible rights as a reward of the inventive genius that has produced the work." In other words, an assignee within the meaning of the statute is one who receives a transfer, not necessarily of the painting but of the right to multiply copies of it. And such right does not depend alone upon the statute, as contended by plaintiff, but is a right derived from the painter and secured by the statute to the assignee of the painter's right. Of this the opinion leaves no doubt, for it is further said: "We think every consideration of the nature of the property and the things to be accomplished support the conclusion that this statute means to give to the assignees of the *original owner of the right to copyright an article* [italics ours], the right to take out the copyright secured by the statute independently of the ownership of the article itself." The same idea was repeated when the court came to consider whether the exhibition of the painting, which was the subject-matter of the case, in the Royal Gallery, constituted a general publication which deprived the painter, as the owner of the copyright, of the benefit of the statutory provision. It was said: "Considering this feature of the case, it is well to remember that the property of the author or painter in his intellectual creation is absolute until he voluntarily parts with the same." And the painter had the right of copyright, he being a subject of Great Britain, that country having copyright relations with

the United States. His assignee, Werckmeister, was also a citizen of a country having copyright relations with us. But it was the right of the painter which was made prominent in the case and determined its decision.

It was not an abstract right the court passed on, one that arose simply from ownership of the painting. It was the right given by the statute, and which, when transferred, constituted the person to whom it was transferred an assignee under the statute and of the rights which the statute conferred on the assignor. "It is the physical thing created, or the right of printing, publishing, copying, etc., which is within the statutory protection." It is this right of multiplication of copies that is asserted in the case at bar, and it is not necessary to consider what right plaintiff might have had under the common law "before he sought his Federal copyright and published the painting." See *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1.

It is next contended that Hernandez, as a subject of Peru, was entitled to a statutory copyright in his own right, because, as it is further contended, Peru belongs to the Montevideo International Union. This contention is based on the words of § 13, *supra*, which gives the right of copyright to a citizen or subject of a foreign state or nation when such state or nation "is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such agreement." If this were all there were in the statute, the contention of the plaintiff might have some foundation. The statute, however, provides that the existence of such condition "shall be determined by the President of the United States by proclamation, made from time to time, as the purposes" of the "act may require." It is insisted, however, that this provision is directory and a right is conferred independent of the action of the President, his proclamation being only a convenient mode of proving the fact. We cannot concur in this view, nor do the cases cited by plain-

tiff sustain it. In *Morrill* v. *Jones*, 106 U. S. 466; *Campbell* v. *United States*, 107 U. S. 407; *Williamson* v. *United States*, 207 U. S. 425, this court decided that where the Secretary of the Treasury or Secretary of the Interior is authorized to make regulations in aid of the law, he cannot make regulations which defeat the law. In *Buttfield* v. *Stranahan*, 192 U. S. 470, a regulation of the Secretary of the Treasury fixed the primary standard of imported tea, and was sustained as an "executive duty to effectuate the legislative policy declared in the statute."

It is admitted that the decision of the State Department is adverse to the contention, and, it is asserted by defendant and not denied by plaintiff, that the Librarian of Congress has always construed the statutes as denying to citizens of Peru copyright protection. We think, besides, the statute is clear and makes the President's proclamation a condition of the right. And there was reason for it. The statute contemplated a reciprocity of rights, and what officer is better able to determine the conditions upon which they might depend than the President?

On the record, we think there was no error in directing a verdict on the opening statement of counsel. We agree, however, with plaintiff that it is better to let a case be developed by evidence. In *Hoffman House* v. *Foote*, 172 N. Y. 348, it was pertinently said: "The practice of disposing of cases upon the mere opening of counsel is generally a very unsafe method of deciding controversies where there is or was anything to decide."

Judgment affirmed.

KREIGH *v.* WESTINGHOUSE, CHURCH, KERR & COMPANY.

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

No. 188. Argued April 27, 28, 1909.—Decided May 24, 1909.

Where at the time of removal to the Federal court neither of the parties was a resident nor citizen of the district, that defect, although jurisdictional, being only as to the particular district, can be waived; and is waived, if, as in this case, the parties make up the issues on the merits without objecting to the jurisdiction. *Re Moore*, 209 U. S. 490; *Western Loan Co.* v. *Butte Co.*, 210 U. S. 368.

It is the duty of the master to use reasonable diligence in providing a safe place for his employés to work in and to carry on his business; and the employé may, in the absence of notice to the contrary, assume that the master will use reasonable care in furnishing appliances for carrying on the business. *Choctaw & Oklahoma R. R.* v. *McDade*, 191 U. S. 64.

The duty of the master to provide safe place and appliances for his employés is a continuing one and must be exercised whenever circumstances demand it, *Santa Fe & Pacific R. R.* v. *Holmes*, 202 U. S. 438; and this applies where the workmen are engaged in work more or less dangerous and it is only a matter of using due skill and care to make the place and appliances safe. *Choctaw & Oklahoma R. R.* v. *McDade*, 191 U. S. 64.

Where the negligence of the master in failing to provide and maintain a safe place contributes to the injury of the employé, the master is liable notwithstanding the concurring negligence of those performing the work. *Deserant* v. *Cerillos Coal R. R. Co.*, 178 U. S. 409.

Questions of negligence do not become questions of law except where all reasonable men must draw the same conclusion from the evidence, nor should a case be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts which the evidence tends to establish. *Gardner* v. *Michigan Cent. R. R.*, 150 U. S. 349.

In this case *held* that there was sufficient evidence as to the defective condition of a derrick and the method in which it was operated to

require the submission, under proper instructions from the court, to the jury.

152 Fed. Rep. 120, reversed.

THE facts are stated in the opinion.

Mr. James S. Botsford and *Mr. Rees Turpin* for petitioner:

The plaintiff's injury was the natural and probable consequence of an act of negligence and is therefore actionable because it could have been foreseen and reasonably anticipated and was the probable result of the act and omission of defendant. *B. & O. R. R. Co.* v. *Baugh*, 149 U. S. 368, 386.

It was plaintiff's duty to be where he was at the time of the accident, and he had a right to assume that the bucket was being moved by a lever or by guy and ropes, so as to control the movement of the bucket, and that warnings and signals of the movement of the bucket would be given. *L. & N. R. R. Co.* v. *Ward*, 61 Fed. Rep. 927; *Union Pac. R. R. Co.* v. *McDonald*, 152 U. S. 262; *Colusa-Parrot Mining & Smelting Co.* v. *Monahan*, 162 Fed. Rep. 276; *Lang* v. *Terry*, 163 Massachusetts, 138; *Newark Electric Light & Power Co.* v. *Garden*, 78 Fed. Rep. 74.

Not only was plaintiff ignorant of the defendant's failure to provide for his safety, but the law cast no obligation upon him to become familiar with it. *Swoboda* v. *Ward*, 40 Michigan 420; *Grace Hyde Co.* v. *Kennedy*, 99 Fed. Rep. 682.

The statement of the Circuit Court of Appeals as to the rule of safe place is correct as a general statement of the law, but does not lead to the result adjudged. The rule applicable to the present case is correctly laid down in *National Refining Co.* v. *Willis*, 143 Fed. Rep. 147; *Austin Manufacturing Co.* v. *Johnson*, 89 Fed. Rep. 677; 32 C. C. A. 309.

Where the servants engaged in a department of work themselves change the condition of the place where they are employed by the work they are doing and by that work create a peril by reason of which one of their number engaged in the same department of work is injured the master is not liable.

Armour v. *Hahn*, 111 U. S. 313. The reason of the rule is that the master should not be liable for an injury caused by the working place becoming unsafe at the particular time of the accident by causes that could not have been anticipated or by sudden exigencies created in carrying on the details of the work. *Grace Hyde Co.* v. *Kennedy*, 99 Fed. Rep. 679. When the plan or method of doing the work directed by the master or any omission of the master creates a danger not necessarily attendant upon the work in which the servant is engaged the master is liable for the results of that danger although it arises in the progress of the work. *Woods* v. *Lindvall*, 48 Fed. Rep. 62; *Thompson-Starrett Co.* v. *Fitzgerald*, 149 Fed. Rep. 721; *Grace Hyde Co.* v. *Kennedy*, 99 Fed. Rep. 679; *Western Electric Co.* v. *Hanselman*, 136 Fed. Rep. 564; *Felice* v. *New York Central & H. R. R. R. Co.*, 14 N. Y. App. Div. 345; *Lang* v. *Terry*, 163 Massachusetts, 138; *McCauley* v. *Norcross et al.*, 30 N. E. Rep. 464.

Mr. Clifford Histed, with whom *Mr. James H. Harkless* was on the brief, for respondent:

In so far as it is claimed that the injury to the plaintiff petitioner was brought about by the other workmen upon the building the doctrine of fellow-servant exempts defendant from liability. *Northern Pacific* v. *Dixon*, 194 U. S. 338; *Northern Pacific* v. *Peterson*, 162 U. S. 346; *B. & O. R. R.* v. *Brown*, 146 Fed. Rep. 24.

The charge of a defective and faulty construction of the derrick was not sustained by the proof. The same is true as to the alleged failure to furnish a system of signals.

Plaintiff's own negligence contributed to his injury. The case is a somewhat peculiar one in respect to the conduct of the plaintiff, who was an exceptionally intelligent and capable man. The derrick was in plain view of the plaintiff upon the roof and he fairly admits in his testimony that he knew that the men had rested the tub on the roof and, of course, he must have known that they would soon be sending it back. He ap-

parently became absorbed in the particular work in which he was engaged and entirely oblivious to his surroundings. He then went along the wall to a point directly in front of the derrick and in the path that the bucket must follow, turned his back upon the men and gave his entire attention to what the people below him were doing, utterly unmindful of his own situation. Of course it goes without saying that he owed a duty to pay reasonable heed to his situation. See *Ross* v. *Ry. Co.*, 113 Mo. App. 600; *National Biscuit Co.* v. *Nolan*, 138 Fed. Rep. 6.

MR. JUSTICE DAY delivered the opinion of the court.

This case is here upon a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. The action was originally brought to recover for injuries received by Eugene C. Kreigh, petitioner, hereinafter called the plaintiff, while engaged in the employ of the respondent, Westinghouse, Church, Kerr & Company, hereinafter called the defendant, superintending the construction of the brickwork in the erection of a brick and steel building for which the defendant was the contractor.

The case was originally commenced in the District Court of Wyandotte County, Kansas. On the application of the defendant it was removed to the United States Circuit Court for the District of Kansas. In the petition for the allowance of the writ of certiorari a question was made as to the jurisdiction of the Federal court, as it appears that at the time of the removal neither party was a resident nor citizen of the Federal district to which the case was removed, and neither of them a resident nor citizen of the State of Kansas. But it appears that no motion was made to remand for want of jurisdiction in the Federal court, and no question as to the jurisdiction was made until the case came here. In that state of the record the defect as to the jurisdiction being simply as to the district to which the suit was removed, the parties being citizens of different States, the

objection as to the jurisdiction might be, and, in our opinion, was waived, by making up the issues on the merits without objection as to the jurisdiction of the court. It is unnecessary to enlarge upon this feature of the case, as it is controlled by the recent cases of *In re Moore*, 209 U. S. 490; *Western Loan &c. Co.* v. *Butte Mining Co.*, 210 U. S. 368.

The remaining question in the case concerns the correctness of the ruling of the Circuit Court, affirmed in the Court of Appeals, whereby, upon the conclusion of the evidence offered by the plaintiff, a demurrer thereto was sustained and the case taken from the jury.

The testimony shows, and in deciding a question of this character the view must be taken of it most favorable to the plaintiff, that he was foreman of the bricklayers engaged in the construction of a large brick building, which the defendant, as principal contractor, was erecting in Kansas City. About the time of the plaintiff's injury a gang of workmen, also employés of the defendant, were engaged in cementing the roof of the building, the plaintiff and his men being engaged in laying the brickwork of the north wall of the building. The roofers were laying concrete upon the top of the roof. This was accomplished by means of a derrick with a rope and bucket attachment for raising the material, which was on the ground on the north side of the building, and which, by means of the derrick and motive power, was raised in the bucket suspended from the boom, or arm, of the derrick, to a height slightly above the roof, and then pulled inward by means of a guy rope attached to the boom, and when the bucket was at the proper place the bottom of it was opened and the concrete deposited upon the roof. Then, in order to put the bucket in position for lowering it, it was swung out over the north wall by means of an energetic push, carrying the end of the boom over the north wall and in position for lowering the bucket again. The work of brick-laying under the superintendence of the plaintiff had progressed to a height of about forty feet in the north wall, and the plaintiff, superintending the erection of a scaffolding for

the men to work upon in the further construction of the wall, was standing upon a plank near the wall, when the boom was swung outward by a push from the men operating it, and the plaintiff was struck by the heavy bucket attached to the rope from the end of the boom, and was knocked off the plank and fell a distance of forty feet to the ground and thereby severely injured.

The testimony shows that the derrick used for the purposes stated was what is known as a "stiff-legged derrick," having a main staff supported by two stiff legs or braces with a swinging boom with hoisting rope attached to it. The derrick at the time was on the top of the roof and was operated by an engine furnishing the power for hoisting the bucket in the manner we have already described.

The plaintiff introduced testimony tending to show that the usual method of constructing such derricks was to provide them with two ropes, one attached on either side of the end of the boom, to be used to haul it back and forth, and for the purpose of steadying its operation; or by the attachment of a lever to the mast in such a way that a man operating the lever could control the swing of the boom. The boom in use had but the one guy rope, and that the testimony shows was used for hauling the loaded bucket over the top of the wall to the place where the load was dumped on the roof. The method of returning the bucket for lowering was by a strong push of the boom, the single guy rope thereof hanging loose at the time.

The testimony of the plaintiff tended to show that while he knew there was a derrick on the roof, he did not know of its method of operation further than he knew that it was operated by hand. He did not know the number of ropes attached to the boom, or whether there was a lever or not; he had not seen the boom in operation from the roof. At the time he was struck, when working on the north wall, he received no warning of the approach of the bucket, and had been there but a very short time when he was struck by the bucket and knocked to the ground.

In the amended petition it was charged as grounds for recovery that—

"1. The defendants were careless and negligent in furnishing and operating a defective, improper and unsafe derrick to raise, move and lower said tub or bucket.

"(*a*) Said derrick was so constructed and operated that there were no means of moving the arm thereof and said bucket or tub after it was emptied, horizontally to or over the north wall of said building, excepting by the employés of the defendants violently pushing the tub or bucket with sufficient force to cause it to clear the wall of the building and also move with it said arm.

"(*b*) Said derrick was so constructed and operated that there were no means of stopping or controlling it or the tub or bucket attached thereto after the bucket or tub was emptied and started toward and over the wall of said building.

"(*c*) The ropes and pulleys on said derrick were defective, insecure and improperly arranged and used.

"2. The defendants were careless and negligent in causing and allowing said bucket to be violently pushed and swung against the plaintiff without notice or warning to him.

"3. The defendants were careless and negligent in failing to supply and use a system of signals or warnings to notify persons on the building when the derrick, tub or bucket were to be moved, raised or lowered."

The duty of the master to use reasonable diligence in providing a safe place for the men in his employ to work in and to carry on the business of the master for which they are engaged has been so frequently applied in this court, and is now so thoroughly settled, as to require but little reference to the cases in which the doctrine has been declared. *Baltimore & Potomac R. R. Co.* v. *Mackey*, 157 U. S. 72, 87; *Northern Pacific R. R. Co.* v. *O'Brien*, 161 U. S. 451; *Choctaw, Oklahoma &c. R. R. Co.* v. *McDade*, 191 U. S. 64.

The employé is not obliged to examine into the employer's methods of transacting his business, and he may assume, in

the absence of notice to the contrary, that reasonable care will be used in furnishing appliances necessary to carrying on the business. *Choctaw, Oklahoma &c. R. R. Co.* v. *McDade,* 191 U. S. 64, 68. But while this duty is imposed upon the master, and he cannot delegate it to another and escape liability on his part, nevertheless the master is not held responsible for injuries resulting from the place becoming unsafe through the negligence of the workmen in the manner of carrying on the work, where he, the master, has discharged his primary duty of providing a reasonably safe appliance and place for his employés to carry on the work, nor is he obliged to keep the place safe at every moment, so far as such safety depends on the due performance of the work by the servant and his fellow-workmen. *Armour* v. *Hahn,* 111 U. S. 313; *Perry* v. *Rogers,* 157 N. Y. 251.

Nevertheless, the duty of providing a reasonably safe place for the carrying on of the work is a continuing one, and is discharged only when the master furnishes and maintains a place of that character. As late as *Santa Fe & Pacific R. R. Co.* v. *Holmes,* 202 U. S. 438, it was declared: "The duty is a continuing one and must be exercised whenever circumstances demand it."

Where workmen are engaged in a business, more or less dangerous, it is the duty of the master to exercise reasonable care for the safety of all his employés, and not to expose them to the danger of being hurt or injured by the use of a dangerous appliance or unsafe place to work, where it is only a matter of using due skill and care to make the place and appliances safe. There is no reason why an employé should be exposed to dangers unnecessary to the proper operation of the business of his employer. *Choctaw, Oklahoma &c. R. R. Co.* v. *McDade,* 191 U. S. 64, 66, and cases there cited.

As we have said, this case was taken from the jury when only the plaintiff's evidence had been introduced, and when the plaintiff had the right to have it submitted to the jury in its most favorable aspect if it fairly tended to show liability on the

part of the master. The plaintiff's witnesses, experts in this field of operation, testified that the proper construction and management of such a derrick required that its boom should be rigged with two guy ropes instead of one, or that the mast should be provided with a lever by means of which the men in control could safely operate the boom. In that view we think it was a question for the jury to determine whether the operation of this derrick, which would swing the bucket into the field of operations where the plaintiff and others were constructing the wall and might be injured, unless the operations of the boom were properly controlled, was not attributable to faults of construction and equipment, as well as to negligent operation at the time of injury.

It is contended by the defendant that the boom could have been safely operated with one rope had the men used care in the operation thereof. But in view of the testimony referred to we think it was a question for the jury to determine whether the character of derrick furnished by the master discharged his obligation to furnish and maintain for the plaintiff and his associates a reasonably safe place in which to labor, and whether that kind of derrick was not of itself a dangerous instrumentality when operated where others were likely to labor in the course of their employment.

If the negligence of the master in failing to provide and maintain a safe place to work contributed to the injury received by the plaintiff the master would be liable, notwithstanding the concurring negligence of those performing the work. *Grand Trunk R. R. Co.* v. *Cummings*, 106 U. S. 700; *Deserant* v. *Cerrillos Coal Railroad Co.*, 178 U. S. 409, 420, and cases there cited.

It is further argued that the testimony shows that the injuries to the plaintiff were solely caused by the negligence of the men operating the derrick in giving it a sudden and strong push toward the north wall, where the plaintiff was standing when injured, and it is contended that the derrick could not have injured the plaintiff but for the negligent operation

thereof by the fellow-servants of the plaintiff using the same. But here again we think the question was one for the jury to determine.

Questions of negligence do not become questions of law to be decided by the court, except "where the facts are such that all reasonable men must draw the same conclusion from them, and the case is not to be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish." *Gardner* v. *Mich. Cent. Railroad*, 150 U. S. 349, 361.

It may be that the jury would have found that the injury to the plaintiff was the result solely of the negligence of his fellow-servants, but there was testimony in the case tending to establish the unsafe character of the derrick when operated in the manner it was intended to be operated, so far as the record discloses. Of course, so long as there were no workmen in the probable swing of the bucket attached by the rope to the boom, there was no danger to the bricklayers. But a jury might have found that when the bricklayers came within the plane of operation of the derrick the swinging bucket became a constant menace to them, and they might consider that, in view of the testimony adduced, the duty of the master had not been discharged in furnishing an appliance the operation of which might make unsafe the place in which the workmen were engaged in carrying on their work. The mere fact that until the workmen came within the plane of operation of the boom and swinging bucket, there was no danger to them, would not affect the case in view of the continuing duty of the master to use reasonable care to keep the place where the workmen were engaged free from dangers not necessarily incident to the business. In other words, we think that upon this branch of the case it was a question for the jury to determine whether the alleged defective appliances contributed directly to produce the injuries complained of.

But it is insisted that the testimony shows that the de-

fendant was guilty of such contributory negligence as should prevent any recovery. But we think there was enough in the case to take it to the jury upon this branch of it. The testimony shows that the plaintiff was engaged in the direct line of his duty at the time of his injury. Whether he had reason to expect the swinging of the bucket across the place where he was at work, without notice or warning to him, or whether he ought to expect that the bucket would swing where he was at work, and that his own safety required him to keep a constant lookout for the approach of the same, were questions for the jury to determine under proper instructions as to the care required of the plaintiff as well as of the defendant. *Lang* v. *Terry*, 163 Massachusetts, 138.

Upon the whole case, we are of opinion that as the testimony stood at the time the case was arrested from the jury, there was enough in it to require its submission, under proper instructions from the court, to the jury to determine the questions involved. In this view we think it was error to take the case from the jury and to instruct for the defendant in the Circuit Court, and that the Circuit Court of Appeals erred in affirming that judgment.

Judgment reversed and cause remanded to the Circuit Court with directions to grant a new trial.

Reversed.

SANTIAGO *v.* NOGUERAS.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 127. Submitted April 7, 1909.—Decided May 24, 1909.

By the ratifications of the treaty of peace of 1898 with Spain, Porto Rico ceased to be subject to that country and became subject to the legislative power of Congress; but, pending the action of Congress, and the necessary delay in establishing civil government, there was no interregnum, and the authority to govern the territory ceded by the treaty was, by the law applicable to conquest and cession, under the military control of the President as Commander-in-Chief. *Cross* v. *Harrison*, 16 How. 164.

The military authority in control of ceded conquered territory at the time of a treaty of peace continues, if not dissolved by the Commander-in-Chief, until legislatively changed; nor is there any presumption of a contrary intention from the inaction of the legislature. Whatever the cause of delay in legislation it must be presumed that the delay was consistent with the true policy of the Government. *Cross* v. *Harrison*, 16 How. 164.

The authority of a military government continued after treaty of peace ceding the conquered territory, though not unlimited, is of large extent, and includes the power to establish courts of justice. *Leitensdorfer* v. *Webb*, 20 How. 176.

The military government in Porto Rico at the time of the ratification of the treaty of peace continued until superseded by the organic act; and it had power to establish the United States Provisional Court, and that court had jurisdiction to render the judgment involved in this case.

Under the provision of the order establishing the Provisional Court of Porto Rico that it have jurisdiction of controversies between different states and of foreign states, it had jurisdiction of a controversy between a subject of Spain and a resident of Porto Rico.

The service of the summons in this case by delivering the same at defendant's usual place of abode into the hands of his wife being strictly in accord with the procedure established by the court, the court had jurisdiction to enter judgment by default.

Whether the court lost jurisdiction, after having properly obtained it, by disregarding rules of procedure is not open in a collateral attack. 2 Porto Rico, 467, affirmed.

THE facts are stated in the opinion.

Mr. Francis H. Dexter for plaintiffs in error:

Plaintiffs in error challenge the power of the Provisional Court and maintain that under the circumstances then existing, considering the institutions and laws of the United States and the condition of peace then prevailing, the President had no power to create such a court. The treaty of peace had been ratified and the courts of the Island were being conducted regularly and normally, in accordance with the local laws, which had been ratified and sanctioned by the military government. Magoon's Reports, p. 13.

Even if the military government had the power on June 27, 1899, to create courts for the trial of all kinds of cases, civil or criminal, in addition to, or substitution of, ordinary courts then in existence in the Island, General Orders, No. 88, Series of 1899, creating the Provisional Court, cannot be construed to sustain the jurisdiction of said court over the original cases against which relief is sought. By such order (although vague in its terms) the only construction to be reasonably made thereof is that with respect to civil cases the jurisdiction of the Provisional Court was limited to such jurisdiction as Circuit and District Courts of the United States at the time possessed under the Constitution and laws of the United States then in force.

The Provisional Court did not have jurisdiction of the cases complained of, because they were not such as a Circuit Court or District Court of the United States should have had jurisdiction over. In all of the cases complained of it appears that the plaintiff was a subject of the King of Spain and that the defendant was a citizen and resident of Porto Rico.

The proceedings in the Provisional Court were in complete disregard of and in opposition to the Code of Civil Procedure then in force, and that court had no power to make arbitrary

rules of procedure different from those provided for in the general law.

Mr. Charles Hartzell and *Mr. Manuel Rodriguez-Serra* for defendants in error:

The Provisional Court created by the military governor of Porto Rico was properly and legally established. See General Order 101, issued by the President of the United States, July 13, 1898; General Orders No. 1, issued by the commanding general of the American army in Porto Rico, October 18, 1898; The Organic Act for Porto Rico, §§ 8, 33; Glenn on International Law, p. 218; *New Orleans* v. *Steamship Co.*, 20 Wall. 387; *Downes* v. *Bidwell*, 182 U. S. 244.

The President of the United States, as the Commander-in-Chief and by virtue of his other attributes of authority, and as the representative of the will of the Government of the United States, was in supreme control of, and the authority over, the Island of Porto Rico from the time of the establishment of the military occupation in 1898, until the time when Congress, by means of the organic act, provided the first civil government for the Island. If this is not true, then where did the authority lie for governing the Island during that period of time? The treaty of peace concluded between the United States and Spain in December, 1898, and ratified and promulgated in April, 1899, made no provision for the temporary government of the Island pending the action of Congress in the premises, the only reference to judicial proceedings being contained in art. 18, the second paragraph of which provided that civil suits pending and undetermined at the date of the treaty shall be prosecuted to judgment before the court in which they may be pending or in the court that may be substituted therefor. This paragraph of the treaty demonstrates that it was even then contemplated that new courts might be substituted by the United States for the determination of actions which had already been brought and were then pending in the courts of Porto Rico.

No power or authority existed for the Government of Porto Rico after the American occupation, and prior to the passage of the organic act, except the military power, which had supreme authority in accordance with the authority which we have quoted, and that the direct recognition of the Provisional Court by the organic act, and the mandatory provision for the continuance of pending proceedings in the Provisional Court to be carried out by the United States District Court for Porto Rico, which was established by said organic act, must definitely determine the legal existence and validity of the acts of the Provisional Court within the scope of its jurisdiction as provided in the general order creating it.

Mr. Justice Moody delivered the opinion of the court.

The plaintiffs in error brought in the District Court of the United States for Porto Rico an action for the recovery of certain parcels of land held by the defendants in error. There was judgment for the defendants in the court below, and the case is here upon writ of error. We need pay attention only to such facts as will make clear the question which we think is decisive of the case.

One of the plaintiffs once owned the lands in dispute, but they were sold upon an execution issued upon a judgment rendered against him by the United States Provisional Court. The defendants, by mesne conveyances, hold the title conveyed by the execution sale. The plaintiffs attack that title solely upon the grounds that the United States Provisional Court had no lawful existence, and if lawfully constituted was entirely without jurisdiction to render the judgment which it did, and that for the one reason or the other the judgment is a nullity everywhere.

The ratifications of the treaty of peace by which Porto Rico was ceded to the United States were exchanged April 11, 1899. 30 Stat. 1754. The act of Congress establishing a civil government in Porto Rico, passed April 12, 1900, 31 Stat. 77, c. 191, took effect on May 1 of that year. Between these two dates,

on June 27, 1899, the United States Provisional Court, here in question, was established by military authority, with the approval of the President, by General Order, No. 88, series of 1899. The parts of the order material here follow:

"I. In view of the existing and steadily increasing legal business requiring judicial determination, which does not fall within the jurisdiction of the local insular courts, such as smuggling goods in evasion of revenue laws, larceny of United States property, controversies between citizens of different States and of foreign States, violation of the United States postal law, etc., etc., and pursuant to authority from the President of the United States, conveyed by endorsement of April 14, 1899, from the Acting Secretary of War, and after full conference with the Supreme Court and members of the Bar of the Island, a United States Provisional Court is hereby established for the Department of Porto Rico.

"II. The judicial power of the Provisional Court hereby established shall extend to all cases which would be properly cognizable by the Circuit or District Courts of the United States under the Constitution, and to all common law offenses within the restrictions hereinafter specified."

"X. In civil actions when the amount in controversy is fifty dollars ($50.00) or over, and in which any of the classes of persons above enumerated in paragraph VIII are parties, or in which the parties litigant by stipulation invoke its jurisdiction, shall be brought in the Provisional Court: Provided, That in the determination of all suits to which Porto Ricans are parties, or of suits arising from contracts which have been or shall be made under the provisions of Spanish or Porto Rican laws, the court shall, as far as practicable, conform to the precedents and decisions of the United States courts in similar cases which have been tried and determined in territory formerly acquired by the United States from Spain or Mexico. In all other civil actions the case shall lie within the jurisdiction of the proper insular court as now provided by local law."

By paragraph XI, the losing party is afforded an opportunity

to apply to this court for a "writ of certiorari or other suitable process to review such judgment or decree." At the time this order was issued peace prevailed in Porto Rico and the courts established under Spanish sovereignty were open.

The plaintiffs contend that the military power, acting by the authority of the President as Commander-in-Chief, does not warrant the creation of the United States Provisional Court.

By the ratifications of the treaty of peace, Porto Rico ceased to be subject to the crown of Spain and became subject to the legislative power of Congress. But the civil government of the United States cannot extend immediately and of its own force over conquered and ceded territory. Theoretically, Congress might prepare and enact a scheme of civil government to take effect immediately upon the cession, but, practically, there always have been delays and always will be. Time is required for a study of the situation and for the maturing and enacting of an adequate scheme of civil government. In the meantime, pending the action of Congress, there is no civil power under our system of government, not even that of the President as civil executive, which can take the place of the government which has ceased to exist by the cession. Is it possible that, under such circumstances, there must be an interregnum? We think clearly not. The authority to govern such ceded territory is found in the laws applicable to conquest and cession. That authority is the military power, under the control of the President as Commander-in-Chief. In the case of *Cross* v. *Harrison*, 16 How. 164, a situation of this kind was referred to in the opinion of the court, where it said: "It (the military authority) was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed.

No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the Government," pp. 193, 194. And see *Leitensdorfer* v. *Webb*, 20 How. 176, and opinion of Mr. Justice Gray in *Downes* v. *Bidwell*, 182 U. S. 244, 345.

The authority of a military government during the period between the cession and the action of Congress, like the authority of the same government before the cession, is of large, though it may not be of unlimited, extent. In fact, certain limits, not material here, were put upon it in *Dooley* v. *United States*, 182 U. S. 222, and *Lincoln* v. *United States*, 197 U. S. 419, though it was said in the *Dooley case*, p. 234: "We have no doubt, however, that, from the necessities of the case, the right to administer the government of Porto Rico continued in the military commander after the ratification of the treaty, and until further action by Congress," citing *Cross* v. *Harrison*, *supra*.

But whatever may be the limits of the military power, it certainly must include the authority to establish courts of justice, which are so essential a part of any government. So, it seems to have been thought in *Leitensdorfer* v. *Webb*, *supra*. With this thought in mind, the military power not only established this particular court in Porto Rico, but as well a system of courts, which took the place of the courts under Spanish sovereignty, and were continued by the organic act. The same course was pursued in the Philippine Islands.

By § 34 of the organic act (31 Stat. 77), a District Court of the United States for Porto Rico was created, and it was provided that the same "shall be the successor to the United States provisional court established by General Orders numbered Eighty-eight, promulgated by Brigadier General Davis, United States Volunteers, and shall take possession of all records of that Court, and take jurisdiction of all cases and proceedings pending therein, and said United States provisional court is hereby discontinued."

The record shows that in conformity with this provision the newly-created District Court of the United States for Porto Rico issued an execution upon this judgment of the United States Provisional Court, and the property was sold upon that execution.

A further contention of the plaintiffs is, that the United States Provisional Court was without jurisdiction, because the diversity of citizenship made requisite by the order did not exist. Assuming, without deciding, that this question is open at this time, we are of the opinion that the citizenship of the parties to the action in the United States Provisional Court was such as to give that court jurisdiction. The plaintiff there was a Spanish subject and the defendant a citizen and a resident of Porto Rico. Taking the second and the tenth paragraphs into consideration and the classes of persons enumerated in paragraph 8, which included "foreigners," there can be no doubt that the case was within the jurisdiction which the order sought to confer. In view of the whole order, we think that a controversy between a Porto Rican and a Spaniard furnished the diversity of citizenship which the order made jurisdictional. Undoubtedly, one of the main purposes of the establishment of this court was to afford a court where Spanish subjects could obtain justice against Porto Ricans at a time when it might be feared that the embers of the old disputes between Spaniards and Porto Ricans were still aflame.

The plaintiffs, one of whom was the defendant in the action before the United States Provisional Court, further suggest that defendant was not served with process and never appeared, and that the judgment rendered against him by default was a nullity. This point does not appear to be pressed and there is nothing in it. The service was in strict accordance with the procedure established by the court and by delivering a summons at the usual place of abode of the defendant into the hands of his wife.

The plaintiffs further contend that if the United States Provisional Court had jurisdiction of the case and the parties,

in some way it had lost it, because in the course of its proceedings it disregarded certain provisions of the Code of Civil Procedure which were binding upon it. But clearly no such question is open on a collateral attack, such at this is, and we need delay no further upon that point.

There were other questions in the case, which the view we have taken of it render it unnecessary to consider.

We are of the opinion that the judgment of the United States Provisional Court was not a nullity and that the sale on execution, under which the defendants claim, conveyed to them a good title. As the court below took the same view, its judgment is

Affirmed.

By agreement No. 128, Santiago *v.* Gonzalez y Rodriguez; No. 129, Santiago *v.* Moscoso; No. 130, Santiago *v.* Ana Semidey, widow of Antonio Costa, abide the result of this case, and corresponding judgments will be entered in them.

TUPIÑO *v.* LA COMPANIA GENERAL DE TABACOS DE FILIPINAS.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 148. Argued April 14, 15, 1909.—Decided May 24, 1909.

Distinct judgments in favor of or against distinct parties, though in the same record, cannot be joined to give this court jurisdiction.

While in case of joint entry and ouster, where the answer of all defendants takes issue without setting up separate claims to distinct parcels, and the judgment for recovery of possession is against all defendants jointly, the measure of appellate jurisdiction is the value of the whole land, *Friend* v. *Wise*, 111 U. S. 797, where there is no allegation of joint ownership or joint possession, and the controversy with each defendant relates to a separate and distinct parcel, and judgment is rendered separately, the measure as to each defendant is the value of his separate parcel. *Tupper* v. *Wise*, 110 U. S. 398. Nor does this court have jurisdiction in such a case if the judgment

were jointly against the defendants for damages where the total amount awarded is less than the jurisdictional amount.

Writ of error to review 2 Philippine, 142, dismissed.

THE facts are stated in the opinion.

Mr. John C. Gittings, with whom *Mr. William Steele Grey* and *Mr. Justin M. Chamberlain* were on the brief, for plaintiffs in error.

Mr. Aldis B. Browne, with whom *Mr. Alexander Britton, Mr. W. A. Kincaid* and *Mr. A. H. Blount* were on the brief, for defendant in error.

MR. JUSTICE MOODY delivered the opinion of the court.

The defendant in error brought this action for the recovery of certain lands, in the Court of First Instance of the Philippine Islands, against eighty-four persons, who are now the plaintiffs in error. The prayer of the complaint was for restoration of possession, for damages and an injunction against further disturbance of the plaintiff's right. The Court of First Instance rendered judgment for the plaintiff, awarding the relief prayed for, and the judgment was affirmed by the Supreme Court of the Philippine Islands. The case is now here upon writ of error, accompanied by a large number of assignments of error. The defendant in error has moved to dismiss the writ for lack of jurisdiction of this court to entertain it, and that motion must first receive consideration.

The jurisdiction of this court is rested by the plaintiffs in error solely upon the ground that the value of the real estate in controversy exceeds the sum of $25,000. Section 10 of act approved July 1, 1902, part 1, 32 Stat. 691, 695. The disposition of the motion to dismiss turns upon the question whether, within the true meaning of the statute, land of the value of $25,000 was in controversy. In the solution of this question it is useful to examine the pleadings, the course of the trial and the judgment.

The company alleged itself to be the owner of lands known as the Hacienda de San Luis y la Concepcion, having certain defined boundaries and an area of some four thousand hectareas. The complaint further alleged "that the defendants above named, for more than one and less than six years ago, illegally seized and continued to hold certain portions of the said property," having an "area of four hundred and forty-six hectareas, seventy-nine areas and four centiareas as to the fields, and four hectareas, approximately, as to the lots on which their houses and warehouses are built, distributed among distinct and separate parcels, but all within the perimeter of the said estate above described, and for a better understanding thereof the following statement is given of the parcels held by each one of the defendants." There then follows eighty-four separate descriptions of the separate holdings of each of the defendants. The case of Miguel Tupiño is agreed upon by the parties as typical of the others, and the allegation with respect to him is, "Miguel Tupiño has a lot of six areas with a dwelling and two warehouses thereon, and two fields, containing four hectareas and fifty areas and two hectareas and twenty-five areas, respectively." Then follows an allegation that "the plaintiff has been damaged in the sum of nine thousand Mexican pesos by reason of the unlawful detention above described," and the complaint closes with the prayer before stated.

Each of the defendants filed separate answers. The answer of Tupiño may be taken as a type. In it he denies the title of the plaintiff and that it suffered the damages alleged; denies, specifically, that the plaintiff had a record title to the portion of the land described as possessed by him; denies that that portion of the land was situated within the boundaries of the Hacienda de San Luis y la Concepcion; denies that the plaintiff is the owner of the portion of the land described as possessed by the defendant or any part thereof, or that the plaintiff has ever been entitled to the possession thereof; denies that the plaintiff has any interest in the portion of the land

described as possessed by the defendant or ever has had any; denies that the defendant has unlawfully withheld from the plaintiff the portion of land described as possessed by the defendant.

In the opinion of the Judge of the Court of First Instance he describes the defense in part as being "That each and every one of them (the defendants) is the owner of the parcel of land occupied by him, because it has been cultivated and possessed by some of them for more than ten years and by all of them for more than one year."

After the Supreme Court of the Philippine Islands had rendered its judgment the defendants made a motion for a rehearing, in which they complained that the court had overlooked an assignment of error in assessing damages jointly against all the defendants, and said, in this connection, "inasmuch as each of said defendants is alleged by plaintiff, and found by the trial court, to be occupying a distinct and separate parcel of land, with no privity or community of interest with his codefendants, and each of said defendants has filed a separate answer for such distinct parcel and maintained a separate defense."

It is very clear, although the plaintiff claimed under a single title all the land occupied separately by the various defendants, that the action itself was not against the defendants as joint disseisors, but was an action against each of them separately as the holder of a distinct parcel or parcels of land. There was no allegation, in either the complaint or the answer, of joint ownership or joint possession or joint action of any kind. The proceeding, in effect, consisted of eighty-four separate and distinct actions against the eighty-four defendants. The complaint alleged that each defendant was in possession of a separate and distinct parcel of land described separately, however inadequately. The answer of each defendant, while denying *in toto* the title of the plaintiff, in other respects related solely to the tract of land alleged to be unlawfully held by that particular defendant. Undoubtedly, where a complaint al-

leges a joint entry and ouster, and the answer takes issue, without setting up separate claims to distinct parcels by the several defendants, and the judgment for the recovery of possession is against all the defendants jointly, then the measure of appellate jurisdiction is the value of the whole land. *Friend* v. *Wise*, 111 U. S. 797. But where the pleadings show that there was no allegation of joint ownership or joint possession, and that the controversy with each defendant related to a separate and distinct lot of land, and the judgment is rendered separately against the defendants, then the measure of jurisdiction on appeal or writ of error is not the value of the whole land, but the value of each part separately. *Tupper* v. *Wise*, 110 U. S. 398, where it was said: "The rule is well settled that distinct judgments in favor of or against distinct parties, though in the same record, cannot be joined to give this court jurisdiction."

We think that the case at bar falls within the rule of *Tupper* v. *Wise*. It appears in point of fact that the value of the whole land, which the plaintiff sought to recover in separate parcels from the eighty-four defendants exceeds $25,000. But it also appears that the value of the land in controversy with any one of the defendants is far less than $25,000.

Stopping at this point, it would follow that the writ of error should be dismissed. But the form of the judgment in this case is peculiar and must receive consideration before the motion to dismiss is finally disposed of. The judgment of the Supreme Court of the Philippine Islands simply affirmed the judgment of the Court of First Instance. In that court, as there was no formal judgment, the terms of it must be gathered from the opinion of the Judge. The opinion concludes as follows:

"I decide; First, that the Compañia General de Tabacos de Filipinas shall be restored by the sheriff or by any of his deputies, to the possession of the hacienda San Luis y la Concepcion by giving possession thereof to D. Miguel Macias y Toro, or any other person lawfully representing the said com-

pany. . . . Third, that both the present defendants as well as those declared in default, be required to immediately vacate the said hacienda or be evicted therefrom, together with their houses and warehouses. Fourth, that the preliminary injunction issued on the 15th of November last, and modified on the third inst., be regarded as perpetual from this date, and the injunction bond of $10,000 given is to be cancelled after the proper legal formalities. The tobacco in the hands of the receiver will be delivered to the Compañia General, and the bond given by the receiver cancelled, after rendition by him of the accounts of his receivership. Fifth, and last, that the defendants present, and those in default, pay the costs and damages in the sum of nine thousand Mexican pesos; and finally, that the said defendants are enjoined absolutely from performing any act hereafter tending in the slightest degree to disturb the possession by the Compañia General of the lands comprised within the hacienda of San Luis y la Concepcion. So ordered."

If this language is to be taken as expressing the judgment of the court, it certainly has some tendency to show that the judgment for the restoration of the lands was a joint one against all the defendants. But we are not inclined to scrutinize too strictly the language of a learned Judge trained in another system of jurisprudence than our own, and in view of the separate issues clearly made by the pleadings and the prayer of the complaint that the plaintiff be restored "to the possession of the various parcels of the said estate above indicated, after the eviction or expulsion therefrom of all the defendants, including the houses and warehouses which they have erected thereon," we construe this judgment to run separately against each defendant for that part of the land of which he was alleged and found to be in possession. It was so treated by the Judge of the Supreme Court of the Philippine Islands, in refusing to allow a writ of error. The judgment for damages appears to be, so far as we can see, a joint judgment against all the defendants. But even the whole amount

of the damages, 9,000 Mexican pesos, added to the value of the land in controversy with any of the defendants, does not make a sum exceeding $25,000. We think, therefore, that the writ of error must be dismissed.

It may not be improper to say that if we had jurisdiction on this writ of error we should find grave difficulty in sustaining the joint judgment for damages against all the defendants, if, indeed, we have properly construed it to be joint. But we have no such jurisdiction, and therefore refrain from deciding that point. Doubtless, if there is anything in it, some way may be found, by application to the Supreme Court of the Philippine Islands, to correct the error, if any exists.

Writ of error dismissed.

WESTERN UNION TELEGRAPH COMPANY *v.* CHILES.

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

No. 168. Argued April 20, 1909.—Decided May 24, 1909.

Where plaintiff in error, defendant below, in a suit for penalty under a state law asks and the court refuses an instruction that if the jury find that the default occurred within a navy yard, over which the United States had exclusive jurisdiction, the recovery could not be had under the state law, this court has jurisdiction to review the judgment.

The Norfolk Navy Yard is one of the places over which, under Art. I, § 8, par. 17 of the Constitution, Congress possesses exclusive power of legislation, and that exclusive power necessarily includes exclusive jurisdiction; and it is of the highest importance that the jurisdiction of the State should be resisted at the border of such places. *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525.

The State cannot inflict a penalty for the non-delivery of a telegram within the limits of a place under the exclusive jurisdiction of the United States; and so *held* that under the statute of Virginia in that regard the penalty cannot be collected for the non-delivery of a tele-

gram to an addressee within the limits of the Norfolk Navy Yard. Congress alone can prescribe penalties in such a case.

107 Virginia, 60, reversed.

THE facts are stated in the opinion.

Mr Francis Raymond Stark, with whom *Mr. George H. Fearons*, *Mr. Robert M. Hughes* and *Mr. Rush Taggart* were on the brief, for plaintiff in error.

Mr W. D. Stoakley for defendant in error, by special leave.

MR. JUSTICE MOODY delivered the opinion of the court.

The defendant in error, a gunner in the Navy, was stationed on board the U. S. S. Abarenda, which was lying at the Norfolk Navy Yard. A telegram addressed to him aboard the ship was received for transmission at Richmond, Va., thence transmitted, so far as appears with due dispatch, to Portsmouth, Va., which adjoins the Norfolk Navy Yard, and is the place to which telegrams directed to the navy yard are commonly sent. The message was never received by the defendant in error. He brought this action in the Court of Hustings of the city of Portsmouth against the plaintiff in error, the telegraph company, to recover a penalty imposed by the laws of Virginia. The Virginia Code, 1904, pp. 696, 697, after providing for a penalty for failure duly to transmit a message, contains the following provision:

"(6) * * * * * * *

"It shall be the duty of every telegraph company, upon the arrival of a dispatch or message at the point to which it is to be transmitted, to cause the same to be forwarded by a messenger to the person to whom the same is addressed or his agent, and upon the payment of any charges due on this dispatch or message to deliver it; provided, such person or agent reside within the city or incorporated town in which such station is, or that at such point the regulations of the company require such delivery.

"It shall also be the duty of such company to forward a dispatch or message promptly, as directed, where the same is to be forwarded. For every failure to deliver or forward a dispatch or message as promptly as practicable the company shall forfeit one hundred dollars to the person sending a dispatch or message or the person to whom it was addressed."

The plaintiff's declaration contained two counts; the first for failure to transmit the telegram in conformity with the law of Virginia, and the second for failure to deliver it in accordance with the part of the law just quoted. As there was no proof in support of the first count, and it was apparently not submitted to the jury at the trial, it may pass out of view.

The second count, after alleging the receipt of the message at the point of origin, and its transmission, and receipt at the office at Portsmouth, avers that it was the duty of the telegraph company to deliver it to the plaintiff on the U. S. S. Abarenda at the navy yard as promptly as practicable, and that the defendant failed to perform its duty in that regard, wherefore it became indebted to the plaintiff for the amount of the statutory penalty. There was a demurrer to the declaration, and one of the reasons alleged was "that the place at which the message was to be delivered was on board a Government vessel, at a yard which is under the jurisdiction and control of the United States, and neither the State nor this honorable court has jurisdiction to impose any penalty for failure to deliver a message at such place." The demurrer was overruled, and the case was tried before a jury. There was testimony in behalf of the defendant that seasonably after the message was received at Portsmouth it was entrusted to a messenger boy for delivery to the plaintiff on board the ship; that it was taken to the gangway of the ship, and there, in accordance with the practice in such cases, delivered to the man on duty at that place, who receipted for it. With the weight of this testimony we have no concern. It also appeared that the message never reached the plaintiff. The defendant requested the presiding Judge to instruct the jury, in substance,

that if the default in delivery occurred within the limits of the territory of the Norfolk Navy Yard, plaintiff could not recover by virtue of the Virginia law, which had no authority within those limits. The court declined, under exception, to give this instruction, and the jury returned a verdict for the plaintiff for the amount of the penalty. There was judgment for the plaintiff, which, upon writ of error duly raising the questions which have been stated, was affirmed by the Supreme Court of Appeals of the State. Thereupon a writ of error from this court was allowed.

Part of the land composing the Norfolk Navy Yard, formerly known as the Gosport Navy Yard, was once owned by the State of Virginia. Title to the remainder of it was acquired by the United States by purchase from the owners. Title to the land owned by the State was acquired by the United States under the provisions of an act of Assembly, passed January 25, 1800, which authorized the Governor of the Commonwealth to convey by deed the title to the State land and "all the jurisdiction which this Commonwealth possesses over the public lands commonly called and known by the name of Gosport," reserving only the right of the officers of the State to execute process within the jurisdiction authorized to be ceded. The files of the Department of the Navy contain a deed of Governor James Monroe, dated June 15, 1801, executing in precise conformity with the act the authority which it conferred. The United States had purchased from the owners other land for the purpose of extending the navy yard. That purchase was recognized by the State of Virginia by an act of Assembly, passed February 27, 1833, and the Governor of the Commonwealth was authorized to cede the same jurisdiction, with the same reservation. The files of the Department of the Navy contain also a deed by Governor Littleton W. Tazewell, dated April 1, 1835, fully executing the provisions of the last-named act.

The case does not call for the consideration of the effect of a contract made within the State of Virginia for the seasonable

transmission and delivery of a telegram. The record presents the single question, whether a law of the State of Virginia imposing a penalty has any effect or operation within the limits of the navy yard. This question, if not fully raised by the demurrer, was distinctly raised by the request for instructions, which was refused. On one aspect of the evidence it might have been found that the only default of the defendant was entirely within the limits of the navy yard, and the defendant was entitled to an appropriate instruction on the issue thus raised. By the refusal to give the instruction requested the jury in effect was permitted to find for the plaintiff, even if the default was entirely within the navy yard. We think this was clearly erroneous. By the terms of the Constitution, Congress is given the power "to exercise exclusive legislation in all cases whatsoever . . . over all places, purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings." Article I, § 8, par. 17, of the Constitution.

It is apparent from the history of the establishment of the Norfolk Navy Yard, already given, that it is one of the places where the Congress possesses exclusive legislative power. It follows that the laws of the State of Virginia, with the exception referred to in the acts of Assembly, cannot be allowed any operation or effect within the limits of the yard. The exclusive power of legislation necessarily includes the exclusive jurisdiction. The subject is so fully discussed by Mr. Justice Field, delivering the opinion of the court in *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525, that we need do no more than refer to that case and the cases cited in the opinion. It is of the highest public importance that the jurisdiction of the State should be resisted at the borders of those places where the power of exclusive legislation is vested in the Congress by the Constitution. Congress already, with the design that the places under the exclusive jurisdiction of the United States shall not be freed from the restraints of the law, has enacted for them

(Revised Statutes, LXX, chapter 3) an extensive criminal code ending with the provision (§ 5391) that where an offense is not specially provided for by any law of the United States, it shall be prosecuted in the courts of the United States and receive the same punishment prescribed by the laws of the State in which the place is situated for like offenses committed within its jurisdiction. We do not mean to suggest that the statute before us creates a crime in the technical sense. If it is desirable that penalties should be inflicted for a default in the delivery of a telegram occurring within the jurisdiction of the United States, Congress only has the power to establish them.

Judgment reversed.

BRYANT, TRUSTEE OF NEWTON & CO., BANKRUPTS, *v.* SWOFFORD BROS. DRY GOODS CO.

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

No. 172. Argued April 22, 23, 1909.—Decided May 24, 1909.

In this case, *held*, that the sale of a stock of dry goods under a contract by which the articles sold remained the property of the vendor until paid for, with provision for substitution of other goods and that proceeds of goods sold also belonged to the vendor, was a conditional sale.

The validity of conditional sales depends upon the law of the State where made, and in bankruptcy the construction and validity of such a contract must be determined by the local law of the State, *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344, and the contract in this case as tested by the law of Arkansas is a conditional sale and is valid without record.

The trustee has no higher rights in regard to property sold to the bankrupt under conditional sale than the bankrupt had, and in this case *held* that the vendor was entitled to the goods unsold and the identified proceeds of those which had been sold.

Where the vendor of goods, sold to the bankrupt under conditional

sale, has taken possession, before the receiver is appointed, of the unsold goods and proceeds of those sold, but surrenders the same to the receiver under an arrangement approved by the referee, providing for the administration of the estate by the receiver, and that the ultimate disposition of the goods and proceeds surrendered shall be determined by the court, the trustee subsequently appointed is bound by the agreement and cannot question whether any of the property surrendered thereunder passed under the conditional sale.

THE record in this appeal, transmitted to this court from the Circuit Court of Appeals, contains the following findings of fact and conclusions of law:

"1. On July 20, 1904, Ernest M. Newton and John F. Newton, partners as E. M. Newton & Co., merchants at wholesale and retail in Arkansas, and Swofford Bros. Dry Goods Co., a corporation, of Kansas City, Missouri, engaged in the wholesale dry goods business, entered into a written contract as follows:

" 'Know all men by these presents: That Mr. E. M. Newton & Co., of New Lewisville, Lafayette County, Arkansas, a copartnership composed of E. M. Newton and J. F. Newton, party of the first part, has this day purchased from Swofford Bros. Dry Goods Co. and said Swofford Bros. Dry Goods Co., party of the second part, has sold to said E. M. Newton & Co. certain goods upon the following expressed conditions:

" '1. Said goods shall be selected by said first party from sample or from stock of said second party at Kansas City, Missouri, and same shall be shipped to said first party upon their request to New Lewisville, Arkansas, from which place they shall not be removed without the written consent of said second party, save and except that said first party shall have the right to sell said goods in the ordinary course of business, but not otherwise.

" '2. Said second party shall prepare at time of shipment full and complete invoices of the goods so sold and selected and shall deliver copies of said invoices by mail or otherwise to said first party. Such invoices shall consist of itemized list of the

articles so sold and shipped with the price and value of each article, and shall show also the credit terms upon which the same are sold and the rate of discount, if any, which is to be allowed upon payment of the purchase price in cash upon delivery or at an earlier date than that specified in said credit terms.

" '3. The title to and right to immediate possession of all the goods so sold and shipped by said Swofford Bros. Dry Goods Co. and of the proceeds derived from the sale of the same by the first party, whether in cash or note or book account, shall be vested and remain in said Swofford Bros. Dry Goods Co. until the full purchase price and the agreed value of the same shall be paid by said E. M. Newton & Co. to said Swofford Bros. Dry Goods Co. in cash; and any and all notes, checks and accepted drafts shall not be considered as payment, but merely as evidence of indebtedness. And upon taking possession of any notes and book accounts derived by said first party from the sale of said goods or any part thereof, said Swofford Bros. Dry Goods Co. shall have the right to collect the same either in its name or in the name of E. M. Newton & Co. by suit or otherwise and in case of disputed notes and accounts against persons of doubtful solvency, said second party may compromise and settle the same or may extend the time of payment thereof in such manner and upon such terms as may to it seem advantageous, and any new notes taken thereafter, whether in the name of Mr. E. M. Newton & Co., or in the name of said Swofford Bros. Dry Goods Co., shall be held and considered in all respects the same as the original evidence of indebtedness.

" '4. This contract and the terms thereof shall apply to all future orders given by the E. M. Newton & Co., and to all future sales and shipments made to them by said Swofford Bros. Dry Goods Co., so long as any part or portion of the purchase price of the goods sold and delivered hereunder shall remain unpaid, said Swofford Bros. Dry Goods Co. shall have the right to terminate this contract at any time, and said E. M. Newton & Co. may terminate the same at any time by paying

in full in cash whatever balance of the purchase price of the goods purchased and shipped shall then remain unpaid. Delivery of the goods properly packed and marked to a common carrier at Kansas City, Mo., consigned to the first party as above specified shall be deemed and considered a full and complete delivery thereof by said second party and all freight and transportation charges shall be paid by said consignees. The acceptance of goods subsequently sold and shipped by the first party and the placing of the same in their stores and warehouses at New Lewisville, Ark., or elsewhere, shall be held and considered sufficient to bring such goods within and under the terms hereof, shall be mentioned or referred to in the order so given or in the invoices given and delivered with each invoice.

" 'Said first party shall keep all goods purchased hereunder properly insured at their expense for the benefit of second party; but the loss or destruction of such goods by fire or otherwise shall not cancel the indebtedness thereof, but said first party shall still remain liable to second party for any part of the purchase price remaining unpaid.

" 'In witness whereof the parties above named have hereunto placed their hands and seals in duplicate this 20th day of July, 1905.

" 'E. M. NEWTON & CO.,

" 'SWOFFORD BROS. DRY GOODS CO.,

" 'Signed by WM. MOORE, *Sec.*'

" 2. The contract was not filed or recorded.

" 3. Pursuant to the contract and prior to June 30, 1905, the Dry Goods Company delivered to the Newtons goods of the value of $15,369.57. The latter paid on account thereof the sum of $2,059.01. On June 30, 1905, the unpaid balance was $13,310.56.

" 4. The goods delivered under the contract were placed by the Newtons in their stock with other goods obtained from other parties, but they were of such character and contained such marks as rendered them capable of being identified and

separated. It was contemplated by the parties that the Newtons might sell the goods so delivered in the usual course of their business. The Newtons did not keep separate accounts of their resales of the goods nor did the Dry Goods Company require them to make reports thereof.

"5. On June 30, 1905, when the Newtons were insolvent and the Dry Goods Company knew it, they surrendered to the Dry Goods Company as belonging to it under the provisions of the contract, goods of the value of $5,337.21; notes to the amount of $1,684.32, and customers' accounts to the amount of $8,277.04. The goods were so surrendered by the Newtons as being the unsold part of those delivered under the contract, and the notes and accounts as representing proceeds of their sales of like goods. Actual possession was taken by the Dry Goods Company.

"6. In fact the goods surrendered to the Dry Goods Company were, with slight exception, goods that had been delivered under the contract, but only about one-half in amount of the notes and accounts surrendered represented proceeds of other goods delivered under the contract.

"7. On July 3, 1905, three days after the surrender of the property as above mentioned, the Newtons filed their voluntary petition in bankruptcy, were adjudged bankrupts, and Thad. A. Bryant was appointed receiver. In one of the schedules attached to the verified petition in bankruptcy the Dry Goods Company was listed as a secured creditor, with a statement of the facts upon which its rights were based, and recitals of the surrender to it of the goods, notes and accounts, that the notes and accounts were proceeds of the goods furnished by the Dry Goods Company under the contract and resold by the Newtons to their customers, and that the goods, notes and accounts were then in the possession of that company.

"8. After the appointment of the receiver in the bankruptcy proceeding he demanded from the Dry Goods Company possession of the goods, notes and accounts mentioned. The

demand was refused, but afterwards the Dry Goods Company surrendered them to the receiver under a written stipulation that they might be disposed of by him in connection with the sale of the other property in his hands, but that the Dry Goods Company should not be prejudiced thereby, and that the proceeds should be held in lieu of the property so surrendered to abide the final determination of a court of competent jurisdiction as to the ownership thereof, and if the Dry Goods Company prevailed it should have the proceeds free of fees, charges and expenses. As one of the conditions upon which it was made it was expressly admitted in this stipulation that the goods, notes and accounts in controversy were then in the actual, exclusive and adverse possession of the Dry Goods Company, that the goods were part of those delivered to the Newtons under the contract of July 20, 1904, and that the notes and accounts were proceeds of other goods delivered under that contract. This stipulation was made subject to the approval of the referee in bankruptcy. It was executed by the Dry Goods Company and the receiver, and the referee duly endorsed his approval thereon. Upon the faith thereof the goods, notes and accounts were then surrendered to the receiver. No fraud or deception was practiced by the Dry Goods Company upon the referee or the receiver in connection with the making of this stipulation.

"9. Thad. A. Bryant who had been appointed receiver was duly selected as trustee. He sold the goods in controversy for $3,135.00. The notes and accounts were not sold but at the time of the hearing of this matter before the referee he had collected $2,250.00 on account thereof and still retained in his hands those that were uncollected. He has kept a separate account of these funds and held sufficient funds to answer the result of the litigation.

"10. The Dry Goods Company thereupon presented its intervening petition seeking the payment to it of the sums realized as mentioned in the preceding finding and the restitution to it of the uncollected notes and accounts. The controversy

in the cause was presented by the intervening petition, the trustee's answer thereto and the reply of the Dry Goods Company.

"*Conclusions of Law.*

"1. The contract of July 20, 1904, is a contract of conditional sale and not of mortgage, and as such was not required by the laws of Arkansas to be filed or recorded.

"2. Under the laws of Arkansas the contract was valid as between the parties thereto, notwithstanding the fact that it authorized the vendees to resell the goods delivered thereunder.

"3. It was also valid as between the parties thereto not only in respect of such of the goods delivered thereunder as remained unsold when the vendor demanded and secured possession from the vendees, but also in respect of the notes and accounts which represented proceeds of like goods resold by the vendee to their customers and which could be so identified and segregated.

"4. The contract being valid under the local law as between the parties thereto the trustee in bankruptcy of the vendee cannot avoid or defeat the title of the vendor who took possession prior to the institution of the proceedings in which the vendees were adjudged to be bankrupts. The trustee has no greater right or title than the bankrupts.

"5. Inasmuch as the bankruptcy court obtained from the vendor possession of the notes and accounts in controversy upon the faith of a stipulation made with its approval and without practice of fraud or deceit that such notes and accounts were the proceeds of goods covered by the contract of conditional sale, and still holds to such possession, the trustee is estopped from disputing the fact stipulated.

"6. Swofford Bros. Dry Goods Company, the vendor, is entitled to a decree that the trustee in bankruptcy pay to it the sum of $3,135.00, the proceeds of the goods in controversy, and the further sum of $2,250.00, the collections of notes and accounts in controversy made by the trustee prior to the hearing

before the referee, and also for such collections as may have been made since that time and for the surrender of such of said notes and accounts as may remain uncollected and for costs. The sums mentioned should be paid in full."

Mr. William H. Arnold, with whom *Mr. James K. Jones* was on the brief, for appellant:

The receiver did not have authority to make the admission, so that it might not be questioned by the trustee, contained in the agreement of July 4, 1905, that the notes and accounts turned over to the intervenor were proceeds of sales of goods purchased from Swofford Bros. Dry Goods Co.

While the receiver undoubtedly had the right and it was his duty to take charge of the bankrupt estate, he did not have authority, under the statute creating his office, to enter into any kind of an agreement which would in any manner affect, or give over to, a claimant the property of the bankrupt estate. The trustee is primarily the representative of the creditors and not the receiver. The receiver is non-partisan and he acts as an agent for the court in protecting the property against loss. *Booth* v. *Clark,* 17 How. 322.

By § 70 of the Bankrupt Act the title of the bankrupt's property is vested in the trustee. If the title of Newton & Company to these notes, accounts and goods, to which the intervenor could not make claim, vested in the trustee, then it would seem that the receiver would be without power to make any contract whereby that title could be divested. In this case the stipulation, however, has been sustained by the Honorable Circuit Court of Appeals, and the direct effect of it was to divest the title of property from the trustee which it was intended by the Bankrupt Act should pass to him.

But the trustee has not in himself the right of unlimited disposition of the property of the bankrupt. He cannot compromise or arbitrate a controversy, except in a certain way prescribed by the statute and by the general orders in bankruptcy. Certainly the receiver, who has not as much power

as the trustee, should not, therefore, be allowed to make contracts or deals without any restriction whatever, whereby the property which belongs to the creditors would be wasted or given away. *Wallace* v. *Loomis*, 97 U. S. 146; *Ray* v. *Norsworthy*, 23 Wall. 128; *White* v. *Schloerb*, 178 U. S. 542.

The contract of July 20, 1904, was a mortgage or secret lien which was fraudulent as to creditors of Newton & Company. *Herryford* v. *Davis*, 102 U. S. 235.

There are a number of decisions of the Supreme Court of Arkansas sustaining contracts wherein it is stipulated that the title of the property is to remain in the vendor until the price is paid, but these decisions are with reference to such things as machinery, farming implements, live stock, and where it is not agreed that the property shall be resold. *Gibson* v. *Martin*, 38 Arkansas, 207; *McIntosh & Beam* v. *Hill*, 47 Arkansas, 363; *Carroll* v. *Wiggins*, 30 Arkansas, 402; *Simpson* v. *Shackerford*, 49 Arkansas, 63; *McRea* v. *Merrifield*, 48 Arkansas, 160; *Cincinnati Safe Co.* v. *Kelly*, 54 Arkansas, 476; *Edgewood Distilling Co.* v. *Shannon*, 60 Arkansas, 133; *Dedman* v. *Earle*, 52 Arkansas, 164; *Ferguson* v. *Hetherington*, 39 Arkansas, 438; *Ames Iron Works* v. *Rea*, 56 Arkansas, 450; *Morris* v. *Cohn*, 55 Arkansas, 401; *Bank of Little Rock* v. *Collins*, 66 Arkansas, 240; *Faisst* v. *Waldo*, 57 Arkansas, 270.

The doctrine of these cases follow the decisions of the Supreme Court of the United States. *Sturm* v. *Boker*, 150 U. S. 312.

There is an obvious difference in reserving the title to implements, wagons, grist-mills, tools, etc., under such contracts, and gents' furnishing goods or general merchandise, where there can be no question of the identity of the wagons, machinery, etc., but there would always be a question with reference to the identity of general merchandise. The very nature of the goods themselves, added to the power of disposition as in the case at bar, without being required to keep them separate from other goods or the proceeds separate from the general stock, ought to bar a recovery in this case.

This difference is recognized by the Supreme Court of Arkansas. *Lund* v. *Fletcher*, 39 Arkansas, 334. See also *Robinson* v. *Elliott*, 2 Wall. 513; *Means* v. *Dowd*, 128 U. S. 273; *Blennerhassett* v. *Sherman*, 105 U. S. 100.

The decisions of the Supreme Court of Arkansas, under practically the same conditions as in the case at bar, show that the intervenors' contract is fraudulent in law and cannot be sustained. *Lund* v. *Fletcher*, 39 Arkansas, 335; *Martin* v. *Ogden*, 41 Arkansas, 192; *Fink* v. *Ehrman Bros.*, 44 Arkansas, 310.

The case of *Triplett* v. *Mansur & Tebbetts Implement Co.*, 68 Arkansas, 230, cited in opinion of Circuit Court of Appeals, has no application to this controversy.

Mr. Ernest S. Ellis, with whom *Mr. Edgar C. Ellis* was on the brief, for appellee:

The stipulation entered into between the Swoffords and the receiver, under the supervision and with the approval of the referee, by virtue of which the Swoffords surrendered possession of the property in controversy to the court, and under which it was later sold by the trustee who now holds the proceeds, is valid and binding on the parties to this action, and cannot be repudiated nor ignored by the trustee. The acceptance and retention of benefits thereunder by the trustee operates as a ratification of same on his part, and as a waiver of any lack of authority or irregularities in its execution. *Bryan* v. *Bernheimer*, 181 U. S. 188.

Under said stipulation the facts as to whether all of the goods returned by the Newtons to the Swoffords were actually bought from them, and as to whether the notes and accounts assigned by the Newtons to the Swoffords represented exclusively proceeds derived from a sale of their goods, has been settled and agreed upon, and are not questions to be litigated in this action. Judgment in relation thereto must, therefore, be made upon the basis of said stipulation.

The written instrument of July 20, 1904, executed by the

Swoffords and the Newtons, and under which the property in controversy was sold by the Swoffords and later returned to it by the Newtons, is a contract of conditional sale; and there is no law in Arkansas which either requires or permits it to be filed or recorded. It is valid between the parties, and valid, also, against the trustee in bankruptcy, who stands merely in the shoes of the bankrupts, and is in no sense a creditor armed with process, a subsequent mortgagee or a purchaser in good faith. *Triplett* v. *Mansur & Tebbetts Impt. Co.*, 68 Arkansas, 230 (57 S. W. Rep. 261), and cases cited.

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

The merchandise which was delivered by Swofford Bros. Dry Goods Co. to E. M. Newton & Co. was delivered under the terms of a written contract. That contract provided that the title to the goods until their sale, and to the proceeds derived from their sale, whether in the form of cash, notes or book accounts, should be and remain in the Dry Goods Company. The contract gave the Newtons the right to sell the goods in the ordinary course of business, but, as has been said, provided that the proceeds of the sale, in whatever form they existed, should be the property of the Dry Goods Company. When the Newtons became insolvent and ceased business they, in recognition of the obligations due from them under this contract, returned to the Dry Goods Company that part of their goods which remained unsold. The character and marks of the goods rendered them capable of being identified and separated. They turned over at the same time, as and for the notes and accounts representing the proceeds of sales of the company's goods, certain notes and customers' accounts. It was found as a fact that one-half in amount of these notes and accounts represented the proceeds of sales of other goods than those delivered under the contract. It, therefore, now appears, if it is competent to show it, that this one-half of the

notes and accounts did not belong to the Dry Goods Company, and ought not to have been turned over to it, and that, on the contrary, they should have gone into the estate of the Newtons, who subsequently became bankrupt. Three days after the surrender of this property the Newtons, on their voluntary petition, were adjudged bankrupts and the appellant was appointed receiver. He demanded of the Dry Goods Company the possession of the goods, notes and accounts mentioned, but the demand was refused. Subsequently a written contract was entered into between the Dry Goods Company and the receiver, with the approval of the referee. No fraud or deceit induced the making of this contract. By its terms the Dry Goods Company, on its part, surrendered the goods, notes and accounts to the receiver, and agreed that he might dispose of them in connection with the assets of the estate, and that the proceeds of the property thus disposed of should be held in lieu of it to abide the determination of a court of competent jurisdiction. The receiver, on the other hand, agreed that the goods, notes and accounts were in the actual and adverse possession of the Dry Goods Company, and that the goods were part of those delivered to the Newtons under the contract between them and the Dry Goods Company before referred to, and that the notes and accounts were the proceeds of other goods delivered under that contract. Subsequently, the receiver was appointed trustee and sold the goods and collected a part of the notes and accounts. The proceeds of the goods, and of the collections are held to await the result of this litigation, which is in the form of an intervening petition of the Dry Goods Company.

We think it clear that the contract under which the goods were delivered to the Newtons was one of conditional sale. *Harkness* v. *Russell*, 118 U. S. 663; *Wm. W. Bierce, Ltd.*, v. *Hutchins*, 205 U. S. 340. There is nothing in the nature of this contract which would forbid the parties from entering into it if it is valid by the laws of the State where made, but in bankruptcy the construction and validity of such a contract must be

determined by the local laws of the State. *Thompson* v. *Fairbanks*, 196 U. S. 516; *Humphrey* v. *Tatman*, 198 U. S. 91; *York Manufacturing Company* v. *Cassell*, 201 U. S. 344. That such a contract is a conditional sale and is valid without record is the law of Arkansas. *Triplett* v. *Mansur & Tebbetts Implement Co.*, 68 Arkansas, 230. The trustee has no higher rights in this regard than the bankrupt. *York Manufacturing Co.* v. *Cassell*, *supra*.

It follows that, so far as the identified goods and notes and accounts are concerned, the intervenor, the Dry Goods Company, must prevail.

It has turned out, according to the finding of facts, that some small fraction of the goods and about one-half of the notes and accounts which were delivered by the Newtons to the Dry Goods Company, as and for the goods, notes and accounts which were the property of that company, were not in fact such, and the question therefore arises whether, under the circumstances disclosed in the findings, the trustee is entitled to avail himself of these facts. We think it was rightly held by the court below that he was not. There seems to be no reason for a nice consideration of the powers of receivers and trustees. When the receiver was appointed he found all the property in dispute in the hands of the Dry Goods Company, to which it had been delivered by the Newtons, as and for the property of the company, and by which it had been received as its own property. When the receiver made his demand for it the return was at first refused. The parties in the controversy, then being at arm's length, agreed that if the Dry Goods Company would give up the advantages of possession and instead of converting the goods, notes and accounts into cash in its own way and on its own account, permit the receiver to do so, then those goods should be deemed part of those delivered under the contract and the notes and accounts the proceeds of other goods delivered under the contract. This arrangement was approved by the referee. The trustee has taken the property under it and has never offered to return the property, or

any part of it. The property has in large part been sold or otherwise disposed of in the course of the bankruptcy administration. Under these circumstances we are of opinion that the trustee, the appellant in this case, was bound by the agreement of the receiver, that all the property in dispute should be conclusively deemed that which passed under the original conditional contract or the proceeds thereof.

Judgment affirmed.

JOSEPH WILD & COMPANY *v.* PROVIDENT LIFE AND TRUST COMPANY, TRUSTEE OF WATKINSON & COMPANY, BANKRUPTS.

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

No. 190. Argued April 29, 1909.—Decided May 24, 1909.

Where a creditor, who had no knowledge of the debtor's insolvency, has a claim upon an open account for goods sold and delivered during the period of four months before the adjudication in bankruptcy, the account being made of debts and credits, leaving a net amount due from the bankrupt estate, the payments made under such circumstances do not constitute preferences which the creditor is bound to surrender before proving his claim. *Yaple* v. *Dahl-Millikan Grocery Co.*, 193 U. S. 526, followed; *Pirie* v. *Trust Co.*, 182 U. S. 438, distinguished.

153 Fed. Rep. 562, reversed.

THE facts are stated in the opinion.

Mr. Max L. Powell and *Mr. Harris S. Sparhawk* for appellants:

The appellants were wholly ignorant of the insolvency of the bankrupts and there was no intent on the part of the bankrupts to prefer appellants. After insolvency and before bank-

ruptcy, the bankrupts' estate by reason of their dealings with appellants was enriched to the amount of $2,565.92.

To this extent it presents exactly the same situation found in *Jaquith* v. *Alden*, 189 U. S. 78, in which it was held that where all the goods were sold and delivered after the bankrupt's property had actually become insufficient to pay his debts, his estate was increased in value thereby to an amount in excess of the payments made.

This was not the fact in *Pirie* v. *Chicago Trust Co.*, 182 U. S. 438, in which case, the estate of the insolvent as it existed at the date of insolvency was diminished by the payment.

The attention of the court is directed to the importance that is given to the date of insolvency in these last two cases, as the only method of determining whether or not a particular creditor has obtained a greater percentage of his debt than any other creditor of the same class is to ascertain if during a period of insolvency the bankrupts' estate has been enriched by reason of the transactions in their entirety. The running account between the insolvent and the creditor may be variable, and during insolvency may show at times a diminishing of the estate; but if in the entirety of the transactions the estate is enriched, then the payments are not preferential.

In the case now before the court no sale was made after the payment. It must be remembered it was payment on a running account. The first payment by insolvents was followed by sales, all were within a period of insolvency, and are to be considered as parts of one continuous *bona fide* transaction kept alive by extension of new credits.

The object of the bankrupt act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt. Such object could not be secured if there were no provisions against preferences. *Pirie* v. *Chicago Title & Trust Co., supra.* A preference is a transfer of property which enables one of the creditors of a bankrupt to obtain a greater percentage of his debt than any other creditors

of the same class. Where a running account, with no knowledge of insolvency on the part of the creditor, and no intent to prefer, comprised within a period of insolvency, shows a net gain to the estate and a consequent loss to the creditor, that creditor has not been preferred, for that creditor does not receive a greater percentage of his debt than other creditors in the same class.

Mr. Arthur G. Dickson for appellees:

The history of the subject shows that the return of the innocently received preference by subsequent credits was an essential part of the theory which permitted the retention of the payments that had been received by the creditor during insolvency and within four months of bankruptcy. It is true that, in *Jaquith* v. *Alden*, 189 U. S. 78, the sale which was the last of the transactions was not large enough to be by itself a return of the payment just previously received, but it was at least a partial return thereof. Furthermore, the payments and sales were very closely inter-related, so that this court was able to regard all of the transactions as one continuing course of dealing, where payments had had the effect of inducing new sales. In *Jaquith* v. *Alden* there were, first, two sales, then two payments; next three sales, then a payment, and, lastly, a sale. The payments, therefore, kept the account alive and helped to increase the estate by inducing the extension of additional credits.

In the present case, the first sale was paid for and then there followed a number of sales. If the transactions had stopped there, this case would not be before this court. There was, however, a subsequent payment of a part of the account. This payment did not induce any subsequent credits; it was not so intermingled with other payments and sales as to entitle the creditor to ask that it be taken as part of a continuing transaction by which the estate was benefited. Its only effect was to reduce the estate, to take a part of the assets which then belonged to all of the creditors of the bankrupts and to give it to

one of them. No reasoning, however plausible, can rob this payment of that effect and it was, therefore, under the bankruptcy act of 1898, a preference.

The decision of the Circuit Court of Appeals in this case was in accord with its own previous opinion in the case of *Gans* v. *Ellison*, 114 Fed. Rep. 734.

"If, then, a creditor innocently preferred has given return credits afterwards, he has surrendered his preference to the extent of such return credits. To effectuate justice, both sides of the account are to be considered, in the case of a creditor who innocently has received preferences, and afterwards in good faith has given the debtor further credit, without security, for property which has become a part of the debtor's estate." See also *Kimball* v. *Rosenham Co.*, 114 Fed. Rep. 85; *In re Colton Export Co.*, 121 Fed. Rep. 663.

Although Circuit Judge Gray, in delivering the opinion in this case, admitted "that the authorities are not harmonious and do not satisfactorily dispose of the precise question here presented, there is no real difference of opinion between the judges of different circuits. In no case, with the exception of *In re Topliff*, 114 Fed. Rep. 323 (District Court of Massachusetts), has there been a decision enabling a creditor, whose last transaction with the bankrupt during insolvency and within four months of bankruptcy, has been the receipt of a payment, to retain such payment. In every other case in which the creditor has been permitted to retain payments received during insolvency and within the four months' period, those payments have been succeeded by new credits extended to the bankrupt.

For a history of the question herein involved see the following cases: *McKay* v. *Lee*, 105 Fed. Rep. 923; *In re Ryan*, 105 Fed. Rep. 760; *In re Southern Overall Mfg. Co.*, 111 Fed. Rep. 518; *Kahn* v. *Export & Com. Co.*, 115 Fed. Rep. 290; *In re E. O. Thompson's Sons*, 6 A. B. R. 663; aff'd in 7 A. B. R. 214, and *Gans* v. *Ellison*, 114 Fed. Rep. 734; *Peterson* v. *Nash Brothers*, 112 Fed. Rep. 311; *In re Beswick*, 7 A. B. R.

395; *Dickson* v. *Wyman*, 111 Fed. Rep. 726; *Morey Mercantile Co.* v. *Schiffer*, 114 Fed. Rep. 447; *Kimball* v. *Rosenham Co.*, 114 Fed. Rep. 85; *In re Sagor & Bro.*, 121 Fed. Rep. 658; *Jaquith* v. *Alden*, 189 U. S. 78; *Yaple* v. *Dahl-Millikan Grocery Co.*, 193 U. S. 526.

MR. JUSTICE MOODY delivered the opinion of the court.

The appellants, Joseph Wild & Company, offered for proof against the estate of George Watkinson & Company, who had been declared bankrupts, a claim of $2,565.92. The claim was allowed by the referee but disallowed by the District Court, except upon a surrender of an alleged preference of $634.78, which was received within four months of the adjudication. The judgment of the District Court was affirmed by the Circuit Court of Appeals.

The facts of the case are simple. The bankrupt became insolvent on or before January 1, 1901, but the claimants had no knowledge of their insolvency during the running of the account hereafter referred to, and the merchandise therein specified was sold and delivered in the ordinary course of business. The appellants sold and delivered merchandise in various items, beginning February 14, 1901, and ending October 8, 1901. The total price of the merchandise thus delivered was $3,377.28. There were payments on account on June 29 and October 10, amounting to $811.36, leaving the net amount by which the bankrupt estate was enriched $2,565.92. The last payment, on October 10, was $634.78, and was two days after the last sale and delivery of merchandise.

The single question in the case is whether that payment was a preference. It is conceded that it would not be a preference, in view of the other facts in the case, if it had been followed by a sale and delivery of goods of any value, however small. This concession is made necessary by the decision in *Jaquith* v. *Alden*, 189 U. S. 78, which is, in all respects, like the present case, except that two days after the payment, which was al-

leged to be a preference, merchandise of trifling value was sold and delivered to the bankrupt. But the decision in that case was not rested upon the fact of this slight sale subsequent to the last payment. It was rather put upon the broader principle that all the dealings between the creditor and the bankrupt were after the bankrupt's insolvency, and that their net effect was to enrich the bankrupt's estate by the total sales, less the total payments. The majority of the court thought these facts distinguished the case from *Pirie* v. *Trust Company*, 182 U. S. 438, though there was a difference of opinion upon that point. But all doubt was resolved in *Yaple* v. *Dahl-Millikan Grocery Co.*, 193 U. S. 526, where the precise question, which is now here, was decided by the court, and it was held, where a creditor has a claim upon an open account for goods sold and delivered during the period of four months before the adjudication in bankruptcy, the account being made up of debits and credits, leaving a net amount due from the bankrupt estate, that payments made under such circumstances did not constitute preferences which the creditor was bound to surrender before proving his claim in bankruptcy.

It follows that the judgment of the Circuit Court of Appeals was erroneous, and it must be

Reversed.

SOUTHERN RAILWAY COMPANY *v.* ST. LOUIS HAY & GRAIN COMPANY.

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

No. 104. Argued March 8, 9, 1909.—Decided June 1, 1909.

A carrier which is at service and expense in stopping goods in transit for inspection and reloading for the benefit of the shipper is entitled to compensation in addition to the actual expense incurred.

Where the Interstate Commerce Commission has held, and its order has been affirmed by the Circuit Court and Circuit Court of Appeals, that

a carrier cannot charge for a service rendered at the request and for the benefit of the shipper any amount in excess of the actual expense incurred, and fixed a rate less than this court considers reasonable, this court cannot, where the testimony has not been preserved in the record, fix a fair and reasonable charge, but will reverse the judgments of both courts and remand the case to the former court with instructions to send the matter back to the commission for further investigation and report.

153 Fed. Rep. 728, reversed.

THIS was an action brought by the defendant in error on an award of the Interstate Commerce Commission. In a general way, the facts are as follows: The St. Louis Hay & Grain Company is a corporation organized under the laws of the State of Illinois, with its principal office at St. Louis, Mo., a dealer in hay, in the course of which business it operates two warehouses in East St. Louis, Ill. The railway company is the owner and operating a line of railway extending from East St. Louis through the Eastern District of Illinois to points in Southern States, to which the hay and grain company is engaged in shipping hay. The company buys some hay at its warehouses, brought in from the adjacent country, but a large portion of it is bought at points to the north and west. Some of the hay thus purchased is sent directly through East St. Louis in the cars in which it was originally loaded, but much of it is taken to its warehouses, there unloaded, inspected and reloaded for the Southern markets. This is called a reconsignment. Taking these cars which are to be reconsigned to the hay and grain company's warehouses and taking the reloaded cars therefrom involves the use of the cars for a longer time, and there is some expense in hauling the cars. For this the railway company had been in the habit of charging $4 or $5 a car, equivalent on the average loading to two cents per hundred pounds. On an application by the company to the Interstate Commerce Commission it was held, on May 15, 1905 (11 I. C. C. Rep. 90), that such charge was excessive and unreasonable, and that one-half thereof a car was sufficient. Upon that basis it awarded to the hay and grain company the sum

of $1,572.08, one-half the sum paid theretofore by it to the railway company. This sum not being paid, the hay and grain company, on January 23, 1906, filed its petition in the United States Circuit Court for the Eastern District of Illinois to recover the amount thus awarded, with interest, and also for an attorney's fee. A trial resulted on June 25, 1906, in a judgment in favor of the hay and grain company for the amount awarded by the commission, with interest thereon, and also for $350 as an attorney's fee. 149 Fed. Rep. 609. On error to the United States Circuit Court of Appeals for the Seventh Circuit the judgment of the Circuit Court was on April 16, 1907, affirmed (82 C. C. A. 614); whereupon the case was brought here on error.

Mr. Edward C. Kramer and *Mr. Claudian B. Northrop* for plaintiff in error.

Mr. P. J. Farrell and *Mr. L. O. Whitnel* for defendant in error.

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

This case rests on the findings and conclusion of the Interstate Commerce Commission, for while on the trial in the Circuit Court testimony in addition to that which was produced before the commission was received, yet the finding of the court was that "from all the evidence heard and adduced on the trial of this cause in this court, the court finds that the said findings of fact by the said Interstate Commerce Commission are supported and justified by the said evidence, and it is ordered that the said findings of fact as above recited and set out be and the same are adopted as the special findings of fact of the court and that the same be set out in the records of this court accordingly."

Nothing was of course added in the Circuit Court of Appeals which merely affirmed the judgment of the Circuit Court. We

turn, therefore, to the proceedings before the commission, and there is this finding of fact:

"While the question is perplexing, and while we may not have apprehended all the material points involved, we are strongly of the opinion and find that, taking everything into account, the average additional expense to southern lines in case of reconsigned hay will not exceed that of direct through shipments by more than from $2.00 to $2.50 per car, which is equivalent upon the average loading of hay to about one cent per hundred pounds."

The conclusions so far as material to this controversy are thus stated:

"The stopping of a commodity in transit for the purpose of treatment or reconsignment is in the nature of special privilege which the carrier may concede, but which the shipper cannot, in the present state of the law, demand as a matter of lawful right. *Diamond Mills* v. *Boston & M. R. R. Co.*, 9 I. C. C. Rep. 311. Carriers may not, however, discriminate between markets nor between individuals in the granting of such privileges. If this right is given to the markets which compete with East St. Louis in this business by these defendants, it should, *prima facie*, also be granted to that market. If these defendants allow this privilege to the competitors of the complainant at East St. Louis, they should accord it the same privilege.

"The case shows, although not very clearly, that the defendants concede this privilege at other competing markets, and that a track buyer in East St. Louis itself can send along a carload, which he purchases but does not unload, without the payment of this charge. It further shows, however, that the right to unload this hay and handle it at its warehouse is of value to the complainant, and that it costs these defendants something to accord that privilege.

"Under these circumstances, we think it is not an undue preference against this complainant if the railroads charge for the privilege what it actually costs them, but we do not think

that they should charge more than the actual cost. The case finds that the fair average cost when the complainant handles its hay through its warehouse over and above the cost of a through shipment is from $2.00 to $2.50 per car, or approximately one cent per hundred pounds. We think, therefore, that this reconsignment charge ought not to exceed the proportional rate by more than one cent, and that the complainant is entitled to recover whatever it has paid in addition to that sum."

It thus appears that the commission was of the opinion that the shipper could not demand as a matter of right the stopping of the hay for the purposes of treatment or reconsignment unless the same privilege was given to other shippers, and that, in granting this privilege, the railway company could only charge the shipper the actual cost. But this privilege involved to the railway company the cost of hauling to and from the warehouses and the use of the car for some hours, perhaps days. The commission found that $2 or $2.50 per car, or approximately one cent per hundred pounds, was the actual cost to the railway company.

We are unable to concur with the commission. If the stopping for inspection and reloading is of some benefit to the shipper and involves some service by and expense to the railway company, we do not think that the latter is limited to the actual cost of that privilege. It is justified in receiving some compensation in addition thereto. A carrier may be under no obligations to furnish sleeping or other accommodations to its passengers, but if it does so it is not limited in its charges to the mere cost, but may rightfully make a reasonable profit out of that which it does furnish. Especially is this true when, as here, the privilege is in no sense a part of the transportation, but outside thereof. Whether the conclusion of the commission that the carrier is under no obligations to permit the interruption of the transit is right, and whether it is or is not under such obligation, it is entitled to receive some compensation beyond the mere cost for that which it does.

We have been particular to copy the exact language used by the commission, for in another case between the same plaintiff and other railroad companies, involving the charges in a case of reconsignment of hay, decided on December 20 of the same year (*St. Louis Hay & Grain Company* v. *The Illinois Central Railroad Company et al.*, 11 I. C. C. 486), the commission made an order dismissing the complaint. It is true that the facts are not precisely like those in this case, but at the same time the difference in the conclusions of the commission is such as seem to suggest that perhaps on further examination the commission had come to a different conclusion.

The testimony taken before the commission is not preserved in the record, hence it would be impossible, even if proper with all the testimony before us, to fix the amount which would be a fair and reasonable charge. All we can do is to reverse the judgments of the Circuit Court and Circuit Court of Appeals and remand the case to the former court with instructions to send the matter back to the Commerce Commission for further investigation and report.

Reversed.

UNITED STATES *v.* NATIONAL EXCHANGE BANK OF PROVIDENCE.

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

No. 90. Argued January 25, 26, 1909.—Decided June 1, 1909.

The United States can recover from a bank presenting pension checks to, and receiving the money therefor from, a sub-treasury, where the names of the payees have been forged; and the right to recover is not conditioned upon either demand or the giving of notice of the discovery of facts which by the operation of the legal warranty were presumably within the knowledge of the bank.

The United States is not chargeable with the knowledge of the signa-

tures of the vast numbers of persons entitled to receive pensions, and the exceptional rule as to certain classes of commercial paper that the person having knowledge of the genuine signature of the payee whose signature is forged is negligent in paying on such an indorsement and therefore cannot recover, does not apply to the United States in regard to pension checks. *Leather Manufacturers' Bank* v. *Merchants' National Bank*, 128 U. S. 26, approving *White* v. *Continental National Bank*, 64 N. Y. 316, followed.

Quære and not decided whether government pension checks are not official warrants, but checks, and, as such, subject to the general rules of commercial paper as between private parties.

151 Fed. Rep. 402, reversed.

THIS action was brought by the United States to recover the sum of payments made at the sub-treasury in Boston upon 194 pension checks, the signatures or marks of the persons to whom the checks were payable having been forged. The National Exchange Bank of Boston was originally sole defendant, but in legal effect the National Exchange Bank of Providence was substituted as defendant, and the issues were made up between it and the United States. We shall hereafter refer to that bank as the Exchange Bank.

The cause was tried upon an agreed statement and the material facts may be thus summarized:

Upon receipt of pension vouchers, regular in form and purporting to be executed by the pensioners named therein—but which in fact were forgeries—the United States pension agent at Boston drew the checks in question upon the sub-treasury at Boston, aggregating $6,362.07, in favor of the pensioners named in the vouchers, and transmitted such checks by mail directly to the address of each pensioner as given in the vouchers, in accordance with the provision of § 4765, Rev. Stat. Of the persons named in the checks fifteen had died, and the others were the widows of soldiers who had remarried, and whose right to a pension had ceased, all the names, however, as we have said, having been forged. With but two exceptions the checks were either for $24 or $36.

The checks with the forged indorsements thereon of the

payees were cashed by the Exchange Bank, and immediately indorsed to a national bank in Boston for collection. The checks were presented by the collecting bank at the subtreasury of the United States in Boston. The collecting bank received payment of the same and accounted for such payment to the Exchange Bank.[1]

In May, 1897, a special examiner of the Pension Bureau was detailed at Providence to investigate the case of one Mooy, a deceased pensioner, in whose name three of the checks here in question, each for $36.00, had been issued and paid in 1896. On June 18, 1897, the examiner reported to the bureau the forgery of the name of the deceased payee, and that it had probably been done by one William A. Munson. December 18, 1897, notice was given to the Exchange Bank by the United States attorney at Providence that the indorsements of Mooy's name to said checks were forged, and that at a proper time reclamation would be made for the money paid to the bank upon the checks. The remaining forgeries were discovered at different times during the months of February, March, April and May, 1898, and in December, 1898, Munson, who was undergoing imprisonment upon a sentence imposed June 22, 1898, for forging a pension check, with which presumably this case is not concerned, admitted that he had forged the signatures of the payees on the checks in suit.

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[1] The payments were made as follows:

During 1886, 1887 and 1888, five checks, each for $36.00, were paid on account of pension certificate issued in name of Martha Crampton		$180 00
During 1892	$334 80	
1893	867 27	
1894	1,092 00	
1895	1,380 00	
1896	1,620 00	
1897	888 00	
		6,182 07
		$6,362 07

On July 22, 1898, the United States attorney at Providence made written demand upon the Exchange Bank to be refunded the sums paid, except as to checks aggregating $351.27, for which no demand for repayment was made other than by the bringing of this action. The bank refusing to repay, this action was commenced on August 27, 1901.

Each of the 194 checks was made the subject of two counts. An indebtedness of the defendant bank to the United States was averred in the first count to have arisen from the fact that a described check had been lawfully issued by a United States pension agent, drawn upon the Assistant Treasurer of the United States, that a signature, purporting to be that of the payee, was thereafter forged upon the check, and that the Exchange Bank indorsed said check and presented it for payment to the Assistant Treasurer, who paid the amount thereof. The second count was the common count for money received by the defendant to the use of the United States. In substance, the defenses interposed in the answer of the bank were that if the facts averred in the declaration were established by the proof, the bank was yet not liable, because the action had not been brought within a reasonable time after the alleged payments of the drafts, nor had prompt notice been given of the discovery of the forgeries. It was also averred that the United States had been negligent in not verifying the signatures of the payees of the checks in suits by comparing them with signatures of the payees in its possession.

Upon the agreed facts the Circuit Court entered judgment against the bank for the full amount claimed with interest. The appellate court, however, reversed this judgment, and remanded the cause with directions to enter judgment for the Exchange Bank (151 Fed. Rep. 402); and this writ of error was thereupon prosecuted.

Mr. Assistant Attorney General Fowler, for plaintiff in error, submitted:

The Government's right of action is not defeated by the

failure of its agents to give notice to defendant of the forged indorsements immediately upon the discovery thereof. The rule adopted by the Circuit Court of Appeals is not in accord with sound reasoning or with the weight of the authorities. *United States* v. *National Park Bank*, 6 Fed. Rep. 852; *United States* v. *Bank*, 13 D. C. Rep. 296; *United States* v. *Onondaga County Savings Bank*, 39 Fed. Rep. 259; *Cooke* v. *United States*, 91 U. S. 389, 402, 403; 5 Cyc. Law and Procedure, pp. 546, 547; *White* v. *Continental National Bank*, 64 N. Y. 316, 321, 322; 2 Daniel on Negotiable Instruments, § 1372.

The pension checks in question were not commercial paper in the strict sense of that term. *The Mayor* v. *Ray*, 19 Wall. 468, 477; *Wall* v. *County of Monroe*, 103 U. S. 74, 78; *Claiborne County* v. *Brooks*, 111 U. S. 400, 408; *District of Columbia* v. *Cornell*, 130 U. S. 655, 661; *Floyd Acceptance Cases*, 7 Wall. 666, 676.

The Government of the United States cannot be bound by the laches of its officers in failing to give notice within proper time that the indorsements on the checks in question were forgeries.

The rule laid down in *United States* v. *Cooke*, Fed. Cas. No. 14,855, that when the Government becomes a party to a negotiable instrument, it is bound to take the same steps to perfect its rights as is an ordinary individual, does not apply in case the checks in question are not negotiable instruments. It should not be applied here, even if it be held that the checks are negotiable instruments, because, as heretofore shown, the Government's right of action does not depend upon the giving of notice to the defendant. If such notice were a necessary prerequisite to the bringing of the action, as is the fact of giving notice of the dishonor of commercial paper, the rule laid down in *United States* v. *Cooke* is a proper one. But where plaintiff's right of action exists, and the neglect to give notice can only be set up as a matter of defense, then it presents precisely the same question as any other act of negligence upon the part of the Government's officials.

Mr. Theodore Francis Green for defendant in error:

In case of a payment under a forged indorsement of commercial paper, the plaintiff, in order to recover, must have given notice of the forgery within a reasonable time after payment. This is clearly the rule in England. *Cocks* v. *Masterman*, 9 B. & C. 902 (1829); *Mather* v. *Lord Maidstone*, 18 C. B. 273, 294; *Wilkinson* v. *Johnson*, 3 B. & C. 428; *Smith* v. *Mercer*, 6 Taunt. 76.

To the same effect in general, see *Bloomer* v. *Spittle*, L. R. 13 Eq. 427 (1872); 2 Parsons, Notes and Bills, 598.

In the United States Federal courts also, a high degree of diligence has been required. *United States* v. *Cooke*, Fed. Cas. No. 14,855; *United States Bank* v. *Bank of Georgia*, 10 Wheat. 333.

Within the rule of the above cases an unreasonable time elapsed between the payment of the checks in this case, and the notice to the defendant of the forgery. The period varied from eighteen months, in the case of the Mooy checks to over eleven years in one instance, and averaged from two to five or six years.

In case of a payment under a forged indorsement of commercial paper, the plaintiff, to recover, must have given notice of the forgery within a reasonable time after its discovery. *United States Bank* v. *Bank of Georgia*, 10 Wheat. 344; *United States* v. *Clinton National Bank*, 28 Fed. Rep. 357; *United States* v. *Central National Bank of Philadelphia*, 6 Fed. Rep. 134; *United States* v. *National Exchange Bank*, 45 Fed. Rep. 163; *Gloucester Bank* v. *Salem Bank*, 17 Massachusetts, 33; *Raymond* v. *Baar*, 13 Serg. & Rawle (Pa.), 318; *Canal Bank* v. *Bank of Albany*, 1 Hill (N. Y.), 287; *Bank of Commerce* v. *Union Bank*, 3 Comst. (N. Y.) 230; *Ellis* v. *Ohio &c. Co.*, 4 Ohio St. 628, 657.

The Government contends that the true rule is, not that notice of a forgery must be given within a reasonable time of its discovery, but that the plaintiff may recover, no matter how long the delay, provided that it does not affirma-

tively appear that the defendant has suffered actual damage thereby.

That rule is laid down in a small number of cases, but it will be found upon analysis that in most of them notice of the forgery was in fact given shortly after its discovery, so that it was not necessary for the court to decide that unreasonable delay in giving notice was not fatal. For example, in *United States* v. *Onondaga County Savings Bank*, 39 Fed. Rep. 259; aff'd 64 Fed. Rep. 703, the forgery was discovered in two years, but notice was given to the defendant within three days thereafter. It was held that the plaintiff might recover.

Proof of damage by the delay in giving notice is not necessary. *United States* v. *National Exchange Bank*, 45 Fed. Rep. 163; *United States Bank* v. *Bank of Georgia*, 10 Wheat. 333; *Continental National Bank* v. *National Bank of the Commonwealth*, 50 N. Y. 575; *Raymond* v. *Baar*, 13 Serg. & Rawle (Pa.), 318; *Gloucester Bank* v. *Salem Bank*, 17 Massachusetts, 33, 46; *McNeely Co.* v. *Bank of North America*, 70 Atl. Rep. 891.

Pension checks are commercial paper. It is immaterial whether the instruments here involved are to be termed bills of exchange, drafts, checks or notes. They are in the ordinary form of a mercantile check, and it is enough that they have been held to be commercial paper by every court before which the question has come. In all the cases cited by the parties in their original briefs in the court below, whatever differences of opinion there may have been on the question of necessity of proof of damage, all the judges agreed that paper of the kind in question was negotiable. *United States* v. *Clinton National Bank*, 28 Fed. Rep. 357; *United States* v. *National Park Bank*, 6 Fed. Rep. 852; *United States* v. *Central National Bank*, 6 Fed. Rep. 134; *United States* v. *Onondaga Savings Bank*, 39 Fed. Rep. 259; *United States* v. *National Exchange Bank*, 45 Fed. Rep. 163; *United States* v. *Cooke*, Fed. Cas. No. 14,855; *Wells, Fargo & Company* v. *United States*, 45 Fed. Rep. 337, 340; *United States* v. *American Exchange Bank*, 70 Fed. Rep. 232;

Bank of the Republic v. *Millard*, 10 Wall. 152; *First National Bank* v. *Whitman*, 94 U. S. 343.

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

A preliminary matter needs to be noticed. In the opinion of the Circuit Court of Appeals it is said (italics ours):

"The precise form of only one of the so-called checks is shown by the record, as follows:

'United States Pension Agency, No. 297073.
Boston, Mass., Mch 5 1892
Assistant Treasurer of the United States
Boston, Mass.
Pay to the order of Mahala B. Jaques 9492 B81
Thirty-six 100 Dollars. $36
36 Interior
W. H. OSBORNE,
U. S. Pension Agent.
Paid Mar. 12, 1892
ASST. TREAS., *Boston.*
Indorsements:
MAHALA B. JAQUES
Payee.
M. M. ANGELL
'Pay Nat. Bank of the Republic, Boston or order, for collection, for account of First National Bank, Providence, R. I.
C. E. LAPHAM,
Cashier.
Indorsement Guaranteed.
Nat'l Bank of the Republic, Boston.'

'This is, however, understood to be a sample of the remaining checks. As they were drawn by the pension agent on the Assistant Treasurer of the United States, the question naturally arises whether, after all, they were anything more than official warrants, a question which we will turn to later. *It will*

be observed, however, that no indorsement by the Exchange Bank appears on the sample shown in the record, and whatever indorsement there is is simply 'for collection.'"

The sample check thus referred to is also set out in the opinion delivered in the Circuit Court. But no such check is in the record, nor is it embraced in the list of checks collected by the Exchange Bank, and for which recovery is sought by the United States. Presumably the stated sample check must have been inadvertently taken from the record in an action against some other bank. At all events, as it is not in argument questioned that the Exchange Bank was the holder of the checks sued for, when they were paid by the United States, we shall assume the correctness of the recital in the agreed statement of facts, that the checks "with the forged signatures thereon were cashed by the defendant, who immediately indorsed the said checks to a national bank in Boston for collection."

The Circuit Court of Appeals reversed the judgment in favor of the United States upon the ground that by the operation of an exceptional rule, said to prevail, under certain conditions, as to commercial paper, the United States could not recover for the mistaken payments, as there had been unreasonable delay in giving notice to the Exchange Bank after the discovery of the forgeries. The correctness of this action is assailed in the assignments of error, the Government contending that the pension checks in question were mere Treasury warrants, not commercial paper in the true sense of that term, and hence not controlled by the so-called exceptional commercial rule, but that even if the checks were commercial paper and governed by such rule mere negligent delay in giving notice of the discovery of the forgery would not prevent recovery, unless the Exchange Bank established by proof that it had thereby suffered damage. It is besides claimed that if the agents of the Government were negligent in giving notice of the discovery of the forgeries, their laches cannot be imputed to the United States. The Exchange Bank not only traverses

these assignments but insists that the claim of the United States to recover was rightfully rejected, because the duty was on it not only to give prompt notice of the discovery of the forgeries but also to discover the forgeries promptly after payment, a contention which is controverted by the Government.

In order to simplify the issue for decision we concede, for the sake of the argument only, that the forged instruments were not official warrants as contended by the Government, but in a generic sense are to be classed as negotiable commercial paper, and that in a case coming within the exceptional rule referred to the laches of the authorized agents of the Government can be imputed to it. But, assuming the instruments to be negotiable paper the question yet remains whether the right of the United States to recover from the Exchange Bank is controlled or limited by the exceptional rule referred to.

That in certain classes of cases an exceptional rule is enforced in England as to commercial paper, by which, under particular circumstances, such paper is taken out of the operation of the general rule relating to the recovery of money paid by mistake is not subject to question. *Price* v. *Neale*, 3 Burr. 1354; *Smith* v. *Chester*, 1 T. R. 654; *Smith* v. *Mercer*, 6 Taunt. 76; *Wilkinson* v. *Johnson*, 8 Barn. & Cresw. 428; *Cocks* v. *Masterson*, 9 Barn. & Cresw. 222. The decisions referred to, however, show that the exception was limited to cases where the person who paid a forged instrument and who sought recovery of the amount paid was charged with knowledge of the genuine signature of the person whose name was forged, and, therefore, was presumed to have been negligent in making the payment. For instance, where one accepted a draft purporting to be drawn upon him by a customer whose signature he was presumed to know, which afterwards turned out to be a forgery. Again, where a draft which purported to have been accepted, and by the seeming act of acceptance was made payable at a particular bank which paid the same for account of its customer, the apparent acceptor, and it afterwards turned

out that the acceptance was a forgery, the exceptional rule was applied.

Several of the English cases above cited were reviewed by this court in *Bank of the United States* v. *Bank of Georgia*, 10 Wheat. 333, 348, *et seq.* In that case recovery of moneys paid was denied to a bank which had received as genuine notes it had issued, but which had been fraudulently altered as to amount after being put in circulation, the decision having been rested (p. 353) "upon the broad ground that there was an acceptance of the notes as genuine, and that it falls directly within the authorities which govern the cases of acceptances of forged drafts."

The exceptional rule was thus noticed in the opinion delivered in *Cooke* v. *United States*, 91 U. S. 389, 396.

"It is, undoubtedly, also true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance, or more properly, perhaps, the adoption, of the paper as genuine by its apparent maker. Often the bare receipt of the paper, accompanied by payment, is equivalent to an adoption within the meaning of the rule; because, as every man is presumed to know his own signature and ought to detect its forgery by simple inspection, the examination which he can give when the demand upon him is made is all that the law considers necessary for his protection. He must repudiate as soon as he ought to have discovered the forgery, otherwise he will be regarded as accepting the paper. Unnecessary delay, under such circumstances, is unreasonable; and unreasonable delay is negligence, which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not. The rule is thus well stated in *Gloucester Bank* v. *Salem Bank*, 17 Massachusetts, 45: 'The party receiving such notes must examine them as soon as he has opportunity, and return them immediately; if he does not, he is negligent; and negligence will defeat his action.'"

Although it has been considered that in later cases courts of England have mitigated the strictness of the exception upheld in the cases we have previously cited, and have made the right to recover back embraced in such cases depend somewhat upon the prejudice occasioned by the delay in giving notice (Chitty on Bills, 464), it is certain that the exception has not been extended so as to cause it to include a case like the one before us. *Imperial Bank of Canada* v. *Bank of Hamilton* (1903), A. C. 49. And, although the courts of some of the States of the Union have limited, restricted, or declined to follow the exceptional rule—see the subject reviewed in *Greenwald* v. *Ford* (1906), 21 S. Dak. 28, and *First National Bank* v. *Bank of Wyndmere* (1906), 15 N. Dak. 299—we have been cited to no decision of a court of last resort, involving a case like the one before us, where it was held that such a case is controlled by the exceptional rule. True it is a decision of the Supreme Court of New York, rendered in 1841 (*Canal Bank* v. *Bank of Albany*, 1 Hill, 287), involving analogous facts, has by some text-writers been treated as holding a doctrine which might be considered as establishing that the exceptional rule, as somewhat qualified by the decision in question, would be applicable to a case like the one before us. In the case referred to it was decided that where the bank upon which a draft was drawn paid it in ignorance of the fact that the supposed signature of the person to whom it was payable had been forged, it could not recover back the money without exercising reasonable diligence to give notice after the discovery of the forgery. We think, however, it is apparent that the court considered not that it was applying the exceptional rule, but that it was simply announcing its conception of the general principle as to the right to recover back money paid by mutual mistake. This is evident, since the court, after holding that the case before it was not governed by the exceptional rule, remarked that "where each party enjoys the same chance of knowledge, no case demands anything more than reasonable diligence in giving notice after the discovery of the forgery." No authority,

however, was cited on this proposition, nor was any intimation given by the court as to whether, even if there had been negligence in giving notice, recovery would not be permitted if no damage had been occasioned by the delay to the party to whom the payment had been made. A later case in New York enforced a principle which we deem applicable to the present controversy. The case is *White* v. *Continental Nat. Bank*, 64 N. Y. 316. The facts were these: A customer of the firm of White & Co. drew a draft on that firm for $27. After the delivery of the draft to the payee it was raised to the sum of $2,750. The raised draft came into the possession of the Continental National Bank of New York city, who took the same from a customer who was credited with and drew the amount. The Continental Bank presented the draft to White & Co., and that firm accepted the same, payable at the Leather Manufacturers' National Bank. When due the Leather Manufacturers' Bank paid the Continental Bank and debited the account of White & Co. This payment was made in August. Monthly accounts passed between White & Co. and its correspondent by whom the draft had been drawn, but the August account, which was rendered in the early part of September, was not examined. When the next account came along and was examined the alteration of the draft was discovered, and White & Co., evidently being bound to the Leather Manufacturers' Bank by the payment made by that bank at the request of White & Co. and for their account, notified the Continental Bank, demanded repayment, and on refusal brought suit to recover. The trial court enforced the exceptional rule and denied the right of White & Co. to recover. The Court of Appeals, while substantially conceding that if the forgery had been of the name of the drawer of the draft, White & Co., because of their presumed knowledge of such signature, would have been, by their acceptance, brought within the exceptional rule decided, that the rule was not applicable because the forgery concerned not the signature but the body of the draft, of which White & Co. were not presumed to have knowl-

edge. Thus eliminating the exceptional rule, the court held that as the Continental Bank had presented the forged draft for payment, and had under the principles of commercial liability at least impliedly warranted its genuineness, the bank was liable to repay to White & Co. Although resting its conclusion upon the warranty on the part of the Continental National Bank of the genuineness of the instrument which it presented, the court, nevertheless, at the close of the opinion, observed (p. 322):

"But waiving the question as to the responsibility of the defendant for the genuineness of the instrument, and taking the most favorable view for the defendant, which is to regard it as a case of a mutual mistake, in respect to which neither was at fault, and in that view and upon that theory, the case is within the principles decided in *The Bank of Commerce* v. *The Union Bank* (3 Comst. 230); *The Kingston Bank* v. *Eltinge* (40 N. Y. 391)."

White v. *Continental National Bank* was cited and the doctrine therein expressed was approved and applied by this court in *Leather Mfrs. Nat. Bank* v. *Merchants' Nat. Bank*, 128 U. S. 26. The opinion in that case, delivered by Mr. Justice Gray, was announced on October 22, 1888, and was subsequent in date to several decisions of lower Federal courts cited in the opinion of the court below in this case, and which were deemed to conclusively demonstrate that the United States was not entitled to recover. In the *Leather Manufacturers' Bank case* the question for decision was thus stated in the opinion (p. 34):

"The question then is whether, if a bank, upon which a check is drawn, payable to a particular person or order, pays the amount of the check to one presenting it with a forged endorsement of the payee's name, both parties supposing the endorsement to be genuine, the right of action of the bank to recover back the money from the person so obtaining it accrues immediately upon the payment of the money, or only after a demand for its repayment."

The right of action was held to have accrued upon the pay-

ment of the money. After distinguishing the case from one which involved the relations of a bank and its depositors, the court said (p. 34):

"But as between the bank and the person obtaining money on a forged check or order, the case is quite different. The first step in bringing about the payment is the act of the holder of the check, in assuming and representing himself to have a right, which he has not, to receive the money. One who by presenting forged paper to a bank procures the payment of the amount thereof to him, even if he makes no express warranty, in law represents that the paper is genuine, and, if the payment is made in ignorance of the forgery, is liable to an action by the bank to recover back the money which, in equity and good conscience, has never ceased to be its property. It is not a case in which a consideration, which has once existed, fails by subsequent election or other act of either party, or of a third person; but there is never, at any stage of the transaction, any consideration for the payment. *Espy* v. *Bank of Cincinnati*, 18 Wall. 604; *Gurney* v. *Womersley*, 4 El. & Bl. 133; *Cabot Bank* v. *Morton*, 4 Gray, 156; *Aldrich* v. *Jackson*, 5 R. I. 218; *White* v. *Continental Nat. Bank*, 64 N. Y. 316.

"Whenever money is paid upon the representation of the receiver that he has either a certain title in property transferred in consideration of the payment, or a certain authority to receive the money paid, when, in fact, he has no such title or authority, then, although there be no fraud or intentional misrepresentation on his part, yet there is no consideration for the payment; and the money remains, in equity and good conscience, the property of the payer, and may be recovered back by him, without any previous demand, as money had and received to his use. His right of action accrues, and the statute of limitations begins to run, immediately upon the payment.

* * * * * * * *

"In the case at bar, as in the case last cited, the plaintiff's right of action did not depend upon any express promise by

the defendant after the discovery of the mistake, or upon any demand by the plaintiff upon the defendant, or by the depositor or any other person upon the plaintiff; but it was to recover back the money, as paid without consideration, and had and received by the defendant to the plaintiff's use. That right accrued at the date of the payment, and was barred by the statute of limitations in six years from that date."

We are of the opinion that the case before us is directly within the principle governing the ruling made in the case just cited as well as within the doctrine of *White* v. *Continental National Bank,* which in effect, as we have shown, was approved by this court in *Leather Manufacturers' National Bank* v. *Merchants' Nat. Bank.* The United States is not before us as the acceptor of a draft drawn upon it and charged with knowledge of the signature of the drawer; nor was it a bank which had paid the check of a depositor and was charged with knowledge of the signature of such depositor. The forgery here was in the name of the payee, and it is therefore impossible, as it was in the case of *White* v. *The Continental Bank* and in the *Leather Manufacturers' Bank case,* to bring this cause within the exceptional rule without holding that the United States was charged with knowledge of the signatures of the vast multitude of persons who are entitled under the law to receive pensions. The exceptional rule as to certain classes of commercial paper proceeds upon an assumption of knowledge or duty to know, naturally arising from the situation of the parties, entirely consonant with their capabilities, and in accord with the common sense view of their relation. To apply the rule, however, to the Government and its duty in paying out the millions of pension claims, which are yearly discharged by means of checks, would require it to be assumed that that was known, or ought to have been known, which on the face of the situation was impossible to be known, would besides wholly disregard the relation between the parties and would also require that to be assumed which the obvious dictates of common sense make clear could not be truthfully assumed. But con-

clusive as are these considerations, the case does not alone depend upon them, since we think legislation of Congress in reason precludes the conception that it was contemplated that the United States (or its agents) had actual knowledge of the signatures of pensioners and in paying pensions was bound to all the world under such an assumption.

By §§ 4764 and 4765, Rev. Stat., it is required, before a pension check shall be issued, that vouchers shall be supplied, and the duty is cast upon the Secretary of the Interior of making rules and regulations to establish the identity of the pensioner. As shown by the record, the regulations thus promulgated require vouchers to be signed in duplicate before an officer authorized to administer an oath or before a fourth-class postmaster. The pensioner is required to exhibit his pension certificate to such officer and also to sign and make oath to a statement as to his identity, his existing right to the pension and his post office address. The officer is required to certify as to inspection of the pension certificate; that the pensioner was fully identified; that he had signed the duplicate receipts; and the address of the pensioner is to be stated in the certificate. These requirements are incompatible with the assumption that the Government was chargeable with knowledge of the identity, continued existence, and right to pensions, or with the signatures of those entitled to receive pension moneys. The requirement by the Government of proof, for its own protection, affords no ground for the contention that as to any action taken as the result of the furnishing of such proof the Government is estopped as to third parties from showing that the proofs furnished were false and fraudulent and that the Government had been deceived thereby. To so hold would be to say that from the act of exerting a precaution against fraud there arose a presumption by which the fraud could be successfully accomplished. This would be the case if it were now held that because by forged vouchers the Government was deceived into acting third parties had a right to rely upon the integrity of the proof and to estop the Government as though

representations as to the verity of such proof had been made by it to such third parties. The rights, therefore, of the bank as the apparent acquirer of the pension checks are to be governed by the nature and character of the instruments and cannot be enlarged so as to relieve the bank from the obligation of warranty implied in the presentation of the checks and the collecting of the amount. The subject is aptly illustrated in the opinion by Coxe, Judge, in *United States* v. *Onondaga County Savings Bank*, 39 Fed. Rep. 259, affirmed by the Circuit Court of Appeals for the Second Circuit in 64 Fed. Rep. 703.

As the nature of the forgery did not cause the case to be controlled by the exceptional rule, and as the Exchange Bank when it presented the checks and obtained thereon the money of the United States by operation of law warranted the genuineness of the instruments which it thus presented and upon which it asked and received payment, it follows that the case in substance is accurately portrayed in observations made by the Court of Appeals of New York in the *White case*, at pages 320–321:

"The facts which disentitled the defendant to receive the money, and in ignorance of which it was paid, were those presumed to be within the knowledge of the defendant and not of the plaintiffs. The defendant, in receiving the money and in disposing of it, did not act upon the faith of any admission by the plaintiffs, express or implied, of any fact which they now controvert in prosecuting this action. There was, therefore, no want of good faith, no negligence, or even want of ordinary care on the part of the plaintiffs in the payment of the money. The defendant, in the entire transaction, acted upon other evidence of its right to the money than the statement or actions of the plaintiffs, and in dealing with the bill and with the money, its avails, acted upon the apparent title and genuineness of the instrument, and the responsibility of those from and through whom it received the bill. The plaintiffs, therefore, owed no duty to the defendant in respect to the forgery,

which invalidated the bill and its title to the moneys represented by it."

Under these conditions the warranty of genuineness implied by the presentation and collection of the checks bearing the forged indorsement having been broken at the time the checks were cashed by the United States, and the cause of action having therefore then accrued, the right to sue to recover back from the Exchange Bank was not conditioned upon either demand or the giving of notice of the discovery of facts which by the operation of the legal warranty were presumably within the knowledge of the defendant.

The conclusion to which we have thus come renders it unnecessary to consider whether if the facts presented merely a case of mutual mistake, where neither party was in fault, and reasonable diligence was required to give notice of the discovery of the forgery if there was lack of such diligence, it would operate to bar recovery by the United States, although the Exchange Bank was not prejudiced by the delay.

The judgment of the Circuit Court of Appeals must be reversed and the judgment of the Circuit Court affirmed.

And it is so ordered.

OCEANIC STEAM NAVIGATION COMPANY *v.* STRANAHAN.

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

No. 509. Argued January 11, 12, 1909.—Decided June 1, 1909.

Money paid to the collector of a port under protest, and on the certainty that if not paid clearance to vessels necessarily sailing on definite schedule would be refused, to the great damage of the owner, is paid involuntarily, and can, if unlawfully exacted, be recovered.

Congress has power to deal with the admission of aliens and to confide the enforcement of laws in regard thereto to administrative officers. *United States* v. *Ju Toy*, 198 U. S. 253.

In construing a congressional statute this court may consider the re-

port of the committee as a guide to its true interpretation in order to dispel ambiguity, if any exists. *The Delaware*, 161 U. S. 459; *Buttfield* v. *Stranahan*, 192 U. S. 470.

It is within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.

The authority, given by Congress in the Alien Immigration Act to the Secretary of Commerce and Labor to impose an exaction on a transportation company bringing to the United States an alien immigrant afflicted with a loathsome contagious disease when the medical examination establishes that the disease existed, and could have been detected by medical examination at the time of embarkation, does not purport to define and punish any criminal offense, but merely entails the infliction of a penalty enforceable by civil suit; and it is within the power of Congress to provide for such imposition by an executive officer, and the enforcement is not necessarily governed by the rules controlling the prosecution of criminal offenses. *Wong Wing* v. *United States*, 163 U. S. 228, distinguished; *Hepner* v. *United States*, 213 U. S. 103, followed.

The constitutional right of Congress to enact legislation in regard to a matter wholly within its jurisdiction is the sole measure by which the validity of such legislation is to be determined by the courts; and the courts cannot proceed on the supposition that harm will follow if the legislature be permitted full sway and, in order to correct the legislature, exceed their own authority, and assume that wrong may be done in order to prevent wrong being accomplished. *McCray* v. *United States*, 195 U. S. 27.

The imposition of a penalty by an executive officer when authorized by Congress in a matter wholly within its competency, such as alien immigration, is not unconstitutional under the Fifth Amendment as taking property without due process of law.

The courts cannot make mere form and not substance the test of the constitutional power of Congress to enact a statute in regard to a matter over which Congress has absolute control.

The prohibition of § 9 of the Alien Immigration Act of March 3, 1903, c. 1012, 32 Stat. 1213, against bringing into the United States alien immigrants afflicted with loathsome and contagious diseases is within the absolute power of Congress; and that provision of the act is not unconstitutional because it provides that the Secretary of Commerce and Labor may, without judicial trial, impose upon, and exact

penalties from, the transportation company for violations of the provisions.

The greater includes the less and where Congress has power to sanction a prohibition by penalties enforcible by executive officers without judicial trial on the ascertainment in a prescribed manner of certain facts, the person upon whom the penalty is imposed is not entitled to any hearing in the sense of raising an issue and tendering evidence as to the facts so ascertained, and is not, therefore, denied due process because the time which the executive officer allows him after notice of the ascertainment and imposition to produce evidence as to certain facts on which the fine might be remitted is too short.

155 Fed. Rep. 428, affirmed.

THE facts, which involve the constitutionality of § 9 of the Alien Immigration Act of March 3, 1903, are stated in the opinion.

Mr. William G. Choate and *Mr. Lucius H. Beers* for plaintiffs in error:

Plaintiffs in error were deprived of their property without due process of law, because the fines were imposed in some cases without any previous notice and in all cases without any, or any adequate, opportunity to be heard. If under § 9 fines may be imposed without notice and without opportunity to be heard, Congress exceeded its power; and if § 9 did not have that meaning, then the Department of Commerce and Labor exceeded its powers. In either case the imposition of the fine was illegal.

The Fifth Amendment left Congress without power to authorize any court or officer to take property without giving the owner previous notice and opportunity to be heard. *Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Scott* v. *McNeal*, 154 U. S. 34, 46, 50; *Simon* v. *Craft*, 182 U. S. 427; *Central Railway* v. *Wright*, 207 U. S. 127; *Stuart* v. *Palmer*, 74 N. Y. 183; *Santa Clara* v. *So. Pac.*, 18 Fed. Rep. 385, 424; *Cooper* v. *Wandsworth*, 14 C. B., N. S. 180; *King* v. *The Chancellor*, 1 Strange, 557; *Security Trust Co.* v. *Lexington*, 203 U. S. 323, 333; *Roller* v. *Holly*, 176 U. S. 398, 409.

Reasonable opportunity to be heard is just as necessary as reasonable notice. *Londoner* v. *Denver*, 210 U. S. 373, 378, 386.

Section 9 violates Art. III of the Constitution relating to the judiciary and also the Fifth Amendment relating to the taking of property without due process of law, because it authorizes the taking of property without judicial trial.

While in dealing with the alien himself and in determining any matter which relates to his admissibility Congress has full power and is not restrained by the Constitution from authorizing executive officers to take all necessary steps in regard thereto, § 9 is not a part of the system of inquiry necessary for that purpose. Its purpose is to require a competent medical examination at foreign ports and it requires a fine to be imposed when the Secretary is satisfied that the disease could have been detected by such an examination. Section 9 imposes a punishment and requires money to be taken in payment of a fine, and it therefore deals with personal and property rights which are protected by the Constitution. See *Wong Wing* v. *United States*, 163 U. S. 228, 237; *United States* v. *Burke*, 99 Fed. Rep. 895, 900; *Boyd* v. *United States*, 116 U. S. 616, 634; *Lees* v. *United States*, 150 U. S. 476; *Union Bridge Co.* v. *United States*, 204 U. S. 364.

These cases are clearly distinguishable from cases where this court has sanctioned the taking of property by the Government without a judicial trial and has placed the determination of the fact on which liability rests on an executive officer, because all of those cases rest upon the existence of an imperative necessity for prompt and summary determination while that necessity does not exist here. See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272.

These fines now in question must either be fines in punishment for crime or penalties imposed for the doing of an unlawful or prohibited act not technically a crime. If they are fines imposed in punishment for crime, then the provisions of the Constitution relating to trial for crime apply. If they are

penalties merely, then the recovery of those penalties would properly be the subject of civil actions, and, in that event, these cases come under the classification of ordinary civil actions, which Congress cannot withdraw from judicial cognizance. See also *Springer* v. *United States*, 102 U. S. 586, 593; *In re Rapier*, 143 U. S. 110, 134; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Lawton* v. *Steele*, 152 U. S. 133, 136, and *Buttfield* v. *Stranahan*, 192 U. S. 470, discussed and distinguished.

It was not in the power of Congress to authorize the Secretary of Commerce and Labor to take private property in the form of a fine without any proof that the alleged offense had been committed.

This is punishment by executive order instead of by judicial procedure and no temporary clamor in favor of peremptory methods can warrant such a change in our institutions.

Section 9 violates the Sixth Amendment inasmuch as it denies to the accused in a criminal prosecution the right to a jury trial.

A suit for a penalty for an act prohibited by a statute of the United States is a criminal prosecution within the meaning of the Sixth Amendment.

It is not the form, but the nature of the action, which determines whether it is criminal or civil. *Iowa* v. *Chi., B. & Q. R. R. Co.*, 37 Fed. Rep. 497.

Boyd v. *United States*, 116 U. S. 616, 633, held that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal and within the reason of criminal proceedings for all the purposes of the Fourth Amendment, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.

Under the same reasoning they are "criminal prosecutions" within the meaning of the Sixth Amendment. *Lees* v. *United States*, 150 U. S. 476, 480.

Mr. Wade H. Ellis, Assistant to the Attorney General, with whom *Mr. Henry L. Stimson*, *Mr. Winfred T. Denison* and *Mr. E. P. Grosvenor* were on the brief, for defendant in error:

Congress is granted by Art. I, § 8 of the Constitution plenary power to regulate the bringing of aliens to our shores; and its acts within that field are valid unless they violate some explicit restriction of the Constitution. *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659; *Turner* v. *Williams*, 194 U. S. 279, 290; *Head Money Cases*, 112 U. S. 580, 595; *Passenger Cases*, 7 How. 283; *Commissioners* v. *North German Lloyd*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *People* v. *Compagnie Générale*, 107 U. S. 59.

It is also a part of the inherent control of the sovereign over its boundary line. *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Chinese Exclusion Case*, 130 U. S. 581; *Turner* v. *Williams*, *supra*; *Nishimura Ekiu* v. *United States*, *supra*.

Within such fields acts of Congress are constitutional unless they fall under some specific prohibition of the Constitution. *Buttfield* v. *Stranahan*, 192 U. S. 470; *Lottery Case*, 188 U. S. 321, 353, 356; *Leisy* v. *Hardin*, 135 U. S. 100, 108; *Fairbank* v. *United States*, 181 U. S. 283, 285.

Section 9 falls under no such prohibition.

Section 9 does not create an offense within the meaning of the word "crime" as used in the constitutional provisions requiring a jury trial.

The penalty provided by § 9 is one of that long-established and well-recognized class of penalties which do not rise to the seriousness or dignity of crimes, but which may be recovered by procedure civil in form. Into such penalties the punitive element admittedly enters, but it has more of the character of punitive damages in tort than of criminal punishment. The Constitution has not imposed limitations as to the method to be prescribed by Congress for the recovery of these penalties, the only limitations which it has imposed being in relation to crimes. *Schick* v. *United States*, 195 U. S. 65, 67; *United States* v. *Zucker*, 161 U. S. 475, 481; *Callan* v. *Wilson*, 127 U. S. 540,

549, 552; *Ex parte Wilson*, 114 U. S. 417, 425; *Taylor* v. *United States*, 3 How. 197, 210; *Lawton* v. *Steele*, 152 U. S. 133, 141; *United States* v. *Ju Toy*, 198 U. S. 253.

If the statute does not create a "crime," then *a fortiori* it does not create an "infamous crime" within the meaning of the Fifth Amendment. *Wong Wing* v. *United States*, 163 U. S. 228, distinguished, and see *Li Sung* v. *United States*, 180 U. S. 486, 495; *Re Ah Yuk*, 53 Fed. Rep. 781; *United States* v. *Wong Dep Ken*, 57 Fed. Rep. 203, 211; *United States* v. *Hung Chang*, 134 Fed. Rep. 19, 24.

The words "infamous crime" have been defined as applying to those crimes which were punishable by imprisonment or other infamous punishment. *Ex parte Wilson*, 114 U. S. 417, 425, *supra; Callan* v. *Wilson*, 127 U. S. 540, *supra; Mackin* v. *United States*, 117 U. S. 348; *United States* v. *Ebert*, 25 Fed. Cas. 972.

The fact that the section uses the word "fine" instead of the word "penalty" does not necessarily indicate an intention to create a crime, for the words "fine" and "penalty" are interchangeable. *Cunard Steamship Co.* v. *Stranahan*, 134 Fed. Rep. 318; note to 1 Bishop, Crim. Law (7th ed., 17*n*), and note to *Reg.* v. *Paget*, 3 Foster and F., citing *Reg.* v. *Charley*, 12 E. and B. 515; *Reg.* v. *Russell*, 3 E. and B. 942.

There are many statutory precedents for penalties to be recovered civilly as debts. See § 4965, Rev. Stat., providing a money penalty for infringement of a copyright, and in *Werckmeister* v. *American Tobacco Co.*, 207 U. S. 375, it was held that the United States, though entitled to one-half the penalty, need not be a party to the proceeding. See also *Chaffee* v. *United States*, 18 Wall. 516, 538; *Stockwell* v. *United States*, 13 Wall. 531, 542; *Proctor* v. *People*, 24 Ill. App. 599; *Ferguson* v. *People*, 73 Illinois, 559; *United States* v. *Whitcomb Co.*, 45 Fed. Rep. 89, 90; *United States* v. *Railway Co.*, 44 Fed. Rep. 769.

In committing the enforcement of the provisions of § 9 to an administrative or executive officer, Congress did not violate

the provision of the Constitution relating to the judicial power. *Helwig* v. *United States*, 188 U. S. 605, 611; *Passavant* v. *United States*, 148 U. S. 214, 221; *Origet* v. *Hedden*, 155 U. S. 228, 236; *Doll* v. *Evans*, 7 Fed. Cas. No. 3,969; *Clay* v. *Swope*, 38 Fed. Rep. 396; *Commonwealth* v. *Byrne*, 20 Gratt. (Va.) 165.

The only safe and efficient method by which Congress could provide for the determination of the questions of fact arising under this section was by administrative process. For many years it has been the policy of the United States to entrust the determination of practically the same issues of fact to administrative officers. *United States* v. *Ju Toy*, 198 U. S. 253; *United States* v. *Sing Tuck*, 194 U. S. 161, p. 170; *Japanese Immigrant Case*, 189 U. S. 98; *Chinese Exclusion Case*, 130 U. S. 581; *Turner* v. *Williams*, 194 U. S. 279, *Nishimura Ekiu* v. *United States*, 142 U. S. 651, *Chin Bak Kan* v. *United States*, 186 U. S. 193; *Fok Yung Yo* v. *United States*, 185 U. S. 296; *Lem Moon Sing* v. *United States*, 158 U. S. 538.

Section 9 does not violate the due process clause of the Fifth Amendment. *Dreyer* v. *Illinois*, 187 U. S. 71, 83, 84; *Michigan Cent. R. R. Co.* v. *Powers*, 201 U. S. 294; *Consolidated Railway Co.* v. *Vermont*, 207 U. S. 541; *Twining* v. *State of New Jersey*, 211 U. S. 78; *Walker* v. *Sauvinet*, 92 U. S. 90; *Maxwell* v. *Dow*, 176 U. S. 581; *Hurtado* v. *California*, 110 U. S. 516; *Davis* v. *Burke*, 179 U. S. 399; *Reetz* v. *Michigan*, 188 U. S. 505.

In the cases before circular No. 58, the determination of the Secretary of Commerce and Labor that the facts warranted the imposition of a penalty was arrived at with due process of law.

Although prior to the issuance of the circular no formal notice of any set hearing preliminary to the imposition of the penalty was given, the plaintiffs had ample opportunity for defense had they cared to make one. Their theory that they were entitled to a technical and formal proceeding, failing which they need make no effort to avail themselves of their other opportunities for defense, is untenable. *Buttfield* v. *Stranahan*, 192 U. S. 470, 497; *Auffmordt* v. *Hedden*, 137 U. S.

310, 323; *Origet* v. *Hedden*, 155 U. S. 228, 236; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272; *McMillen* v. *Anderson*, 95 U. S. 37; *Springer* v. *United States*, 102 U. S. 586; *Turpin* v. *Lemon*, 187 U. S. 51, 58.

The due process clause is not intended to require the Government to pursue proceedings of which the parties concerned never avail themselves and thereby reduce to empty formulas. The delay of fourteen days provided by circular No. 58 clearly constitutes an impairment of the public interests and is to be required only where that public disadvantage is balanced by some substantial advantage to the individual.

Nor need the notice be a formal, personal notice. It is sufficient if the party concerned is made aware of the proceedings, as by publication, *Lent* v. *Tillson*, 140 U. S. 316; *Happy* v. *Mosher*, 44 N. Y. 313, or by statute fixing the sessions. *Glidden* v. *Harrington*, 189 U. S. 255, 258.

In the cases after circular No. 58, the determination of the Secretary of Commerce and Labor that the facts warranted the imposition of a penalty was arrived at with due process of law; the regulations provided for fourteen days' notice. *Johnson* v. *Hunter*, 127 Fed. Rep. 219, 223; *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 192; *Huling* v. *Kaw Valley Ry.*, 130 U. S. 559; *Bellingham Bay &c. Co.* v. *New Whatcom*, 172 U. S. 314, 318.

It was within the authority of the Secretary to issue circular No. 58. The entire arrangement was for the benefit of the plaintiffs. The collector had a right to hold the vessel until the proceedings had been completed and the fine imposed; he allowed it to go on condition that security for the payment of the fine was retained; and this permission was not only well within the implied power of his department, but was expressly covered by the powers granted by § 22 of the immigration law. The final imposition of the fine completed the Government's right to the money, if ever incomplete, and ratified its collection. *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Origet* v. *Hedden*, 155 U. S. 228; *Auffmordt* v. *Hedden* 137 U. S. 310,

323; *Ludloff* v. *United States*, 108 U. S. 176; *Thacher's Distilled Spirits*, 103 U. S. 679; *In re Kollock*, 165 U. S. 526; *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301; *Dastervignes* v. *United States*, 122 Fed. Rep. 30; *Stratton* v. *Oceanic Steamship Co.*, 140 Fed. Rep. 829.

Congress had the power to make the payment of the penalty a condition of obtaining clearance. *Gibbons* v. *Ogden*, 9 Wheat. 1; *United States* v. *Brigantine William* (1808), Fed. Cas. No. 614; *Hendricks* v. *Gonzalez*, 67 Fed. Rep. 351; *Cunard Co.* v. *Stranahan*, 134 Fed. Rep. 318; 17 Op. Atty. Gen. 82.

An English precedent is contained in Statutes 6 and 7, William IV, c. 11, § 2.

MR. JUSTICE WHITE delivered the opinion of the court.

The steamship company sought the recovery of money paid to the collector of customs of the port of New York which was exacted by that official under an order of the Secretary of Commerce and Labor. The findings of the court, the case by stipulation having been tried without a jury, leave no doubt that the money was paid to the collector under protest, and involuntarily. We say this because the findings establish that the company was coerced by the certainty that if it did not pay the collector would refuse a clearance to its steamships plying between New York city and foreign ports at periodical and definite sailings, whose failure to depart on time would have caused not only grave public inconvenience from the non-fulfillment of mail contracts, but besides would have entailed upon the company the most serious pecuniary loss consequent on its failure to carry out many other contracts.

Both the Secretary and the collector were expressly authorized by law, the one to impose and the other to collect the exactions which were made. The only question, therefore, is whether the power conferred upon the named officials was consistent with the Constitution. The provision under which the officials acted is § 9 of the act of March 3, 1903, entitled, "An Act

to regulate the immigration of aliens into the United States." c. 1012, 32 Stat. 1213. Light to guide in an analysis of the contentions concerning the asserted repugnancy of the section to the Constitution will be afforded by giving at once the merest outline of some of the comprehensive provisions of the act of which it forms a part.

The act excludes from admission into the United States, among other classes, those afflicted "with loathsome or with dangerous contagious diseases." § 2. It prohibits the importation of persons for immoral purposes or of persons to perform "labor or service of any kind, skilled or unskilled, by previous solicitation or agreement." §§ 3 and 4. It imposes the duty on the master of any vessel having on board alien immigrants to deliver to the immigrant officer at the port of arrival lists made at the port of embarkation. § 12. These lists are required to be verified by the oath of the master of the vessel taken before the immigrant officer at the port of arrival, to the effect that the surgeon of the vessel who sails therewith has physically and orally examined each alien, and that from such examination by the surgeon and from his own investigation the officer of the ship believes that no one of the listed persons is disqualified by law from entering. This list is also required to be verified by the affidavit of the surgeon, and in case no surgeon sails with the ship it is required that the owner of the vessel employ at the port of embarkation a competent surgeon to make the examination. §§ 13 and 14. Upon the arrival of a vessel in the United States, for the purpose of verifying the lists, immigration officers are authorized to board the vessel, inspect the immigrants and to disembark them for further inspection and medical examination, the disembarkation for such purposes not to be considered as a landing within the United States. The medical examination, the statute provides, shall be made by medical officers of the United States Marine Hospital Service assigned to such duty, and upon them is imposed the obligation of certifying, "for the information of the immigration officers and the boards of spe-

cial inquiry provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien." In case of controversy concerning the right of an alien to land, full provision is made for the taking of testimony, and ultimately where a right to land is challenged, for a determination of the question by boards of inquiry which the statute creates. §§ 16, 17, 24. The cost of maintenance pending investigation or treatment of an alien found to be within the prohibited class or classes is cast upon the vessel and its owners, and the duty of returning at its cost such immigrant to the port from which he came is also cast upon the ship or its owner. § 19. The performance of the duties which the act imposes are sanctioned in some cases by the creation of a criminal responsibility, and in others by the imposition of penalties recoverable in civil actions. Thus, among others, it is made a misdemeanor, punishable by fine and imprisonment, for any person to bring into or land, or attempt to do so, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter. § 6. It is made a misdemeanor, punishable upon conviction by fine and imprisonment, to land any alien without complying with the requirements for examination by medical officers as contemplated in the statute. §§ 17 and 18. And it is also made a misdemeanor, punishable by fine or imprisonment, to knowingly aid or assist or conspire to procure or permit the entry of an alien into the United States contrary to the regulations which the statute provides. § 38. Further, it is made a misdemeanor to refuse to discharge the duty of returning an immigrant and power is given to refuse clearance to the vessel. § 19. And a penalty, recoverable by civil action, is authorized for violations of § 4, relating to the importation of aliens under previous contract. Section 9, which as we have said is here involved, is as follows:

"That it shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel, to bring to the

United States any alien afflicted with a loathsome or with a dangerous contagious disease; and if it shall appear to the satisfaction of the Secretary of the Treasury (Secretary of Commerce and Labor) that any alien so brought to the United States was afflicted with such a disease at the time of foreign embarkation, and that the existence of such disease might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of one hundred dollars for each and every violation of the provisions of this section; and no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid, nor shall such fine be remitted."

The express prohibition against bringing into the United States alien immigrants afflicted with "loathsome or dangerous contagious diseases," which the section contains, is so apparent, and the power to enact the prohibition so obvious, that we dismiss these subjects from further consideration. The exaction which the section authorizes the Secretary of Commerce and Labor to impose, when considered in the light afforded by the context of the statute, is clearly but a power given as a sanction to the duty, which the statute places on the owners of all vessels, to subject all alien emigrants, prior to bringing them to the United States, to medical examination at the point of embarkation, so as to exclude those afflicted with the prohibited diseases. In other words, the power to impose the exaction which the statute confers on the Secretary is lodged in that officer only when it results from the official medical examination at the point of arrival not only that an alien is afflicted with one of the prohibited diseases, but that the stage of the malady as disclosed by the examination establishes that the alien was suffering with the disease at the time of embarkation, and that such fact would have been then discovered had the medical examination been then made by the vessel or its

owners, as the statute requires. We think it is also certain that the power thus lodged in the Secretary of Commerce and Labor was intended to be exclusive, and that its exertion was authorized as the result of the probative force attributed to the official medical examination for which the statute provides, and that the power to refuse clearance to vessels was lodged for the express purpose of causing both the imposition of the exaction and its collection to be acts of administrative competency, not requiring a resort to judicial power for their enforcement. While we have said that the conclusions just stated are clearly sustained by the text, yet, if ambiguity be conceded, it is dispelled, and the same result is reached by a consideration of the report of the Senate Committee on Immigration, where the provisions originated, and which we have a right to consider as a guide to its true interpretation. *The Delaware*, 161 U. S. 459; *Buttfield* v. *Stranahan*, 192 U. S. 470, 495. In that report it was said:

"Notwithstanding the explicit prohibition of the present law, it has been found impossible to prevent the steamship companies from bringing diseased aliens to our ports. Once on this side, every argument and influence that can be used is resorted to, either to effect the landing of such aliens or their treatment in the hospital as a preliminary to such landing. Expert medical testimony is secured to attack the diagnosis of the examining surgeon and even to question the contagious nature of the disease. Pitiable stories are told of the separation of parents from young children to induce officers to relax in the discharge of their plain duty. Great charitable organizations intervene, and even political influence is invoked for the same purpose, the steamship companies themselves, either covertly or openly, displaying a spirit of resistance to the law. If all of these obstacles to the execution of the law fail of their purpose, and the alien afflicted with tuberculosis, favus, or trachoma is sent back, still by the willful or indifferent defiance of this sanitary law the design sought by its passage is defeated, for hundreds may possibly have been—indeed,

almost certainly have been—exposed to the disease in the steerage on the way over, may have been affected by it and landed before it has reached a stage of development sufficiently advanced to be detected by the medical inspector.

"Section 10 of the measure under consideration [which in the final enactment became § 9 of the law] therefore imposes a penalty of $100, to be imposed by the Secretary of the Treasury (now Secretary of Commerce and Labor), for each case brought to an American port, provided in his judgment the disease might have been detected by means of medical examination at the port of embarkation. This sufficiently guards the transportation lines from an unjust and hasty imposition of the penalty, insures a careful observance of the law, and leaves in their own hands the power to escape even a risk of the fine being imposed, since they can refuse to take on board even the most doubtful case until certified by competent medical authority to be entirely cured." 57th Con. 1st sess. S. Rept. No. 2119, p. viii; 57th Con. 2d sess. S. Doc. No. 62.

Resting, as the statute does, upon the authority of Congress over foreign commerce and its right to control the coming of aliens into the United States, and to regulate that subject in the fullest degree, reserving for future consideration the particular contentions advanced at bar by the plaintiff in error, it may not be doubted that it is not open to discussion that the statute as thus construed was within the power of Congress to enact. In *Buttfield* v. *Stranahan*, 192 U. S. 470, considering the subject, it was said (pp. 492, 493):

"Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff

legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion

* * * * * * * *

"As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution."

In *Turner* v. *Williams*, 194 U. S. 279, in the course of an opinion considering the act here involved, and holding it valid in so far as it provided for the exclusion of anarchists, it was said (p. 289):

"Repeated decisions of this court have determined that Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers; that the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law, and that the provisions of the Constitution securing the right of trial by jury have no application."

The whole subject was again reviewed in *United States* v. *Ju Toy*, 198 U. S. 253, where, in upholding the validity of the Chinese Exclusion Act, it was observed that the power of Congress to deal with the admission of aliens and to confide the enforcement of such laws to administrative officers was in view of the previous cases no longer open to discussion.

We come to consider the specific grounds which are relied

upon to remove the case from the control of these general principles.

1. It is insisted that, however complete may be the power of Congress to legislate concerning the exclusion of aliens and to entrust the enforcement of legislation of that character to administrative officers, nevertheless the particular legislation here in question is repugnant to the Constitution because it defines a criminal offense and authorizes a purely administrative official to determine whether the defined crime has been committed, and, if so, to inflict punishment. Conclusive support for the legal proposition upon which this contention must rest, it is insisted, results from the ruling in *Wong Wing* v. *United States*, 163 U. S. 228, where it was said (p. 237):

"We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by Congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.

"But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused. No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial.

It is not consistent with the theory of our Government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."

But in so far as the case of Wong Wing held that the trial and punishment for an infamous offense was not an administrative but a judicial function, it is wholly inapposite to this case, since, on the face of the section which authorizes the Secretary of Commerce and Labor to impose the exaction which is complained of, it is apparent that it does not purport to define and punish an infamous crime, or indeed any criminal offense whatever. Clear as is this conclusion from the text of § 9, when considered alone, it becomes, if possible, clearer when the section is enlightened by an analysis of the context of the act and by a consideration of the report of the Senate committee to which we have previously made reference. We say by an analysis of the context of the act, because, as we have previously stated, its various sections accurately distinguish between those cases where it was intended that particular violations of the act should be considered as criminal and be punished accordingly, and those where it was contemplated that violations should not constitute crime, but merely entail the infliction of a penalty, enforcible in some cases by purely administrative action and in others by civil suit. We say also by a consideration of the report of the Senate committee, since that report leaves no doubt that the sole purpose of § 9 was to impose a penalty, based upon the medical examination for which the statute provided, thus tending, by the avoidance of controversy and delay, to secure the efficient performance by the steamship company of the duty to examine in the foreign country, before embarkation, and thereby aid in carrying out the policy of Congress to exclude from the United States aliens afflicted with loathsome or dangerous contagious diseases as defined in the act. The contention that because the exaction which the statute authorizes the Secretary of Commerce and Labor to impose is a penalty,

therefore its enforcement is necessarily governed by the rules controlling in the prosecution of criminal offenses, is clearly without merit, and is not open to discussion. *Hepner* v. *United States*, 213 U. S. 103.

2. But it is argued that even though it be conceded that Congress may in some cases impose penalties for the violation of a statutory duty and provide for their enforcement by civil suit instead of by criminal prosecution, as held in *Hepner* v. *United States*, nevertheless that doctrine does not warrant the conclusion that a penalty may be authorized, and its collection committed to an administrative officer without the necessity of resorting to the judicial power. In all cases of penalty or punishment, it is contended, enforcement must depend upon the exertion of judicial power, either by civil or criminal process, since the distinction between judicial and administrative functions cannot be preserved consistently with the recognition of an administrative power to enforce a penalty without resort to judicial authority. But the proposition magnifies the judicial to the detriment of all other departments of the Government, disregards many previous adjudications of this court and ignores practices often manifested and hitherto deemed to be free from any possible constitutional question.

Referring in *Bartlett* v. *Kane*, 16 How. 263, to the authority of Congress to confide to administrative officers the enforcement of tariff legislation, it was said (p. 272):

"The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are satisfied that such a power was never intended to be given to them. *Decatur* v. *Paulding*, 14 Pet. 499."

And in the same case, in considering the nature and character of a penalty of ten per cent which the tariff act of 1842 (5 Stat. 563, chap. 270) authorized administrative officers to impose in cases of undervaluation, it was said (p. 274):

"An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an un-

dervaluation by the importer, shows that they were exacted as discouragements of fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the acts this additional duty has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, . . . it must still be regarded in the light of a penal duty."

See also *Murray's Lessee et al.* v. *Hoboken Land & Improvement Co.*, 18 How. 272.

In *Passavant* v. *United States*, 148 U. S. 214, the authority of Congress to delegate to administrative officers final and conclusive authority as to the valuation of imported merchandise, accompanied with the power to impose a penalty for undervaluation, was reiterated, and the doctrine of *Bartlett* v. *Kane* was applied. And the same principle was upheld in *Origet* v. *Hedden*, 155 U. S. 228.

In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.

It is insisted that the decisions just stated and the legislative practices referred to are inapposite here, because they all relate to subjects peculiarly within the authority of the legislative department of the Government, and which, from the necessity of things, required the concession that administrative officers should have the authority to enforce designated penalties without resort to the courts. But over no conceivable subject is the legislative power of Congress more complete than it is over that with which the act we are now considering deals. If the proposition implies that the right of Congress to enact legislation is to be determined, not by the grant of power made

by the Constitution, but by considering the particular emergency which has caused Congress to exert a specified power, then the proposition is obviously without foundation. This is apparent, since the contention then would proceed upon the assumption that it is within the competency of judicial authority to control legislative action as to subjects over which there is complete legislative authority, on the theory that there was no necessity calling for the exertion of legislative power. As the authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject, it must follow that if Congress has deemed it necessary to impose particular restrictions on the coming in of aliens, and to sanction such prohibitions by penalties enforcible by administrative authority, it follows that the constitutional right of Congress to enact such legislation is the sole measure by which its validity is to be determined by the courts. The suggestion that if this view be applied grave abuses may arise from the mistaken or wrongful exertion by the legislative department of its authority but intimates that if the legislative power be permitted its full sway within its constitutional sphere, harm and wrong will follow, and therefore it behooves the judiciary to apply a corrective by exceeding its own authority. But as was pointed out in *Cary* v. *Curtis*, 3 How. 236, and as has been often since emphasized by this court (*McCray* v. *United States*, 195 U. S. 27), the proposition but mistakenly assumes that the courts can alone be safely intrusted with power, and that hence it is their duty to unlawfully exercise prerogatives which they have no right to exert, upon the assumption that wrong must be done to prevent wrong being accomplished.

3. It is urged that the fines which constituted the exactions were repugnant to the Fifth Amendment, because amounting to a taking of property without due process of law, since, as asserted, the fines were imposed, in some cases, without any previous notice, and in all cases without any adequate notice or opportunity to defend. Stated in the briefest form, the

findings below show that on the arrival of a vessel, if the examining medical officers discovered that an immigrant was afflicted with one of the prohibited diseases, the owner of the vessel was notified of the fact, and, indeed, that the steamship company had at the place where the examination was made what is known as a landing agent, whose business it was to keep informed as to the result of medical examinations, and to know when an immigrant was detained by the medical officers because afflicted with a prohibited disease. The findings also established that where a fine was imposed under § 9 by the Secretary of Commerce and Labor it was only done after the transmission to that official of the certificate of the examining medical officer that a particular alien immigrant had been found to be afflicted with one of the prohibited diseases, and that the state of the disease established in the opinion of the medical officer that it existed at the time of embarkation, and could then have been detected by a competent medical examination. Prior to a certain date the action of the Secretary of Commerce and Labor imposing a fine was notified to the steamship company and demand of payment was practically at once made. After a certain date, by what is known as circular No. 58, the same process was followed as to the imposition of the fine, but a period of time—fourteen days—was allowed to intervene between the notice given of the imposition of the fine and its final and compulsory exaction. As to the action of the Secretary of Commerce and Labor before the promulgation of circular No. 58, the court below found that no adequate opportunity was afforded the vessel or its owner to be heard, and, as to the notice given after the promulgation of circular No. 58, it was found that the fourteen days allowed by that circular, and the practice under it, "did not afford the plaintiff a reasonable opportunity to obtain evidence from the port of embarkation and to be heard upon the question whether a fine should be imposed." Much contention is made in argument concerning these findings, it being insisted that there is conflict between them, and different views are taken as to

which of the findings should, under the circumstances of the case, be treated as dominant. But into that controversy we do not think it necessary to enter, since, as previously pointed out, it is evident that the statute unambiguously excludes the conception that the steamship company was entitled to be heard, in the sense of raising an issue and tendering evidence concerning the condition of the alien immigrant upon arrival at the point of disembarkation, as the plain purpose of the statute was to exclusively commit that subject to the medical officers for which the statute provided. We shall, therefore, test the soundness of the proposition we are considering upon that assumption.

In view of the absolute power of Congress over the right to bring aliens into the United States we think it may not be doubted that the act would be beyond all question constitutional if it forbade the introduction of aliens afflicted with contagious diseases, and, as a condition to the right to bring in aliens, imposed upon every vessel bringing them in, as a condition of the right to do so, a penalty for every alien brought to the United States afflicted with the prohibited disease, wholly without reference to when and where the disease originated. It must then follow that the provision contained in the statute is of course valid, since it only subjects the vessel to the exaction when, as the result of the medical examination for which the statute provides, it appears that the alien immigrant afflicted with the prohibited malady is in such a stage of the disease that it must in the opinion of the medical officer have existed and been susceptible of discovery at the point of embarkation. Indeed, it is not denied that there was full power in Congress to provide for the examination of the alien by medical officers and to attach conclusive effect to the result of that examination for the purposes of exclusion or deportation. But it is said the power to do so does not include the right to make the medical examination conclusive for the purpose of imposing a penalty upon the vessel for the negligent bringing in of an alien. We think the argument rests

upon a distinction without a difference. It disregards the purpose which, as we have already pointed out, Congress had in view in the enactment of the provision, that is, the guarding against the danger to arise from the wrongful taking on board of an alien afflicted with a contagious malady, not only to other immigrant passengers, but ultimately it might be to the entire people of the United States, a danger arising from the possible admission of aliens who might contract the contagion during the voyage and yet be entitled to admission because apparently not afflicted with the prohibited disease, owing to the fact that the time had not elapsed for the manifestation of its presence. In effect, all the contentions pressed in argument concerning the repugnancy of the statute to the due process clause really disregarded the complete and absolute power of Congress over the subject with which the statute deals. They mistakenly assume that mere form and not substance may be made by the courts the conclusive test as to the constitutional power of Congress to enact a statute. These conclusions are apparent, we think, since the plenary power of Congress as to the admission of aliens leaves no room for doubt as to its authority to impose the penalty, and its complete administrative control over the granting or refusal of a clearance also leaves no doubt of the right to endow administrative officers with discretion to refuse to perform the administrative act of granting a clearance as a means of enforcing the penalty which there was lawful authority to impose.

There are many other propositions urged in argument which we do not deem it necessary to specifically notice, as in effect they are all disposed of by the considerations which we have stated.

We have not considered the questions which would arise for decision if the case presented an attempt to endow administrative officers with the power to enforce a lawful exaction by methods which were not within the competency of administrative duties, because they required the exercise of judicial authority.

Affirmed.

INTERNATIONAL MERCANTILE MARINE COMPANY *v.* STRANAHAN.

SAME *v.* SAME.

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

Nos. 510, 511. Argued January 11, 12, 1909.—Decided June 1, 1909.

Decided on the authority of the preceding case.

THE facts are stated in the opinion.

Mr. William G. Choate and *Mr. Lucius H. Beers* for plaintiffs in error.[1]

Mr. Wade H. Ellis, Assistant to the Attorney General, with whom *Mr. Henry L. Stimson, Mr. Winfred T. Demson* and *Mr E. P. Grosvenor* were on the brief for defendant in error.[1]

MR. JUSTICE WHITE delivered the opinion of the court.

These writs of error are prosecuted to obtain the reversal of judgments entered in favor of the United States in actions brought to recover back sums paid as penalties imposed and collected under authority of § 9 of the Immigration Act of March 3, 1903. One action concerned penalties exacted before and the other related to a penalty which attached after the promulgation by the Secretary of Commerce and Labor of a certain rule of procedure known as circular No. 58. As the controversies in these cases are of the same nature as that presented by the record in *Oceanic Steam Navigation Company, Limited,* v. *The United States,* No. 509, just decided, *ante,* p. 320, and as the principles which controlled the decision in that case are here absolutely decisive, the judgments in these cases must be, and they are,

Affirmed.

[1] For abstracts of argument see pages 322–329, *ante.*

WEEMS STEAMBOAT COMPANY OF BALTIMORE *v.* PEOPLE'S STEAMBOAT COMPANY.

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

No. 181. Argued April 26, 1909.—Decided June 1, 1909.

A wharf on a navigable stream is private property and subject to the absolute control of the owner as other property is.

The rights of a riparian owner on a navigable stream are governed by the law of the State in which the stream is situated, but subject to the paramount public right of navigation.

One of the rights of a riparian proprietor is to build private wharves out so as to reach the navigable waters of the stream, and this right has been affirmed by the courts of Virginia; but a wharf obstructing navigation or private rights of others or encroaching upon any public landing may be abated.

A private wharf on a navigable stream is the exclusive property of the owner of which he can only be deprived in accordance with established law, and, if taken for public use, on compensation being made.

A private wharf on a navigable stream is not held by the owner, as a railroad is, subject to the public use, and a third person has no right to demand its use even on tendering compensation therefor and even though there may be no other wharf at the place. *Munn* v. *Illinois*, 94 U. S. 113, distinguished. *Louisville & Nashville Railway Co.* v. *West Coast Naval Stores Co.*, 198 U. S. 483, followed.

The public obtains no adverse right against the owner of a private wharf by mere user; in the absence of an intent on the owner's part to dedicate, and an acceptance by the public authority, the use is mere license subject to withdrawal.

The remarks of Mr. Justice Bradley in *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, as to the right of the owner of a private wharf to make arbitrary charges are *obiter* and are not applicable to the present case.

141 Fed. Rep. 454, and judgment of Circuit Court of Appeals, affirming it, reversed.

THE complainant (the above-named petitioner) commenced this suit in the Circuit Court of the United States for the Eastern District of Virginia against the defendant, the Peo-

ple's Steamboat Company and its officers and agents, for the purpose of obtaining an injunction restraining the corporation defendant from using certain wharves on the Rappahannock River, in the State of Virginia, of some of which the complainant was the owner in fee, and of others the lessee of the exclusive use from the owners. The complainant contended that it had the exclusive right to the use of such wharves, either as owner or lessee, and that the defendant illegally and against the will of the complainant insisted upon using them to carry on its business, although offering to pay the complainant what was the reasonable value of the defendant's use of such wharves.

The corporation and the individual defendants filed joint and separate answers, setting up a claim of right to the use of such wharves upon compensation being made therefor, and the case came before the court on motion of complainant for a temporary injunction, as prayed for in the bill of complaint. The court, without then passing upon any other question, ordered that the matter be referred to a special master for the purpose of taking such evidence as might be submitted to him by either party, or which he might find necessary to take, bearing upon the title to the several wharves mentioned in complainant's bill and claimed by complainant, and to ascertain what rights passed to complainant with the acquisition of such wharves and whether or not the wharves were public or private wharves. Pursuant to this order of reference, hearings were had before the master, who returned the evidence taken before him with his opinion in favor of granting the injunction as prayed for by the complainant, on the ground that the wharves in question were private wharves owned or leased by the complainant, who had the exclusive right to their use. The facts found by the master were not overruled, but his conclusions of law were not concurred in by the court, and the preliminary injunction was refused. The case was then submitted to the court for trial upon all the evidence taken, and the bill was dismissed with costs. 141 Fed. Rep. 454.

The complainant appealed from the decree of dismissal to the Circuit Court of Appeals for the Fourth Circuit, where it was affirmed upon the opinion of the Circuit Court.

The complainant then applied to this court for a writ of certiorari to bring the case here, which petition was granted, and the case has been submitted to this court upon the briefs of respective counsel.

Mr. St. George R. Fitzhugh and *Mr. George Weems Williams*, with whom *Mr. Nicholas P. Bond* was on the brief, for petitioner:

The mere fact that property is owned by a common carrier does not make such property subject to any and every public use. Neither does the fact that property may be used by a common carrier in its business as such subject it to any use that may be of supposed or actual benefit or advantage to the public, but the carrier fulfills its obligation if it permits the public, without discrimination, to use such property in transacting business with it as such carrier. *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279; *Pittsburg &c. Ry. Co.* v. *Bingham*, 29 Ohio St. 364, 370; 1 Farnham on Waters and Water Rights, § 66, p. 297; Same, § 110, pp. 509, 510; Same, § 112, p. 523; Same, § 113*b*, pp. 533, 534; *King* v. *Russell*, 6 Barn. & C. 566; *Yates* v. *Milwaukee*, 10 Wall. 497; *Weber* v. *Board of Harbor Commissioners*, 18 Wall. 57.

The right to maintain private wharves in a navigable river was recognized again in *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, and in *Ill. Cent. R. Co.* v. *Illinois*, 146 U. S. 387, 445, 446, and in *Dutton* v. *Strong*, 1 Black, 23.

The right of a riparian owner as to the erection of wharves in Virginia under statute, and the decisions of Virginia courts, is as follows:

Code of Virginia of 1887, § 998:

"Any person owning land upon a water course may erect a wharf on the same, or pier or bulkhead in such water course opposite his land, provided the navigation be not obstructed,

nor the private rights of any person be otherwise injured thereby. But the court of the county in which said wharf, pier or bulkhead is, after causing ten days' notice to be given to the owner thereof of its intention to consider the subject, if it be satisfied that such wharf, pier or bulkhead, obstructs the navigation of the water course, or so encroaches on any public landing as to prevent the free use thereof, may abate the same." See *Norfolk City* v. *Cooke*, 27 Gratt. 430, 435; *Railway Co.* v. *Faunce*, 31 Gratt. 761, 764, 765; *McCready* v. *Commonwealth of Virginia*, 27 Gratt. 985; *Hardy* v. *McCullough*, 23 Gratt. 251, 262.

The statutes of Virginia and the decisions of its courts govern in the determination of the rights of a riparian owner in the navigable waters of that State. *Shively* v. *Bowlby*, 152 U. S. 1, 24–26; *Illinois Central Ry. Co.* v. *Illinois*, 146 U. S. 387; *St. Anthony Falls* v. *St. Paul*, 168 U. S. 349.

The plaintiff is not, because it is a common carrier, bound to permit, upon any terms, vessels competing with its own for the same business to make use of its wharves for the purpose of such competition, and can exclude not only competitors, but all persons, from the use of its wharves, except those who have business to transact thereat with it as a common carrier.

The fact that public roads have been built to the shore ends of certain of these wharves has no effect on their character as private wharves or the plaintiff's rights to limit their use to its own patrons or other persons having business with it as a common carrier.

The fact that nearly all these wharves are built in the open country, along the banks of the river, and not in cities or towns or harbors or places where there may be more than one landing place, makes no difference in the real character of these wharves, whether public or private.

The law does not declare that a wharf, which is public in the sense that the owner thereof has permitted the public to use it for any purpose upon payment of compensation, shall for all time remain public, but allows the owner thereof to change the

public character of such a wharf by a proper and reasonable notice. See *Louisville & Nashville R. R. Co.* v. *West Coast Naval Stores Co.*, 198 U. S. 483; *Exterkamp* v. *Covington Harbor Co.*, 104 Kentucky, 796; *Brisbine* v. *St. Paul Railway Co.*, 23 Minnesota, 114, 129, 130; *California Nav. Co.* v. *Union Co.*, 126 California, 433; *Irwin* v. *Dixion*, 9 How. 33; *Coney* v. *Brunswick St. Co.*, 42 S. E. Rep. 498; *S. C.*, 116 Georgia, 222; *Mills* v. *Evans*, 100 Iowa, 712. See also *Bogert* v. *Haight*, 20 Barb. 251.

The opinion of the Circuit Court complained of herein disregards the principles of the cases which hold that a common carrier has the right to select its agencies for conducting its business and to decline to allow other carriers the use of its terminal facilities. *Atchison &c. R. R.* v. *Denver & N. O. R. R.*, 110 U. S. 667; *Express Cases*, 117 U. S. 1; *St. Louis Drayage Co.* v. *Louisville & N. R. R.*, 65 Fed. Rep. 39.

That a wharf owner may revoke a license to use his property is settled in the following cases: *Railroad Company* v. *Hanning*, 15 Wall. 649; *Ilwaco &c. Co.* v. *Oregon Short Line*, 57 Fed. Rep. 673; *Coney* v. *Brunswick &c. Co.*, 116 Georgia, 222; *Bogert* v. *Haight*, 20 Barb. 251; *Heaney* v. *Heaney*, 2 Denio, 625; *Swords* v. *Edgar*, 59 N. Y. 28, 31, 32. Compare *O'Neill* v. *Aunett*, 27 N. J. L. 290; see also 29 Am. & Eng. Ency., 1st ed., 64.

Mr. William D. Carter, with whom *Mr. Ellerbe W. Carter* was on the brief, for respondents:

The right to "wharf out," neither under the common law nor by statute, is conferred upon any common carrier as such. No common carrier takes such right by Magna Charta, nor has it such "*jus naturalis*." The privilege of constructing pier wharves, and duties which arise when the privilege is exercised, pertain only to riparian proprietors. If the "plaintiff" owns a wharf, it is as a riparian proprietor, and not because it is a common carrier, that it is permitted to hold, maintain, and enjoy the same. *Hunt* v. *Ill. Central R. R.*, 184 U. S. 77, 86;

S. C.,146 U. S. 387; *Yates* v. *Milwaukee*, 10 Wall. 497; *Dutton* v. *Strong*, 1 Black, 23; Virginia Code, §§ 998, 999.

Equity and justice require that the appropriate rules of law be made to apply to every riparian proprietor alike. One riparian proprietor who has exercised his privilege of constructing a wharf may enjoy his structure in his own way, and put the wharf to his own use alone, or to his own use collectively with others, provided the uses are restricted and the location and surrounding circumstances permit such use without injury to the public. *Dutton* v. *Strong*, 1 Black, 23; *L. & N. R. R. Co.* v. *West Coast Naval Stores Co.*, 198 U. S. 483.

The title to navigable waters and to the soil under water in navigable rivers, is and must be held in perpetual trust for the public as beneficiary. *Martin* v. *Waddell*, 16 Pet. 410; *Shepherd's Point Land Co.* v. *Atlantic Hotel*, 44 S. E. Rep. 39; *Smith* v. *Maryland*, 18 How. 71, 74.

Though his domain stops at low-water mark, the riparian proprietor (and he alone) may build out a wharf structure in aid of navigation. *Mobile Transp. Co.* v. *Mobile*, 13 L. R. A. 352; 1 Farnham on Waters, p. 227, § 113*b*; *Dutton* v. *Strong*, 1 Black, 23; *Yates* v. *Milwaukee*, 10 Wall. 497.

The legislature of Virginia has, by statutory enactment, declared this rule of law also. Code of 1887, §§ 998, 999.

In building a wharf under § 998, the riparian proprietor exercises an inherent privilege which he enjoys under the law. Whether he makes of his wharf a private "staith" or a public facility depends mainly on the use to which it is subsequently put. He may charge for the use of his wharf, but the charge must be "reasonable" if he serves the general public. Code of Virginia, § 999; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691; *Riddick* v. *Dunn*, 58 S. E. Rep. 493; *Mobile Transp. Co.* v. *Mobile*, 13 L. R. A. 352; and see *Gibler* v. *St. Louis Terminal Assn.*, 203 Missouri, 208, for an exposition of the duties owed the public by a toll bridge owner, and what differentiates between such a public servant and a common carrier. Both serve the public, but a common carrier furnishes transporta-

tion. The duties of a wharf owner serving the public are the same as those of a bridge owner, with added responsibilities on the wharf owner to serve both the public or individual patrons coming to his wharf to secure the services of a carrier, and the carrier public coming to the wharf in the line of securing business or discharging traffic.

If the circuit court of a Virginia county permit any individual to build out a wharf from a "public landing" under Code, § 999, *supra*, it needs no argument to show that the public is the riparian proprietor, and the licensee builds under the power or privilege of the licensor—the county, or, in other words, the public.

Every such wharf is irrevocably affected with a public interest "*ab condide*," no matter how often it may be conveyed and pass from vendor to vendee. *Weber* v. *Board of Harbor Comrs.*, 18 Wall. 61.

Under the decision in *Dutton* v. *Strong*, 1 Black, 23, a private wharf, when maintainable at all, must be devoted habitually to private business. Even though built by a private proprietor opposite his own shore (a condition the record shows does not exist as to at least some of the wharves in controversy here), if devoted to purposes of public commerce for compensation, it is a public wharf. Lord Hale, "De Portibus Maris; and cases, *supra*.

The riparian owner who has built a wharf from his shore out into the navigable waters of the Rappahannock and invited the public to use his wharf, and who for hire has habitually so served the public, cannot burden that service with any such "condition" as that the shipping public must take passage over his wharf, either upon sailing vessels or else patronize exclusively the steamers of a single carrier. *Munn* v. *Illinois*, 94 U. S. 5.

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

It appears that the complainant herein is a corporation of

the State of Maryland and the defendant is a corporation of the State of Virginia, the individual defendants being officers or agents of such corporation and citizens of the same State. The complainant has been for a long time engaged in the business of transportation of passengers and freight between Baltimore and various landings or places on the Rappahannock River, in the State of Virginia, and for many years has been the owner or lessee of the wharves on that river mentioned in the bill of complaint. Some time before the commencement of this suit the defendant began the transportation of passengers and freight between Fredericksburg and Urbanna, in Virginia, and along the Rappahannock River in that State, stopping at the same wharves on that river as complainant and engaged in the same business. In order to transact its business it made use of the wharves owned or leased by the complainant, in spite of the opposition of complainant and against its protests, although defendant offered to make compensation for the reasonable value of the use which it made of such wharves in the prosecution of its business, which offers were refused by the complainant, and it notified the defendant to desist from the use of the wharves owned or leased by it. The action of the defendant in making use of the wharves of complainant was based upon the contention that the defendant had the legal right to do so, inasmuch as in many cases there were no other wharves at such places where the defendant desired to land, and that it was necessary to use such wharves in order that defendant might prosecute its business of transporting passengers and freight to and from the various landings on the river, and because the wharves had for many years been used by the public.

It was proved before the master (and we take the facts in the case, as found by him), that the complainant was the owner in fee of five different wharves along the banks of the river and of the land under the water where the wharves were built; also that the complainant was the lessee of eight wharves owned by different persons who had, prior to the commencement of this

suit, leased their exclusive use to the complainant, and that it was during the time of the existence of the leases that the defendant entered upon and used the wharves for its own purposes. The master reported that there was no evidence of any prior dedication of any of such wharves to the public, either those owned by or leased to complainant, and, of course, none of any acceptance thereof by the public authorities, nor was there any evidence of any condemnation of any of such wharves on the part or in behalf of any public authority; that the wharves were private wharves, either owned by the complainant in fee or leased by it, for its exclusive use, from the owners in fee of such wharves. The most that can be said is that in some cases the former owners of the wharves now owned by the complainant, as well as the lessors of the wharves before they leased the same, and while owners thereof, had built them and had permitted the public to use them, and had frequently received compensation for such use, and in many cases the use had been without compensation. After the sales of the wharves and after the execution of the leases neither the former owners nor the lessors made any claim to the use of the wharves or to any right to permit others to use them, either with or without compensation, and the complainant formally notified the defendant that the complainant refused to permit such use any longer. It appeared that public roads had been made from the surrounding country to the places where these private wharves had been built sometimes before the building of the wharves and sometimes the roads had been laid out after such wharves had been built. The use that had been made of the wharves after they had been built and prior to the purchase or leasing by the complainant was nothing more than such as was founded upon a mere license on the part of the owners and without any dedication of the wharves to the public or any acceptance on the part of the public further than by indiscriminate user, and with no taking or condemnation of the right to use the wharves as public wharves. The title to the wharves as private property remained unaffected in any

way, and there was nothing to prevent the withdrawal of license to use at any time. In some cases the wharves were the only ones that had been built at the places where such wharves existed and the use of such wharves was convenient for the transaction of the defendant's business.

The complainant is in the actual possession of all the wharves, those which it has purchased and those which it has leased, and its title and right to the exclusive possession of all of them is recognized and assented to by both grantors and lessors, and not one of them makes any claim of any interest in the wharves as against complainant.

The Circuit Court, in speaking of the facts as found by the master, said, p. 455:

"While the said thirteen wharves involved in this proceeding by no means include all the wharves or stopping places for vessels on the river, it may be said that they embrace the important wharves from which passenger and freight business is chiefly procured in passing up and down the river, and that the business from said wharves is large. With possibly a single exception these wharves are at the termini of public highways in the counties in which they are respectively built; the character of the business consists of passenger travel, and merchandise received over said wharves, consisting of the general products of the country; and they are the usual stopping places of persons living in the immediate neighborhood of the wharves, and of the inhabitants of the country for some distance in the interior. That at said wharves United States post offices are established, at which the mail of the people for the surrounding country is procured; and that, as to the wharves leased as aforesaid, the same were leased upon a rental of a commission of ten per cent of all freight charges and passenger fares collected by the complainant on said wharves, the owner of said wharves maintaining an agent there to assist in mooring the vessels of the complainant making landings there, and in receiving and forwarding freight therefrom, and at some of the wharves sail vessels from time to time moor and

lade and unlade, making proper compensation to the owners of the wharves for their use."

With reference to these facts the Circuit Court said that "While the special master is doubtless correct in his findings as to the actual ownership of the property rights in said wharves, namely, that they are the individual property of the several owners thereof, and as such pass regularly by the laws of descent and purchase, it by no means follows that said wharves are private *quoad* the public; that is, either the citizens desiring to use the wharves to reach the means of transportation upon and over said river, or owners of such methods of transportation plying the waters of said river; the obligation upon each being to render and pay to such wharf owner reasonable wharfage and charges for the use of his property, under such proper and reasonable regulations as might be imposed either by law or by the owner of the property."

The rights of a riparian owner upon a navigable stream in this country are governed by the law of the State in which the stream is situated. These rights are subject to the paramount public right of navigation. The riparian proprietors have the right, among others, to build private wharves out so as to reach the navigable waters of the stream. *Dutton* v. *Strong*, 1 Black, 23; *Yates* v. *Milwaukee*, 10 Wall. 497; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 699; *Illinois Central R. R.* v. *Illinois*, 146 U. S. 387, 445; *St. Anthony Falls Water Power Company* v. *St. Paul Water Commissioners*, 168 U. S. 349, 368. The courts of the State of Virginia affirm the same rights of the riparian proprietor. *Norfolk City* v. *Cooke*, 27 Gratt. 430, 435; *Alex. &c. Railway* v. *Faunce*, 31 Gratt. 761, 765. If the wharf obstructs navigation or the private rights of others, or if it encroach upon any public landing, the wharf may be abated. Code of Virginia (1887), § 998. A private wharf on a navigable stream is thus held to be property which cannot be destroyed or its value impaired, and it is property the exclusive use of which the owner can only be deprived in accordance with established law, and if necessary that it or any part of it

be taken for the public use due compensation must be made. The owner of a private wharf on a navigable stream does not, on that account only, hold it by a different title from the owner of any other property which he may use himself or permit others whom he may select to use, while at the same time denying its use by any one else.

The case of *Munn* v. *Illinois*, 94 U. S. 113, 127, has, in our judgment, no bearing upon the question before us. In that case and in those cited therein the discussion was in regard to the right of owners of property of the nature described to charge what they pleased for the doing of the business in which they were engaged. Their property was being used with their consent by and its use devoted to the public to any extent desired, and the only question was in regard to the compensation which they were entitled to ask for the business thus done. The complaint was that the charges were too great and were a violation of a law of the State and were not reasonable, and the answer made by the owners of the property was that it was their private property, and they had the right to charge what they pleased. The court said, as you have devoted your property to a use in which the public has an interest, you have granted to the public an interest in that use and the right, on the part of the State, to regulate charges which you shall make, to the end that they shall be just and reasonable. If the owner of one of these wharves had devoted it to the public use and permitted the public to use it as it desired, and demanded compensation for such use, the question as to the amount of such compensation might be raised as in the Munn class of cases, to be determined with reference to the reasonableness of the charge. But this is no such case. The legislature has passed no law regarding rates, if that were material, and the reasonableness of the charge is not under consideration. The right to use the property has been withdrawn by the owner as to the public in general, including defendant. The only question is whether a third person has the right to use a private wharf on tendering reasonable compensa-

tion therefor, because there is no other wharf at the place, or because it would be more convenient to such third person to so use it or because the former owner of the wharf had permitted the public to use it, although the present owner refused to consent to such use. There is no more reason why such property should be held subject to the right of others to use it against the will of its owner than there is for any other kind of property to be so held.

The question as to the right of the owner to exclude others from the use of a private wharf on a navigable stream has been very recently decided by this court in *Louisville &c. Railway Co.* v. *West Coast Naval Stores Co.*, 198 U. S. 483, and the right of such owner to exclude any or all other persons from the use of such wharves was affirmed. The owner was not, it was also said, compelled to use the wharf exclusively for his own business or else to throw it open for the use of every one; that he could not only use it himself and permit some others to use it, but might at the same time exclude still others to whom he did not choose to grant such right. The case was not decided with reference to the existence of another wharf in the harbor. No such matter was adverted to.

And so in regard to the use of a private wharf by the public, with or without compensation to the owner. The public can obtain no adverse right as against such owner by mere user. To obtain it there must be an intention on the part of the owner to dedicate the property to the use of the public, and there must be an acceptance of such dedication on the part of some public authority, which may sometimes be implied (but not in such a case as this), and in the absence of such dedication and acceptance the use will be regarded as under a simple license, subject to withdrawal at the pleasure of the owner. *Harris* v. *The Commonwealth*, 20 Gratt. 833; *Gaines* v. *Merriman* (1898), 95 Virginia, 660; *Irwin* v. *Dixion*, 9 How. 10, 32. The rights of the public must have been obtained by an adverse user so as to take away from the owner the ordinary rights of ownership. In this case there was never anything but a mere

license. The mere fact that there may be no wharf in the particular place other than that owned by the complainant, and also the fact that the use of such wharf is very convenient or even necessary for the defendant in order to prosecute its business as a competitor of complainant, together with the fact that the former owners had permitted the public upon occasions to use the wharf, furnish not the slightest reason for holding that the wharf of complainant is held on the condition that it must continue to permit others to use it upon compensation, when they desire to prosecute their own business of transporting passengers or freight on the river. It was found by the master that there had never been any abandonment of the right of exclusive enjoyment of any of the wharves, and they were assessed for taxation to the owners and taxes paid on them by the owners.

Mr. Justice Bradley in *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 699, remarked (*obiter*) that whether a private wharf might be maintained as such where it is the only facility of the kind in a particular port or harbor, might be questioned. He recognized the law to be that there might be a private wharf in a navigable stream, and that the owner in permitting its temporary use by another would be at liberty to make his own bargain for such use. The remark was made with reference to the amount of the charges for wharfage, and the Justice doubted the right, under the circumstances stated, of the owner of a wharf to make such charges as he chose, without reference to their being reasonable. It is another matter, however, to say that the owner of a private wharf must permit its use by the public simply because the wharf he has built or purchased is the only wharf in the port, or because the public had theretofore been permitted to use the wharf, with only the rights of a licensee.

We see no sufficient reason for subjecting a private wharf to the public use, which may frequently include that of a competitor with the owner, simply because there is no other wharf at the place. A public wharf, it is presumed, may be built, or

if there be no place for one, the private wharf might be taken by public authority for the public use, upon compensation being made for the taking of the property.

We are of opinion that the decree of the court below is erroneous, and it is therefore

Reversed, with directions to enter a decree for an injunction as prayed for in the bill of complaint. So ordered.

ENGLISH *v.* TERRITORY OF ARIZONA *ex rel.* GRIFFITH, TREASURER OF PIMA COUNTY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 180. Submitted April 26, 1909.—Decided June 1, 1909.

Where there is doubt as to the construction of a statute of a Territory this court leans towards the construction given by the Supreme Court of the Territory, *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 474, and unless there is manifest error this court will not disturb a decision of that court, *Fox* v. *Haarstick*, 156 U. S. 674, and in this case this court accepts the decision of the Supreme Court of Arizona in construing a revenue statute of that Territory.

The question of special benefit of assessment work and property to which it extends is one of fact. *Stanley* v. *Supervisors*, 121 U. S. 535, 550.

Property owners who have been duly notified of the meeting of commissioners in regard to a public improvement and assessment therefor are bound to take notice of the subsequent presentation in conformity with law of the report of such commissioners. *Lander* v. *Mercantile National Bank*, 186 U. S. 458.

One who promotes an improvement and appears before the commission to protest against the amount of the assessment on his property is precluded from attacking the legality of the assessment on the ground that he had no notice. *Wight* v. *Davidson*, 181 U. S. 371.

THE facts are stated in the opinion.

Mr. James Reilly, Mr. A. C. Baker and *Mr. Marcus A. Smith* for appellants.

Mr. Samuel L. Kingan for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This suit was brought in the District Court of Pima County, Arizona, by the Territory of Arizona to collect a delinquent special assessment levied by the city of Tucson on the property of appellants for the payment of the improvement of Congress street in that city. The assessment was levied under the provision of chapter 2 of title 11 of the Revised Statutes of the Territory. The Territory obtained judgment for the amount of the assessment, $12,533.75, which was affirmed by the Supreme Court of the Territory.

The contentions that appellants made in the Supreme Court of the Territory as far as appears from its opinion were, (1) That the Territory, at the relation of the treasurer and *ex officio* tax collector of Pima County, had no right to bring this suit, but that such right was in the city tax collector. (2) (*a*) That the assessment was erroneous because the cost of the improvement was divided "by the arbitrary front foot rule," and that the assessment was made upon that basis and not upon the basis of benefits derived from such improvement; (*b*) the committee appointed under the act to make the assessment took into consideration the value to appellants of a certain narrow strip of land lying between the lot of appellants and Congress street, left open and unoccupied in the widening and improvement of the street. (3) That the appellants had no notice, actual or constructive, when the common council would act upon the report of the committee. (4) That the property was not subject to special assessment because appellants' property was not contiguous to the improvement made. The Supreme Court of the Territory decided all of the contentions against appellants, the last one on the ground that the complaint alleged that appellants' property was contiguous to the im-

provement, which allegation was not denied by the answer. That contention, therefore, we may take no further notice of.

The first contention is repeated here, and it invokes our construction of the statutes of the Territory against that made by the Supreme Court. If there were doubt we should certainly lean to the construction given by the Supreme Court. *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 474, 479. But we think there is no doubt. There is no dispute as to the proceedings taken, so far as they could vest authority in the relator Bogan as county tax collector to bring this suit. The dispute turns upon the law. Paragraph 483 of the Revised Statutes of the Territory as amended in 1897 provides that "it shall be the duty of the collector of special assessments, within such time as the common council may provide, but in no event later than the 21st of December of the year in which such assessment was made, to make a report in writing to the general officer of the county authorized by the general revenue law to sell for taxes due the county and Territory, of all the lands, town lots and real property upon which he shall be unable to collect special assessments, with the amount due of special assessments and unpaid thereon, together with his warrant or a brief description of the nature of the warrant received by him authorizing the collection thereof; . . . that he is unable to collect the same or any part thereof, and that he has given notice required by law that said warrants have been received by him for collection." It is further provided that the report when made shall be *prima facie* evidence that all of the forms and requirements of the law have been complied with, and that the special assessments mentioned in the report are due and unpaid. "And in any action before any court, wherein the question of the validity of such assessment is an issue, no defense or objection shall be made or heard which might have been interposed in the proceedings for the making of such assessment or the application for the confirmation thereof." It is provided in the next section that the county collector shall incorporate said list with the county

delinquent list, and "shall sell such delinquent city property at the same time and in the same manner for such city delinquent special assessment as real property is required to be sold by law for county and Territorial delinquent taxes." The Supreme Court said that "this section construed alone might well be considered as excluding any other method of collecting delinquent special assessments." But the court further said that paragraph 488 should be considered. That paragraph reads as follows:

"The general revenue laws of this Territory in reference to proceedings for the collection of delinquent taxes on real property, the sale thereof, the execution of certificates of sale and deeds thereon, the force and effect of such deeds and sales; and all other laws in relation to the enforcement and collection of delinquent taxes and redemption of tax sales, except as herein otherwise provided, shall be applicable to proceedings to collect such special assessments."

The court pointed out that the Act 92 of the Laws of 1903 repealed the general revenue law of the Territory in reference to proceedings for the collection of delinquent taxes, and substituted for a sale of the property by the tax collector a suit by that officer in the name and for the use of the Territory. The court said: "Unless, therefore, the act of 1903 applies to delinquent special assessments there would be no method provided by the existing statutes for the sale of delinquent city property for delinquent special assessments." And the court concluded that §§ 84 and 96 of the Acts of 1903 make "the method of collecting delinquent taxes provided for in the act applicable to all delinquent taxes which may appear on the roll." Section 84 provides:

"Within sixty days after the taking effect of this chapter, and every year thereafter, within thirty days after the settlement of the tax collector, the several clerks of the county boards of supervisors in each county in this Territory shall make in a book to be called the 'back tax book' a correct list in numerical order of all tracts of land and town lots on which

back taxes shall be due in such county, city or town, setting forth opposite each tract of land or town lot the name of the owner," etc.

Section 96 reads as follows:

"All back taxes, of whatever kind, appearing due upon delinquent real estate shall be extended in the 'back tax book' made under the chapter and collected by the tax collector under authority of this chapter."

Appellants contest the construction made by the Supreme Court of the Territory, but we have said that, unless in a case of manifest error, this court will not disturb a decision of the Supreme Court of a Territory construing a local statute. *Fox* v. *Haarstick*, 156 U. S. 674, 679. There is certainly not manifest error in the ruling in the present case. Indeed, we see no reason to doubt its correctness.

Of the second contention of appellants, that the assessment was made according to the "arbitrary front foot rule," and not upon the basis of benefits derived from the improvement, the Supreme Court said that even if the record showed that the committee in the respects named had improperly assessed the property, that appellants, not having followed the remedy given by the statutes for a revision of the assessments, were precluded from complaint, citing *Stanley* v. *Supervisors*, 121 U. S. 550.

But be this as it may, it was certainly decided in *Stanley* v. *Supervisors* that the question of special benefit and the property to which it extends is of necessity a question of fact, and the Supreme Court found that the commissioners appointed examined the locality of the improvement, ascertained to what extent the public would be benefited and to what extent there would be benefits to property, and found also the amounts that the property would be benefited, "apportioned and assessed such amounts so found to be a benefit to the property upon the several lots, plots, tracts and parcels of land, in the proportion of which they were severally benefited by such improvements." It was further found that no lot was assessed for a greater amount than it was actually

benefited. It may be that it is an answer to appellants' contention, and counsel recognize that it may be an answer, that appellants did not avail themselves of the remedy afforded by the law, that is, did not appeal from the order of the city council confirming the assessment. The finding of the court, however, is undoubtedly an answer to the contention if the commissioners were legally appointed. Of this there is a diversity of views between appellants and appellee, the appellants contending that paragraph 471 (§ 7) of the Revised Statutes of the Territory controls. It provides that the common council shall appoint three of its members, or any three competent persons, to "make examinations of the premises to be affected and make an assessment of the improvements contemplated." The appellee contends that paragraph 471 is not applicable, but that paragraph 467 controls. By that paragraph, when the improvements contemplated "require the taking or damaging of property, the proceedings for making just compensation therefor shall be the same as provided in title 21" of the Revised Statutes. Such proceedings were taken and in course of them the court appointed commissioners who, we have seen, examined the locality of the improvements and assessed the amount due from the property benefited. That this was the legal course to pursue was the view of the officers concerned with the administration of the law, including the court in which the proceedings for condemnation of the property were conducted, and, it may be inferred, was also the view of the Supreme Court of the Territory. The statute will bear that construction, and even if plausible objections can be urged against it, under the authorities which we have cited, we would not be justified in pronouncing it incorrect.

It is assigned as error that the trial court erred in not finding that no notice was given of the meetings of the common council upon the confirmation proceedings. The statute does not provide for notice of the meeting of the common council. It does provide for a notice of the meeting of the commissioners, and this notice was given, and it is found by the Su-

preme Court that Allen H. English appeared, through his attorney or agent, and made a formal protest against his assessment, but did not produce any witnesses nor did he specify any ground of objection. The law charged appellants with notice that the report would be presented to the common council and the report was actually filed with the common council a few days after the hearing. We think they were bound to take notice of this action. *Lander* v. *Mercantile National Bank*, 186 U. S. 458. See *Weyerhaueser* v. *Minnesota*, 176 U. S. 550. The record shows besides that English was a promoter of the improvement. It is true that he appeared before the commissioners and protested against his assessment, but he not only gave no reason for the protest, but his attorney expressly stated that the "protest was made for the sole purpose of saving the question of review," and that he "did not wish to intimate that he had any objection, but wanted to save his right in case he should have any." And it is found by the court that he knew of the enactment of the ordinance providing for the collection of the assessments and the issuing of bonds to pay for the improvement, that he interested himself in the sale of the bonds, and assisted in disposing of the same. There is, therefore, ground for the contention that such conduct constituted a waiver of all objections to the assessments. It certainly precludes him from saying that he had no notice of the proceedings before the common council. *Wight* v. *Davidson*, 181 U. S. 371.

Appellants pleaded that there was another action pending for the collection of the assessment against them, brought by the city of Tucson, and though conceding that the pleas were defective, urge that they were sufficient to put the court upon notice that the pending suit was not brought by the real party in interest, and that such party was the city of Tucson. The contention, however, is but a phase of the question that the general revenue law of the Territory was not repealed. There are other contentions, but they are without substantial merit.

Judgment affirmed.

EXPANDED METAL COMPANY *v.* BRADFORD.

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

GENERAL FIREPROOFING COMPANY *v.* EXPANDED METAL COMPANY.

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

Nos. 66, 606. Argued March 18, 19, 1909.—Decided June 1, 1909.

The writs of certiorari in these cases bring conflicting decisions of the Circuit Courts of Appeal to this court for review.

The patent involved in this case shows a method for expanding metal consisting of two operations, which when combined produce a new and useful result covered by the claim allowed; and this result, when read in connection with the specifications, shows substantial improvement in the art of making expanded metal work.

A new combination of elements, though old in themselves, which produces a new and useful result, entitles the inventor to the protection of a patent. *Loom Co.* v. *Higgins*, 105 U. S. 580.

While the mere function or effect of the operation of a machine cannot be the subject-matter of a patent, a method of doing a thing so clearly indicated that those skilled in the art can avail themselves of mechanism to carry it into operation can be the subject-matter of a patent. *Cochrane* v. *Deener*, 94 U. S. 780.

A process and an apparatus by which it is performed are distinct things. They may be found in one patent; they may be the subject of different patents. *Leeds & Catlin* v. *Victor Talking Machine Co.*, 213 U. S. 301.

An invention or discovery of a process or method involving mechanical operation and producing a new and useful result, such as expanding metal, may, and in this case does, entitle the inventor to a patent, and such a process is not limited to those showing chemical action or elemental changes. *Risdon Locomotive Works* v. *Medart*, 158 U. S. 68, distinguished.

In this case, *held*, that the Golding patent No. 547,242 for the process of expanding metal was a substantial improvement of the art involving mechanical operations and producing a new and useful result independently of particular mechanisms for performing such process, and is valid.

157 Fed. Rep. 564, reversed; 164 Fed. Rep. 849, affirmed.

THE facts, which involve the validity of certain letters patent of the United States, are stated in the opinion.

Mr. Ernest Howard Hunter for the Expanded Metal Co., petitioner in No. 66 and respondent in No. 606:

The general question involved in these cases is that of the patentability of processes which consist of mechanical steps or operations only; the specific question is whether the improvement in the art or method of making expanded sheet metal described and claimed in Golding's patent No. 527,242, dated October 9, 1894, is a new and useful invention, and susceptible as such of protection under the patent laws. "Expanded sheet metal," or "expanded metal," as first suggested, as a possibility, and described in earlier patents was merely an idea of the possibility and desirability of such material as a commercial article, and the method of production, which the earlier patents disclosed, was commercially impracticable, and such metal was never practically or commercially produced according to it.

"Expanded metal," as a commercial product, capable of use in the industrial arts, was originated by the complainant's patentee, Golding, and one Durkee, under the process described in letters patent No. 320,242, dated June 16, 1885. It was then first commercially and practically produced, became known as "expanded metal" and became extensively used and recognized as a new commercial article; but although commercially successful to some extent it was limited and restricted in its uses by the inherent defects of the process by which it was produced. So great were these defects that some of the companies, both here and abroad, where Golding had

introduced his method, failed to achieve commercial success for about ten years until the improvement in the art described in the patent in suit. This improvement was a radical departure from the former method employed by the patentee. By it the deficiencies and limitations were entirely removed, and the character of the metal was so greatly improved that its adaptability and availability for commercial use were greatly extended. In fact this new process as described in the patent in suit, revolutionized the art of expanding sheet metal, and resulted in its being widely and generally adopted for industrial purposes throughout the world.

The patentee's invention consisted in a combination of certain operations in a certain relation to one another and to the material acted upon, by which a new result might be accomplished. The instrumentalities, which might be employed to carry out that invention commercially, were no part of the invention. What the patentee gave to the world was a new method of manipulating or cutting, bending and stretching sheet metal, to produce the thing known as expanded metal. That new method did not depend upon any particular instruments, it could be carried out by anyone by such instruments as might be found best adapted to the purpose. A dozen different machines might be created for carrying out the process; in fact, several different machines have been created. Old machines might be reorganized and made to do the work.

Instruments must be used to apply it to practice, but the invention must reside in the method and not in the instruments.

The patent laws require that a patentee shall explain his invention in a manner sufficiently clear to enable those skilled in the art to understand it. If the invention is a machine, then the machine must be described sufficiently to enable those skilled in the art to build and operate the machine; if the invention is a process, consisting, as a process must, merely in the performance of certain operations upon an article or substance, independently of the particular instruments employed,

then the patentee must describe the performance of those operations sufficiently to enable those skilled in the art to practice them, leaving to such persons the choice of the instruments used for the purpose.

The real defense is: that, even though Golding had invented a new and useful method which was not a machine or a manufacture or a composition of matter, it was not susceptible of protection under the patent laws, because it was a process or method which consisted of mechanical operations and did not involve chemical reactions or elemental changes, relying on *Risdon Iron & Locomotive Works* v. *Medart*, 158 U. S. 68, but that case is not in point. As to this see *Westinghouse* v. *Boyden Power Brake Co.*, 170 U. S. 537; *Carnegie Steel Co.* v. *Cambria Iron Co.*, 185 U. S. 403; *Simonds Rolling Machine Co.* v. *Hathorn Mfg. Co.*, 90 Fed. Rep. 201; *Melvin* v. *Thos. Potter Sons & Co.*, 91 Fed. Rep. 151; *Kahn* v. *Starrells*, 135 Fed. Rep. 532; *Thomas & Sons Co.* v. *Electric Porcelain Co.*, 111 Fed. Rep. 923; *Baker Lead Mfg. Co.* v. *National Lead Co.*, 135 Fed. Rep. 546; *Kirchberger* v. *American Acetylene Burner Co.*, 124 Fed. Rep. 764; *American Tube Works* v. *Bridgewater Iron Co.*, 132 Fed. Rep. 16; *Shepard* v. *Excelsior Furnace Co.*, 137 Fed. Rep. 399; *J. R. Williams Co.* v. *Miller DuBrul & Peters*, 107 Fed. Rep. 290; *Peters* v. *Union Biscuit Co.*, 120 Fed. Rep. 679; *In re Weston*, 94 O. G. 1786; *S. C.*, 17 App. D. C. 431; *In re Wagner*, 105 O. G. 1783; *S. C.*, 22 App. D. C. 267; *Ex parte Patterson*, 116 O. G. 2533.

The doctrine that processes involving mechanical operations, as distinguished from chemical reactions or elemental changes, are unpatentable, is foreign to the patent jurisprudence of other nations. *Boulton* v. *Bull*, Davies' Pat. Cases, 162; *King* v. *Wheeler*, 3 Barn. & Ald. 350; *Boulton & Watt* v. *Bull*, 2 H. Bl. 493; *Jones* v. *Pearce*, 1 Web. Pat. Cases, p. 123; *Russell* v. *Cowley*, 1 Web. Pat. Cases, 459; *Walton* v. *Potter*, 1 Web. Pat. Cases, 585; *Gibson* v. *Brand*, 1 Web. Pat. Cases, 627; *Reynolds* v. *Amos*, 3 Pat. Off. Rep. 215; *Dowling* v. *Billington*, 7 Pat. Off. Rep. 191; *Tubes, Limited*, v. *Perfecta Seamless Steel Co.*,

20 Pat. Off. Rep. 77; *Gammons* v. *Battersby*, 21 Pat. Off. Rep. 322.

The doctrine that processes are not patentable unless they involve chemical reactions and elemental changes is unjust and contrary to the spirit of the Constitution and the intent of the patent laws. 1 Robinson on Patents, § 167, p. 250; *Dowling* v. *Billington*, 7 Pat. Off. Rep. 191; *O'Rourke Engineering Construction Co.* v. *McMullen et al.*, 160 Fed. Rep. 933, 938.

If it be conceded—and it cannot be logically denied—that an exercise of the inventive faculties can be involved in the discovery of a combination of functions, acts or operations, by which a new and useful result is obtained, then to deny the patentability of such inventions is to establish a false standard of patentability, and to exclude a large class of meritorious inventors from the protection of the patent laws. Such a false standard is not recognized in other countries, it is not within the spirit of the Constitution or the meaning of the statutes, and we believe it was never the intent of the Supreme Court to create it.

Mr. Frederick P. Fish and *Mr. Thomas W. Bakewell*, with whom *Mr. E. Hayward Fairbanks* was on the brief, for respondents in No. 66 and petitioner in No. 606:

The subject of the patent in suit is the manufacture of expanded metal. This product, expanded metal, was old and the operations for making it were first disclosed and fully described in British specification, No. 2,125 of 1862, and other patents earlier than the one in suit.

In 1885 Golding & Durkee patented a machine (patent No. 320,241), which is still largely in use, for making this old product, expanded metal. Their mode of operation was such that they did not greatly strain the metal and they were consequently adapted to cut and expand thin sheets.

When, however, Golding came to treat thick sheets, he required cutters especially adapted for that purpose. He therefore devised a machine with knives arranged in a straight row

instead of a stepped row. In this machine the alternation in the position of the cuts was effected by shifting the cutters or the sheet itself between each stroke of the cutters. This alternate location of the cuts was old and the product of the machine was old. What is involved in the patent in suit is an effort to claim the function or mode of operation of this subsequently invented machine of Golding, a machine which performs an old process and produces an old product. In performing the old process the machine works according to its own peculiar manner or mode of operation; but almost all machines have distinctive modes of operation; and the rule of law that such modes of operation are not patentable, and that results are not patentable, but only new processes and new mechanisms and new articles, renders the patent in suit invalid.

The only reason for the success which has attended the device of the patent in suit is that the machine indicated therein was adapted to treat heavy metal, and in the modern art of concrete reinforcement heavy expanded metal has had a large use, and therefore that machines adapted to produce heavy metal have been largely used. This does not argue any novelty in method, but simply argues the adaptability of the machine to produce the heavy metal which is now demanded.

The case at bar involves no new principle of law, but only the rule of law that patents for methods or processes can only be granted for methods or processes which are new as methods or processes; that a new machine devised for the practice of an old method does not entitle one to a patent for a method of operation although it may have, as most machines have, a distinctive mode of operation.

The Expanded Metal Company admits that the operation of simultaneously cutting and bending metal so as to stretch the strand was old. It claims that what Golding discovered or invented was the act of repeating that old operation in such a way that the two operations would combine to produce a new result by reason of their combination.

And the record contains statements that amount to an ad-

mission that all the steps of the process recited in the claim of the patent were old, and that the only alleged novelty is in the application of the known and familiar step of stretching metal strands to the known process of expanding sheet metal.

The exigencies of the case have driven the complainant into the inconsistent position in the two suits now pending before this court. In the case at bar, where the defendant's machine has a guillotine-shape knife carrying a series of cutters arranged in a single straight line and therefore necessarily operating at each stroke in a straight line from end to end of the sheet, the complainant, in order to sustain its contention of novelty in the method, has found it possible, without at the same time differentiating its patent from the defendant's machine, to contend that a novel step of the method patented was the forming of the cuts in the sheet of metal in a straight line and then, in successive operations forming other parallel series of cuts in alternate positions. This complainant contends in No. 606.

In No. 66, the defendant's machine in this respect is substantially different from that of the defendant in No. 606. It does not make a single line of cuts extending from end to end of the sheet, but makes diagonal cuts arranged like the cuts produced by the machine of the prior patent of Golding & Durkee. The interpretation which the complainant puts upon the claim of the patent in the case at bar is rendered impossible and untenable by the charge of infringement which it makes in the *Bradford case*. In these two suits the complainant has assumed different and contradictory definitions of the patented invention.

The alleged invention of the patent in suit is not patentable as a method. The subject-matter of the claim being a method, the patentee must be an original and first inventor of a method. *Tilghman* v. *Proctor*, 102 U. S. 707, 728.

Keeping in mind the distinction, both in fact and in law, between method and apparatus, there are three classes of decisions in "method" cases.

Those in which the patentee is shown to be the first and original inventor of the entire method, as in *O'Reilly* v. *Morse*, 15 How. 62; *Eames* v. *Andrews*, 122 U. S. 40 (the *Driven Well case*); *The Telephone Cases*, 126 U. S. 1.

Those in which the patentee is the inventor of some new and essential part of a method otherwise old, as in *Mowry* v. *Whitney*, 14 Wall. 630; *Cochrane* v. *Deener*, 94 U. S. 780; *New Process Fermentation Co.* v. *Maus*, 122 U. S. 413.

In cases coming fairly within either of these two classes, the patents have generally been sustained—and properly so.

In the third class are included those patents which include no substantial novelty of operation, or those in which every essential element of method is already well known in the same art.

In such cases, the courts have uniformly held a method claim to be void—and this for the reason that in respect of method, the patentee has invented nothing. In fact, nothing remains for him to invent except a machine by which to work the method.

In a method claim, in order that it may be held patentable, the patentee must have incorporated some novelty of operation which was previously unknown in the art to which his invention belongs, and this must be something different from the mere mode of operation of apparatus with which an old method is put into practice. *Corning* v. *Burden*, 15 How. 252; *Burr* v. *Duryee*, 1 Wall. 570; *Fuller* v. *Yentzer*, 94 U. S. 288; *Knapp* v. *Morss*, 150 U. S. 227; *Wing* v. *Anthony*, 106 U. S. 142, 146; *Risdon Locomotive Works* v. *Medart*, 158 U. S. 68; *Cochrane* v. *Deener*, 94 U. S. 780; *Busch* v. *Jones*, 184 U. S. 589; *McKay* v. *Jackman*, 12 Fed. Rep. 615; *Brainard* v. *Cramme*, 12 Fed. Rep. 621; *Hatch* v. *Moffit*, 15 Fed. Rep. 253.

Mr. Justice Day delivered the opinion of the court.

These cases involve opposing decisions as to the validity of letters patent of the United States No. 527,242, dated Octo-

ber 9, 1894, granted to John F. Golding for an alleged improvement in the method of making expanded sheet metal. In case No. 66, here on writ of certiorari to the Circuit Court of Appeals for the Third Circuit, a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania, sustaining the patent, was reversed, and the patent held invalid. The opinion of the Circuit Judge sustaining the patent is found in 136 Fed. Rep. 870. The case in the Court of Appeals is found in 146 Fed. Rep. 984. After the decree in the Circuit Court of Appeals for the Third Circuit, the Expanded Metal Company having filed a bill against the General Fireproofing Company in the Circuit Court of the United States for the Northern District of Ohio, the case was heard and the patent held invalid on the authority of the case in the Circuit Court of Appeals for the Third Circuit. 157 Fed. Rep. 564. The Circuit Court of Appeals for the Sixth Circuit reversed the United States Circuit Court for the Northern District of Ohio, and held Golding's patent valid and infringed. 164 Fed. Rep. 849. These writs of certiorari bring these conflicting decisions of the Courts of Appeal here for review.

The patent in controversy relates to what is known as expanded sheet metal. Expanded metal may be generally described as metal openwork, held together by uncut portions of the metal, and constructed by making cuts or slashes in metal and then opening them so as to form a series of meshes or latticework. In its simplest form sheet metal may be expanded by making a series of cuts or slits in the metal in such relation to each other as to break joints, so that the metal, when opened or stretched, will present an open mesh appearance. It may be likened to the familiar woven wire openwork construction, except that the metal is held together by uncut portions thereof, uniting the strands, and the whole forms a solid piece.

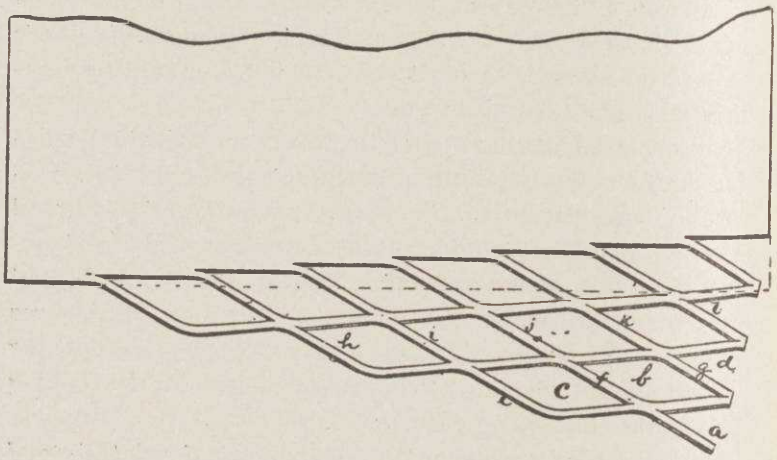
In the earlier patents different methods are shown for cutting the metal, which cuts were afterwards opened by a separate operation of pulling or stretching. These crude methods

are shown in the earlier American and English patents which appear in the record. While nothing more than such methods was accomplished in the art there was little general or commercial use for expanded metal.

It was apparent that if a method could be devised by which the metal could be simultaneously cut and expanded, such method would be a distinct advance in the art, and this record discloses that the desirable result of simultaneously performing these operations was accomplished in the Golding and Durkee patent No. 320,242. In that patent the operation was performed by means of knives arranged in a step order, the sheet to be fed obliquely. The inventors describe the Golding and Durkee method as follows:

"The process consists in the employment of a flat piece of metal of any desired size, and beginning at one side and corner and making an incision within the side of the metal, thus forming a strand which is simultaneously pressed away from the plane of the metal in a direction at or near a right angle, the position the strand assumes depending upon the distance it is moved from the plane of the metal. *a* in the drawing shows the first cut made. The next step in this process is to make additional incisions, as is shown at *c*, *b*, and *d*, further within the plate of metal, and leaving uncut sections at the ends of the cuts, and simultaneously with the cutting the strands are pressed away from the plane of the metal at the angle and to the desired position, as above described. Thus each row of meshes is simultaneously cut and formed from a blank piece of metal without buckling or crimping the blank. In the act of cutting and forming the meshes, the finished article is contracted in a line with the cuts or incisions, and consequently it is shorter in this direction than the piece from which it was cut, but it is greatly lengthened in a line at an angle to the plane of the original sheet, plate or blank."

The result was to produce expanded metal, as shown in this figure:



With this patent as the advanced state of the art, Golding set about making further improvements and the result was the patent in suit. The specifications of the patent in suit state:

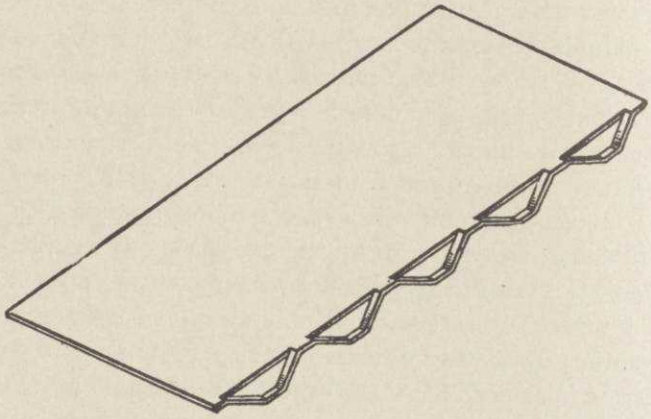
"In the manufacture of what is now generally known as expanded sheet metal, it has been customary to first cut the slits in the sheet metal at short distances apart, and to open the metal at the cuts thus formed by bending the severed portions or strands in a direction at right angles substantially to the plane of the sheet. It has also been made by simultaneously cutting and opening the metal by means of cutters set off or stepped relatively so as to make the slashes or cuts in different lines in the manner set forth in patents No. 381,230 or No. 381,231, of April 17, 1888. In both of these methods the product is somewhat shorter and materially wider than the original sheet, but practically no stretching or elongation of the metal forming the strands is caused.

"In my present invention I seek to avail myself of the ability of the metal to stretch or distend as well as of its ability to bend under strain or pressure, and the invention consists in the improved method of making expanded metal, viz., by simultaneously cutting and opening or expanding the metal at the cuts by stretching the severed portions."

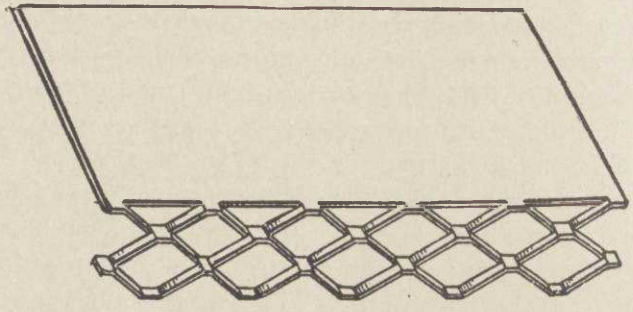
In the method further described in the specifications the expanded metal is shown to be made by the use of knives making a series of slits in a straight line at equal distances apart across the sheet and at the same time carrying downward the severed portions of the metal. And this operation is performed by bending the severed portion at a time when its ends are securely attached to the main sheet, thereby expanding the sheet without materially shortening it. The sheet is then fed forward, and the slitting and stretching operation is repeated in such a manner that the slits are in every case made back of the portion unsevered by the preceding operation, or, in other words, as the specification states, the slits and unsevered portions alternate in position in each successive operation, the bends given to the severed portions or strands being in direction at right angles to the plane of the sheet, there is no contraction in the length of the metal, and the expansion is obtained by the stretching, distension, or elongation of the severed strand. This patent contains the single claim, which is as follows:

"The herein described method of making open or reticulated metal work, which consists in simultaneously slitting and bending portions of a plate or sheet of metal in such manner as to stretch or elongate the bars connecting the slit portions and body of the sheet or plate, and then similarly slitting and bending in places alternate to the first-mentioned portions, thus producing the finished expanded sheet metal of the same length as that of the original sheet or plate, substantially as described."

It is thus apparent that the method covered by the claim of the patent is accomplished by the two operations indicated and performed in the manner pointed out in the specifications. The first operation of cutting, bending and stretching the strands simultaneously produces a series of stretched loops or half diamonds. Thus:



This series of half diamonds is then supplemented by the second operation, which consists in making a second series of cuts and expansions for stretching the strands back of and opposite the parts of the metal left uncut by the first operation. The result is that the series of one-half diamonds is converted into the series of full diamonds and because of the manner in which the stretching is done, while the ends of the strands are still firmly attached to the sheet, there is no material shortening of the length of the sheet. Thus:



What has Golding accomplished by this alleged improvement? These records leave no doubt that there are substantial advantages in the method of the patent in suit. As the sheet is not shortened, the completed product is regular

in form and ready for many uses to which the shortened sheet of the old method could not be put. The metal worked upon can be much heavier than that which could be successfully manipulated by the old process. The meshes are formed in a uniform and regular way, so that a line drawn through their intersections in one direction is at right angles with a line drawn through their intersections in the other direction. There is no irregularity in the width of the strands. Put to the test of actual use, this record discloses that while the method of the Golding and Durkee patent is still in use in some places in this country, the method disclosed in the patent in controversy is largely in use in the United States, Great Britain and Continental Europe; that it has greatly increased the use of expanded metal in this country, and opened new fields for use where sheets of a regular shape can be used to a greater advantage than they could be when made under the old process.

The learned Circuit Court of Appeals for the Third Circuit seems to have regarded the invention as consisting merely of the improvement of the process in the manufacture of expanded metal by stretching certain portions of the metal when the slit is cut and the mesh is opened. A broad claim of that character was made in the Patent Office, and the file wrapper and contents show that it was disallowed by the examiner. The claim in its present form, framed by the examiner as sufficient to cover the real invention of the patent, was accepted by the applicant, and is now the claim of the patent.

If all that Golding did was to show a method of simultaneously cutting and stretching the metal, the examiner was doubtless right in holding it to have been anticipated by former inventions, notably the patent to Ohl, No. 475,700, and in a degree in the previous patents to Golding and to Golding and Durkee.

But the patent in suit, embraced in the claim allowed, shows more than a mere method of making open meshes by simultaneously cutting and stretching the metal. It shows a method by which the metal is first cut and stretched in the

manner indicated to make the half diamond, and then a second operation, coördinating with the first and completing the mesh by the manner in which it is performed in connection with the first. It is the result of the two operations combined which produces the new and useful result covered by the claim allowed in the Patent Office, and, which, when read in connection with the specifications, shows substantial improvement in the art of making expanded metal work.

But it is said that the patent in suit discloses no means of practically operating the method shown, and therefore, as said by the learned judge in the Third Circuit, "it is but the expression of a happy thought," but the requirement of the patent law, in order to make a method or process patentable, is that the patent shall indicate to those skilled in the art the adaptation of means to put it into practice.

We think this record amply discloses, while no complete mechanism is pointed out in the specifications, enough to indicate to those skilled in such matters a mechanism whereby the method of the patent can be put into operation. As said by Judge Severens, delivering the opinion of the court in No. 606, in the Circuit Court of Appeals for the Sixth Circuit:

"But here the inventor has gone on to point out that the slitting and bending is to be done by a stationary cutter under the sheet, and upper cutters to coöperate in shearing the slit. These upper cutters are so constructed as to bend down the strand to the proper distance. It is not stated just what the form shall be, but only ordinary skill in mechanics would suggest that the outer side of the cutter might be bevelled or a shoulder might be formed thereon to carry down the strand when severed.

"Mechanism for the shifting of the sheet and of the knives was already in use in machines for expanding metal, and, indeed, was common in the mechanical arts. Moreover, experts have here testified that these devices could be arranged by any skillful mechanic, and we have no reason to doubt it."

Golding testifies that he at first executed his process by

hand. Other witnesses, skilled in the art, say that they could do likewise from the information found in the patent.

The important thing in this patent is a method of procedure, not the particular means by whch the method shall be practised. Golding's machine patent was not applied for for more than a year and a half after the issue of the patent in suit.

It is suggested that Golding's improvement, while a step forward, is nevertheless only such as a mechanic skilled in the art, with the previous inventions before him, would readily take; and that the invention is devoid of patentable novelty. It is often difficult to determine whether a given improvement is a mere mechanical advance, or the result of the exercise of the creative faculty amounting to a meritorious invention. The fact that the invention seems simple after it is made does not determine the question; if this were the rule many of the most beneficial patents would be stricken down. It may be safely said that if those skilled in the mechanical arts are working in a given field and have failed after repeated efforts to discover a certain new and useful improvement, that he who first makes the discovery has done more than make the obvious improvement which would suggest itself to a mechanic skilled in the art, and is entitled to protection as an inventor. There is nothing in the prior art that suggests the combined operation of the Golding patent in suit. It is perfectly well settled that a new combination of elements, old in themselves, but which produce a new and useful result, entitles the inventor to the protection of a patent. *Loom Company* v. *Higgins*, 105 U. S. 580–591.

To our minds, Golding's method shows that degree of ingenuity and usefulness which raises it above an improvement obvious to a mechanic skilled in the art, and entitles it to the merit of invention. Others working in the same field had not developed it, and the prior art does not suggest the combination of operations which is the merit of Golding's invention.

It is lastly contended, and this is perhaps the most important question in the case, that in view of the former declara-

tions and opinions of this court, what is termed a process patent relates only to such as are produced by chemical action, or by the operation or application of some similar elemental action, and that such processes do not include methods or means which are affected by mere mechanical combinations, and a part of the language used in *Corning* v. *Burden*, 15 How. 252, and *Risdon Locomotive Works* v. *Medart*, 158 U. S. 68, is seized upon in support of this contention. We have no disposition to question the decision in those cases.

An examination of the extent of the right to process patents requires consideration of the object and purpose of the Congress in exercising the constitutional power to protect for a limited period meritorious inventions or discoveries. Section 4886 of the Revised Statutes provides:

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof . . . may obtain a patent therefor."

This is the statute which secures to inventors the right of protection, and it is not the province of the courts to so limit the statute as to deprive meritorious inventors of its benefits. The word "process" is not used in the statute. The inventor of a new and useful art is distinctly entitled to the benefit of the statute as well as he who invents a machine, manufacture, or composition of matter. The word "process" has been brought into the decisions because it is supposedly an equivalent form of expression or included in the statutory designation of a new and useful art.

What then is the statutory right to a patent for a "process" when the term is properly considered? Curtis, in his work on the Law of Patents, says:

"A process may be altogether new, whether the machinery by which it is carried on be new or old. A new process may be invented or discovered, which may require the use of a newly-invented machine. In such case, if both the process and the machine were invented by the same person, he could take sepa-

rate patents for them. A new process may be carried on by the use of an old machine, in a mode in which it was never used before. . . . In such a case, the patentability of the process in no degree depends upon the characteristic principle of the machine, although machinery is essential to the process, and although a particular machine may be required." Curtis, 4th ed. § 14.

In Robinson on Patents, vol. 1, § 167, it is said:

"While an art cannot be practiced except by means of physical agents, through which the force is brought in contact with or directed toward its object, the existence of the art is not dependent on any of the special means employed. It is a legal, practical invention in itself. Its essence remains unchanged, whatever variation takes place in its instruments as long as the acts of which it is composed are properly performed."

And Walker on Patents, 4th ed. § 3, states that valid process patents may be granted for "operations which consist entirely of mechanical transactions, but which may be performed by hand or by any of several different mechanisms or machines."

It is undoubtedly true, and all the cases agree, that the mere function or effect of the operation of a machine cannot be the subject-matter of a lawful patent. But it does not follow that a method of doing a thing, so clearly indicated that those skilled in the art can avail themselves of mechanism to carry it into operation, is not the subject-matter of a valid patent. The contrary has been declared in decisions of this court. A leading case is *Cochrane* v. *Deener*, 94 U. S. 780, in which this court sustained a process patent involving mechanical operations, and in which the subject was discussed by Mr. Justice Bradley, speaking for the court. On page 787 that learned justice said:

"That a process may be patentable, irrespective of the particular form of the instrumentalities used, cannot be disputed. . . . Either may be pointed out; but if the patent is not confined to that particular tool or machine, the use of the others would be an infringement, the general process being the

same. A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or may not be new or patentable; whilst the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence."

This clear and succinct statement of the rule was recognized and applied (Mr. Justice Bradley again speaking for the court) in the case of *Tilghman* v. *Proctor*, 102 U. S. 707. In the course of the opinion the learned justice tersely says:

"A machine is a thing. A process is an act, or a mode of acting. The one is visible to the eye—an object of perpetual observation. The other is a conception of the mind, seen only by its effects when being executed or performed. Either may be the means of producing a useful result."

That this court did not intend to limit process patents to those showing chemical action or similar elemental changes is shown by subsequent cases in this court.

In *Westinghouse* v. *Boyden Company*, 170 U. S. 537, the opinion was written by the same eminent justice who wrote the opinion in *Risdon Locomotive Works* v. *Medart*, 158 U. S. *supra*, and, delivering the opinion of the court, he said (p. 557):

"These cases [158 U. S. 68, and 103 U. S. 461] assume, although they do not expressly decide, that a process to be patentable must involve a chemical or other similar elemental action, and it may be still regarded as an open question whether the patentability of processes extends beyond this class of inventions."

And added these significant words:

"Where the process is simply the function or operative effect

of a machine, the above cases are conclusive against its patentability; but where it is one which, though ordinarily and most successfully performed by machinery, may also be performed by simple manipulation, such, for instance, as the folding of paper in a peculiar way for the manufacture of paper bags, or a new method of weaving a hammock, there are cases to the effect that such a process is patentable, though none of the powers of nature be invoked to aid in producing the result. *Eastern Paper Bag Co.* v. *Standard Paper Bag Co.*, 30 Fed. Rep. 63; *Union Paper Bag Machine Co.* v. *Waterbury*, 39 Fed. Rep. 389; *Travers* v. *Am. Cordage Co.*, 64 Fed. Rep. 771. This case, however, does not call for an expression of our opinion upon this point, nor even upon the question whether the function of admitting air directly from the train pipe to the brake cylinder be patentable or not, since there is no claim made for an independent process in this patent, and the whole theory of the specification and claims is based upon the novelty of the mechanism."

And the same learned justice wrote the opinion of the court in *Carnegie Steel Co.* v. *Cambria Iron Co.*, 185 U. S. 403, and sustained a process patent. If by any construction that process could be said to involve a "chemical or other similar elemental action," no stress was laid upon that fact. This court, speaking through Mr. Chief Justice Waite, sustained a patent in the *Bell Telephone Cases*, 126 U. S. 1, for a method of transmitting electrical undulations similar in form to the vibrations of the air accompanying vocal sounds, and at the same time the patent for the apparatus by which the method was operated was sustained.

In *Leeds & Catlin* v. *Victor Talking Machine Company*, decided at this term, 213 U. S. 301, 318, this court said: "A process and an apparatus by which it is performed are distinct things. They may be found in one patent; they may be made the subject of different patents."

We therefore reach the conclusion that an invention or discovery of a process or method involving mechanical operations,

and producing a new and useful result, may be within the protection of the Federal statute, and entitle the inventor to a patent for his discovery.

We are of opinion that Golding's method was a substantial improvement of this character, independently of particular mechanisms for performing it, and the patent in suit is valid as exhibiting a process of a new and useful kind.

As to the infringement, little or no question was made in case No. 606. In case No. 66 the Circuit Court held that there was some evidence of infringement, enough at least to warrant the decree sustaining the patent and awarding an accounting. With this conclusion we agree. It follows that the decree of the Circuit Court of Appeals for the Third Circuit (No. 66) should be reversed and that of the Circuit Court of Appeals for the Sixth Circuit (No. 606) should be affirmed, and the cases remanded to the Circuit Courts of the United States for the Eastern District of Pennsylvania and the Northern District of Ohio, respectively, for further proceedings consistent with this opinion.

Decrees accordingly.

UNITED STATES *v.* SHIPP.

INFORMATION IN CONTEMPT.

No. 5, Original. Argued March 2, 3, 1909.—Decided May 24, 1909.

The court, having already held, 203 U. S. 563, that the information sufficiently set forth a contempt of the court to punish which the court has jurisdiction, now finds on the testimony taken under its direction that certain of the defendants named were guilty of the contempt as charged and directs that attachments issue against them, and that the defendants not found guilty be discharged.

Where a riot and the lawless acts of those engaged therein are the direct result of opposition to the administration of the law by this

court, those who defy its mandate and participate in, or who knowingly fail to take the proper means within their official power and duty to prevent, acts of violence having for their object to, and which do, defeat the action of this court are guilty of, and must be punished for, contempt.

One, who after conviction by the state court has applied to the Federal court for his release on *habeas corpus* on the ground that he was denied due process of law is remanded by the Federal court to the custody of the sheriff to be detained for a specified time in which to enable him to prosecute an appeal to this court, is held under § 766, Rev. Stat., as a Federal prisoner and the sheriff is accountable to the Federal courts; and, to the extent of his power and the means under his control, he must exercise due diligence and reasonable efforts to protect the prisoner from mob violence, and if, after this court has granted an appeal, he negligently fails in his duty in this behalf, he is guilty of contempt.

Knowledge of an allowance by this court of an appeal and a stay of proceedings renders those who defy the mandate of the court and so conduct themselves as willfully to defeat the administration of the law liable for contempt.

This court having allowed an appeal from an order of a Circuit Court discharging a writ of *habeas corpus* and remanding the prisoner to the custody of the sheriff to be held for a specified period for prosecution of the appeal, the sheriff and his deputies and the jailer, who had knowledge of such allowance of appeal and also of an intense feeling in the neighborhood against the prisoner which on previous occasions had threatened his safety, were bound to use all means within their power to protect him, and failure on their part to take any precautions whatever to prevent the seizure and killing of the prisoner at the hand of a mob attacking the jail while in a defenseless condition was, under the circumstances of this case, willful negligence, and disregard of duty to, and contempt of, this court; and so held as to the sheriff of Hamilton County, Tennessee, and his deputy and the jailer, in connection with the lynching on March, 19, 1906, of Ed Johnson by a mob after this court had allowed his appeal from an order refusing relief on *habeas corpus*.

Those of a mob who attack a state jail and lynch a person held therein as a Federal prisoner under an order of this court of which they have had notice are guilty of contempt of this court.

THE facts, which involve the lynching of a person held in the custody of a sheriff under an order of the Federal court

and after an appeal had been allowed by this court from an order of the United States Circuit Court denying his petition for *habeas corpus*, are stated in the opinion.

Mr. Attorney General Bonaparte, and *Mr. Solicitor-General Hoyt*, with whom *Mr. Edwin W. Lawrence*, Special Assistant to the Attorney General, was on the brief for the United States:

This is an information in contempt filed by the Attorney General of the United States charging the defendants with contempt of this court in lynching the negro Ed Johnson at Chattanooga on March 19, 1906, on the ground that he was at that time a prisoner in the jail under order of this court and that the lynching was in direct defiance of the known order of this court and to prevent the administration of the law by it.

The information appears at length, pages 439–444, *post*.

Certain preliminary questions of law were raised by defendants and passed upon by this court, 203 U. S. 563. It was there held that the complaint sufficiently set forth a contempt of this court; that it was immaterial for the purposes of this proceeding whether or not the Circuit Court had jurisdiction of the *habeas corpus* proceedings or whether this court had jurisdiction to entertain the appeal; and that the answers of the defendants under oath disavowing intent did not purge them. This decision removes from the case all questions of law except those as to the admission of evidence. The question now before the court is one of fact: Has the United States in the evidence, which has been taken by the commissioner under order of this court, proved the allegations of the information? Most of those allegations are established by agreement [1] or undisputed evidence. The only issues are: (1) Were the sheriff and his deputies informed and did they have every reason to believe that an attempt would be made

[1] This agreement appears at length at page 472, *post*.

in the evening of March 19, by a mob to break into, and take Johnson from, the jail for the purpose of lynching him? (2) Did the sheriff and his deputies commit acts and do things manifesting a purpose and disposition on their part to render it less difficult and less dangerous for the mob to lynch Johnson and aid and abet the mob? (3) Were defendants, excepting Shipp and Gibson, members of the mob which lynched Johnson, or did they participate in the conspiracy? (4) Did defendants in the things they did intend to show contempt of the order of this court and to prevent it from hearing Johnson's appeal? [1]

The information alleges that the acts of the defendants were done with intent to show their contempt and utter disregard for the order of this court, and in order to prevent this court from hearing the appeal of Johnson then under condemnation of death and who had been remanded by the Circuit Court to the custody of the sheriff pending the action of this court which had granted the appeal. In delivering the opinion upon the hearing of the preliminary questions of law, 203 U. S. 563, Mr. Justice Holmes said:

"If the presence and acts should be proven, there would be little room for the disavowal of intent. . . . It may be found that what created the mob and led to the crime was the unwillingness of its members to submit to the delay required for the appeal. From that to the intent to prevent that delay and the hearing of the appeal is a short step."

Intent is best proved, and in many cases can only be proved, by acts. If the acts with which defendants are charged have been proven, it needs no argument to demonstrate that defendants intended to prevent this court hearing Johnson's appeal and to delay its mandate. It has already been shown that the reason for the mob's action was fear of the law's delay and the unwillingness of the sheriff, his deputies, and the members of the mob to submit to it. The intent to commit

[1] The Government's brief then reviews the testimony at length.

a contempt of this court was necessarily present in the acts of the defendants.

This proceeding is unique in the history of courts.

Its importance cannot be overestimated. Lynchings have occurred in defiance of state laws and state courts without attempt, or at most with only desultory attempt, to punish the lynchers. Perpetrators of such crimes have heretofore been censured only by public opinion; courts have remained silent. Powerful as such opinion always is, severe as it has been in its rebuke of such deeds, it has been inadequate to check these outbreaks of lawlessness. Only recently lynchings became so numerous that the whole country was aroused to earnest discussion of mob violence and a remedy for it. It is indeed useless to seek relief unless the judiciary can punish those who snatch and kill the men it has imprisoned. The arm of justice fetters men for years. It strikes death to the murderer. It can take property and life. Must it confess it is too weak to protect those whom it has confined? The arm can destroy. Can it not protect? If the life of one whom the law has taken into its custody is at the mercy of a mob the administration of justice becomes a mockery.

When this court granted a stay of execution upon application of Johnson, it became its duty to protect him until his case should be disposed of. It matters not with what crime he was charged. It is immaterial what the evidence was at the trial. Sentenced to death, Johnson came into this court alleging that his constitutional rights had been invaded in the trial of his case, and upon this the Supreme Court said he had a right to be, and would be, heard. From that moment until his case should be decided, he was under the protection of this court. And when its mandate, issued for his protection, is defied, punishment of those guilty of such contempt must be certain and severe.

Never in its history has an order of this court been disobeyed with impunity. A few attempts to disregard its decrees have been made, but always without ultimate avail. In 1779 the

Continental Congress, through its Standing Committee of Appeals in Cases of Capture, reversed the judgment of the Court of Admiralty of the State of Pennsylvania and made an award in favor of Olmstead, a claimant, in a prize case. The State resisted enforcement of the decree and Congress yielded. Olmstead thus found the decision of the appellate tribunal in his favor useless to him. With the adoption of the Constitution the jurisdiction of appeals formerly exercised by the Continental Congress became vested in this court and in 1808 Olmstead sought redress here in the same matter. *United States* v. *Peters*, 5 Cranch, 115. In one of his powerful opinions the great Chief Justice made it clear that the court's decrees in favor of Olmstead must be obeyed. Nevertheless the State for a time defied the order. This resistance, however, was unable to withstand the unswerving determination of this court and finally disappeared. Members and officers of the state militia who had interfered with execution of the decrees were tried and sentenced to fine and imprisonment. This court then declared and established a supremacy which has ever since been maintained and which will always be a priceless heritage to the American people.

In the controversy between the State of Georgia and the Cherokee Indians, which came before this court in *Worcester* v. *Georgia*, 6 Pet. 515, the State refused to release a prisoner in obedience to a direction of this court. Although the National Executive declined to aid in requiring obedience, after some months the State withdrew opposition and again the supremacy of this court was recognized.

In the history of the case of *Ableman* v. *Booth*, 21 Howard, 506, we for a third time find evidence of a State arraying itself against this court. Officers and courts of the State of Wisconsin, contrary to the decision of this court, insisted that the fugitive-slave law was unconstitutional, and resisted its enforcement. But the outcome was the same. Finality of decisions of the Supreme Court of the United States was declared, and obedience to its order was compelled.

It is not surprising that in the early history of this country, when the jurisdictions of the Federal and the state governments were not clearly defined or well understood, States should have resisted the orders of this court. But it is remarkable that individuals should now undertake to defy the mandate of this great tribunal.

Justice is at an end when orders of the highest and most powerful court in the land are set at naught. Obedience to its mandates is essential to our institutions. Contempts such as this strike down the supremacy of law and order and undermine the foundations of our Government. Recurrence of such acts must be prevented. The commission of the offense has been established, and punishment should be imposed in accordance with its gravity.

Mr. James J. Lynch and *Mr. Moses H. Clift*, with whom *Mr. Judson Harmon, Mr. Robert Pritchard, Mr. William D. Spears* and *Mr. Robert B. Cooke* were on the brief, for defendant Shipp:

The testimony shows that Sheriff Shipp did not conspire, aid or abet the lynchers and did not fail in his duty to take proper precautions to guard him.

It is alleged in the information that the prisoner had been heavily guarded until the night of the lynching and that the guards were purposely withdrawn in order to permit the lynching. The record shows that the jail had not been guarded with extra guards after Johnson's conviction on February 9. During the time he had remained in the jail after his return from Knoxville, there had been no extra guard at the jail.

In their brief, counsel for the Government seem to bring a wholesale indictment against the whole citizenship of Chattanooga and Hamilton County. The undisputed testimony of dozens of witnesses is swept aside by the simple announcement that it is absurd and ridiculous. The testimony of gray-haired ministers, of veteran physicians, of merchants, manu-

facturers, and officials, is all treated in the same manner. To all of these, counsel for the Government say:

"It is absurd for the defendants and their witnesses to say that the community was in a state of peaceful repose on March 19 or preceding days. It is idle for them to say that they did not apprehend mob violence to Johnson."

And yet this fact is testified to by numerous witnesses for the Government and denied by no witness.

Judge McReynolds and Attorney-General Whittaker are also severely criticised by counsel for the Government. Just why, it is hard to understand. These gentlemen first sounded the alarm on the night of the lynching. Walking the streets about nine o'clock and noticing a suspicious gathering at the jail, they went to the office of the Chattanooga Times and notified the editor and reporters of what was going on—called the sheriff and requested him to go to the relief of the prisoner —'phoned to the office of the chief of police—and, in fact, did everything that could have reasonably been expected of any citizen under the circumstances.

Judge McReynolds treated Johnson with every consideration throughout the whole proceeding. He appointed able counsel to defend him, and after his conviction, appointed a committee of other able counsel to confer with his attorneys and render such assistance and advice as the case demanded. When counsel were appointed and before Johnson was tried, Judge McReynolds and the Attorney-General had the sheriff submit to the counsel appointed to defend Johnson all of the evidence the State had against the accused and also give Johnson's counsel the names of the witnesses for the State—a consideration for the defendant seldom, if ever before, shown in the criminal courts of this State.

After Johnson was lynched, Judge McReynolds delivered a strong charge to the grand jury, instructing that body to indict all those engaged in the lynching. Both he and Attorney-General Whittaker did everything possible to procure indictments. That the grand jury failed to indict any of

the lynchers is not strange in view of the difficulty that the Government, with all of its agents and detectives, have had in establishing the identity of those engaged in the lynching. These splendid officials need no defense at our hands. But it is quite a coincidence that counsel for the Government in their brief, criticise most severely those who did the most to avoid the lynching of Johnson.

As before stated, it is possible that Captain Shipp acted with poor judgment on the night of the lynching. It is easy to see now that he should have had the jail guarded and should have been prepared for a mob. But if he had done so, he would have been wiser and would have shown more foresight than any other citizen of Chattanooga.

It is easy to see now, looking back over events as they occurred on that night, that Captain Shipp, instead of going to the jail, should have gone to police headquarters or the armory, where the militia were drilling, and organized a posse. It must be remembered, however, that Captain Shipp did not have time to carefully consider the situation and coolly decide the best course to pursue. He was called up in the night and told by the prosecuting attorney that he should go at once to the jail—the Attorney-General showed just as poor judgment as did Captain Shipp. The Attorney-General was in conference with several other gentlemen, including the Criminal Judge, and in requesting the sheriff to go at once to the jail, he (the Attorney-General) spoke not only for himself, but for the other gentlemen present, showing that in the excitement of the moment, all of them were guilty of the same error of judgment that Captain Shipp was.

The testimony heretofore cited shows that Mr. Spurlock, who was with the judge and Attorney-General, after thinking the matter over, concluded that it would be foolish and, perhaps, dangerous, for the sheriff to rush into the jail alone, and knowing Captain Shipp's temperament, he knew he would attempt to do this. For this reason, they attempted to intercept the sheriff, but failed to do so.

Certainly Captain Shipp cannot be convicted for contempt of this court simply because in the performance of his duties, he exercised bad judgment. He says, himself, that if he had the thing to go over again he, perhaps, would know better what to do, and would act differently, but at that time he acted on the spur of the moment and had gone to the jail for the purpose of seeing what the trouble was and to do what he could to protect the prisoner.

Captain Shipp denied, in his testimony, all the charges in the information with reference to a conspiracy with those engaged in the lynching. He denied any intention to aid or abet, in any way, those engaged in the killing of Johnson. He denied that he anticipated or had any reason to anticipate or expect a mob on the night of March 19. He insisted that he had the very greatest respect for this honorable court and had done no act, and omitted no duty, from which a contrary conclusion could be drawn.

Captain Shipp has lived in Chattanooga since 1874. During that time he has been engaged in various business enterprises. During the time he has lived in Chattanooga he has been connected with various public affairs in that city. He was a Confederate soldier, and has, for many years, been a member of the Confederate Veterans' organization, and is quartermaster general of the entire organization. He was on the staff of the late Gen. John B. Gordon and the late Gen. Stephen D. Lee. He has been a Mason for over forty years and a member of numerous other secret societies. He was also tax assessor for Hamilton County, Tennessee, before elected to the position of sheriff. His splendid character is testified to by every witness whose testimony has been referred to in this brief. Old men and young men, political friends and political adversaries, ministers of all denominations, veterans of the Civil War who wore the blue and who wore the gray, men of all classes and all persuasions who have known Captain Shipp during his long life in Chattanooga, all, in one voice, say to this court that he is a truthful, law-

abiding, honorable gentleman. Can this court say that a man with such a character and such a record, would suddenly, without any motive whatever, betray his trust, sacrifice the life of a prisoner in his keeping, become a perjurer and a murderer, in order to show his contempt and disregard for the orders of this, the highest and greatest court in the world?

Mr. James J. Lynch and *Mr. Robert B. Cooke*, with whom *Mr. William D. Spears* was on the brief, for defendant Gibson:

The statement of the defendant as to what occurred on the night of the lynching is told in an honest, candid manner, and we submit that his statement is entitled to be believed.

The mob came to the jail and surprised him between 8:30 and 9 o'clock—battered down the door leading to upstairs where the defendant was at the time the mob arrived, and forced him to surrender the keys. Many members of the mob were armed, and they handled him roughly. He shows that he had no avenue of escape after the mob arrived, and no chance to communicate with the outside world. He was an old man 62 years old, and a veteran of the Civil War, and numerous witnesses testify to his good character.

Mr. Robert B. Cooke and *Mr. Moses H. Clift* for defendant Galloway: [1]

It is clear from the evidence that the defendant Galloway was not with the crowd or mob that lynched Johnson, and that when we take into consideration the manner in which this defendant exposed himself and his life for the protection and to prevent the mobbing of Johnson theretofore, as is shown by the record in this case, it seems preposterous that the able attorneys for the Government should ask this honorable court to convict or hold this defendant to be in contempt of the orders of this honorable court, on the testimony of witnesses who impeach themselves so thoroughly and so ef-

[1] The rule was discharged as to Galloway.

fectively that no one, much less this honorable court, could give any credence to their statements. The evidence establishes, beyond question, the fact that Galloway was not only not with the mob or about the jail, or at the bridge at the time the lynching occurred, but, as shown by the proof, was, at the time the lynching occurred, in the Eagle Club rooms on Market street and knew nothing of the mob until after the lynching occurred.

This honorable court will look into the conduct and the resistance made by this courageous, faithful officer in the defense of the lives of prisoners in his hands. It will take into consideration all the testimony as presented in the record, and when it does this, we feel confident that this honorable court will discharge this faithful officer, as well as all the officers, including the sheriff and each of his deputies, and commend their faithfulness as officers in the discharge of their duty.

Mr. G. W. Chamlee, with whom *Mr. J. A. Hood*, *Mr. W. H. Cummings* and *Mr. W. F. Chamlee* were on the brief, for defendant Ward:[1]

The Government has failed to make out its case against the defendant Ward, who is entitled to his discharge because the proof fails to show that he had any connection whatever with the lynching, and also fails to show that he had any knowledge of the fact that this honorable court had acquired jurisdiction of the case of Johnson *v.* Tennessee, and in the absence of such information he could not be guilty of contempt of this honorable court. To make the defendant guilty of a contempt it is necessary that he should have in his mind at the time of the commission of the unlawful act, knowledge that this honorable court had taken jurisdiction of the Johnson case and his participation either by aiding or abetting in the alleged lynching should be

[1] The rule was discharged as to Ward.

prompted by a spirit of disrespect for its orders. On both of these questions the Government has wholly failed to make out its case.

The evidence shows that at the very hour of the lynching the defendant was at Barnes' saloon under the influence of strong liquor to such an extent that the witnesses say he was drunk, and probably asleep.

This defendant is an innocent man. The proof against him is in the testimony alone of one Stonecipher who has been successfully impeached and this defendant has proven a satisfactory alibi and lack of knowledge of the jurisdiction of this court over the Johnson case.

Mr. G. W. Chamlee, with whom *Mr. W. H. Cummings* and *Mr. W. F. Chamlee* were on the brief, for defendant Williams:

There is enough in this record to show beyond any question or controversy that Mr. William's record for truth and veracity is good and that he is entitled to full faith and credit on his oath in a court of justice.

The Government has failed to show that Mr. Williams did anything in the world in aiding or assisting in the lynching of Ed Johnson. It has failed to show that he had any knowledge that this honorable court had acquired jurisdiction of the case of Johnson v. Tennessee. His answer denies every material allegation made against him in the information filed by the Attorney-General.

Counsel for the Government in the brief for the Government leave the impression that Mr. Ware swears positively that Mr. Williams was the man that shot five bullets into the dead body of Johnson as it lay on the county bridge. This is shown to be clearly erroneous, and a careful reading of Mr. Ware's testimony does not sustain the contention of counsel for the Government. It is most earnestly insisted that the proof shows that Mr. Williams was simply present as a spectator as were numbers of other people, but that he took no part in the lynching and is not guilty in any manner

or in any sense of the charges made and was in no way responsible for the death of Ed Johnson. It is, therefore, confidently urged that the charge against Mr. Williams is not proven and that he should be dismissed.

Mr. T. Pope Shepherd, with whom *Mr. Lewis Shepherd* and *Mr. Martin A. Fleming* were on the brief, for defendants Nolan, Justice,[1] Padgett and Mayse:

These defendants are charged with being members of the mob that lynched Johnson. They are not interested in the details of the occurrence at the county jail and bridge on the night of the lynching except to deny their presence and participation nor are they interested in the proof showing the history of the Johnson case and the condition of public sentiment with reference thereto. The only question to be considered, so far as these defendants are concerned, is their participation in the lynching.

Each one of the defendants filed an answer to the information denying his respective participation in the lynching and showing where he was on this particular night.

While the defense of each is separate and distinct and will be hereinafter treated separately there are some questions that may properly be considered as applying to all alike and will be treated in one discussion.

The Johnson case has been a famous case in and around Chattanooga, Tennessee, from the time the crime was committed, until the present time. From the whole record it will be seen and can properly be inferred that the facts connected with the case have been prominently in the minds of the Chattanooga people at all times. Every step in the case was watched with intense interest by almost every citizen and the subject was, evidently, constantly under discussion during the time from the arrest of Johnson to the night of the lynching. So in times of such great interest it is comparatively an easy matter for a man to remember his actions and wherea-

[1] The rule was discharged as to Justice.

bouts on that eventful night in the city of Chattanooga. At any ordinary time, or upon any ordinary night where there is nothing to particularly impress one's mind at that time or later, it is usually a difficult matter, after a lapse of a few weeks, to fully remember the occurrences of such a time or with certainty to identify such time with particular occurrences. But it is different at times of extraordinary events, whether such events are known at the time or ascertained later. A report on the following morning of some extraordinary occurrences of interest to every one in a community would have the result of recalling vividly to one's mind where he was and what he had been doing at such time. It is therefore entirely reasonable that these defendants could give an account of their actions on the night of March 19, 1906, when Johnson was lynched. And it is also entirely reasonable that their several actions could be identified with this particular night.

Nolan denied his presence and participation in the lynching of Johnson, and showed where he was on that night during the time of the lynching. He was at his place of business over a mile from the county jail up to about 9:30 P. M., that he then went to the saloon of his brother and remained there until a little after 10 P. M. at which time the saloon was closed for the night, that he then went to his home near by and there remained until the following morning. This is supported by the testimony and contradicts the testimony to the contrary that Nolan was in the crowd. Some of the Government's witnesses testified that he was masked and others that he was not. He was not fully identified, and the record of the witnesses who testified that they saw him is bad.

Under a fair construction of all the evidence the Government has failed to show Nolan's participation in the mob. His alibi is well supported by competent proof and his defense is sustained by the great weight of the evidence.

Defendant Justice denies that he was at the county jail

on the night of the lynching, or that he had any connection with or knowledge of the mob or lynching of Johnson. On that night he was at his home in St. Elmo several miles from the jail, and a part of the time visiting at a neighbor's house.

In the brief counsel for the Government first say that it must be remembered that this defendant was a member of the first mob that tried to lynch Johnson.

Defendant was asked about this. He stated that he was present as a spectator in company with such men as Judge McReynolds, Attorney-General Whittaker and H. Clay Evans. He was requested to act on a committee to examine the jail. Later defendant made a speech advising the crowd to disperse. Defendant is six feet one inch high and weighs from 215 to 236 pounds.

The man identified as Justice was evidently the leader of the mob, but the parties must have been mistaken and one witness says there was a man in the mob who did resemble Justice.

Defendants Padgett and Mayse answered denying their participation in the lynching. Padgett shows that he was at the Stag Hotel during the evening of the day of the lynching.

Mayse shows that he was at home after about 6 o'clock P. M. Neither knew anything of the lynching until the next morning.

The witnesses as to the alibi testified in a straightforward, intelligent manner. There is nothing so remarkable in their testimony as to justify the statement in counsel's brief that they are unworthy of belief. True, they are friends and associates of the defendant, but where could he get proof of his whereabouts except from his associates? Each one gives a reasonable account of his actions that night and a proper reason for remembering the details. It is not quite fair to charge that witnesses are unworthy of belief because, perchance, they have testified in favor of the opposite side in a lawsuit. There should be some respectable evidence on which to base such charge before it is justified.

The Government relies on the testimony of one Stonecipher.

There is no proof that these defendants were seen at the jail that night. The case is based on certain statements and admission made by them to Stonecipher who says there was a conversation before the lynching in which Padgett and Mayse were expressing dissatisfaction with the course of the Johnson case. There is nothing in this conversation to show that these parties were intending or making preparations to lynch Johnson; and on the next day Stonecipher claims that he heard a conversation between Padgett and another in which Padgett admitted that he and Mayse were participants and Padgett admitted his complicity—all of which both Padgett and Mayse denied—and so the witness Stonecipher stands alone and unsupported in his statements, and is contradicted by both defendants and other testimony.

Padgett does not remember what was said except that he did not state that he was a member of the mob. It is a remarkable proposition that a man would openly in a public place to a mere acquaintance state that on the night before he had committed murder. Stonecipher's story is highly unreasonable, and for that reason should be given less weight than evidence of a reasonable nature.

Then again the nature of the conversation is such that a court cannot afford to call it evidence. At the most it was thoughtless, idle talk or as sometimes expressed as barroom gossip. It cannot be considered as sufficient proof of murder.

If all that Stonecipher says is true and it should be considered as a confession, there is not a case made out for the reason that defendants have shown by an abundance of competent proof that they did not participate in the mob. Under the rule of first trying to make all the witnesses speak the truth the innocence of defendants is consistent with the testimony of every witness.

Witnesses who have known Stonecipher since he was a boy and know his reputation both in Chattanooga and in his former Georgia home, unhesitatingly say that his reputation is bad and that he is not entitled to credit on his oath.

Giving Stonecipher's testimony the most favorable light it does not in any degree prove participation, nor overcome the alibis set up and relied on by these defendants.

These cases are in effect criminal cases, and in weighing the evidence the rules in criminal cases should prevail.

Whether the reasonable doubt rule should prevail or not the court should require strong and convincing proof before convicting these defendants and inflicting punishment. The evidence should be stronger than a mere preponderance as in civil cases. There is something more important than property rights and consequently more strictness required. The freedom and liberty of a citizen should not be taken except on the strongest and most convincing proof.

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

This was an information filed by the Attorney-General of the United States against Joseph F. Shipp and twenty-six other defendants,[1] which was dismissed as to eighteen of them and heard as to defendants Shipp, Galloway, Gibson, Nolan, Williams, Justice, Padgett, Mayse and Ward.

The information charged, in substance, that February 11, 1906, Ed Johnson, a negro, was convicted of rape by the criminal court of Hamilton County, Tenn., held in Chattanooga, and was sentenced to death; that on March 3, following, Johnson filed a petition for the writ of *habeas corpus* in the United States Circuit Court, sitting in Tennessee, alleging that in the trial he had been deprived of constitutional rights; that on March 10 the petition was dismissed and the writ denied, petitioner being remanded to the sheriff of Hamilton County to be detained in his custody for ten days, in which to enable petitioner to prosecute an appeal, and in default of such appeal to be further proceeded with by the state court under its sentence; that on March 17 Mr. Justice Harlan, of the United

[1] The information at length and names of all defendants appear at page 439, *post.*

States Supreme Court, allowed an appeal from the decision of the Circuit Court, and on March 19 an order was made by the Supreme Court allowing said appeal; that defendant Shipp, sheriff of Hamilton County, then was at once notified by telegraph of said order, which stayed all proceedings against Johnson, and required Shipp to retain custody of Johnson pending determination of the appeal; that before 6 o'clock in the evening of March 19 a full account of this action of the Supreme Court was published and circulated in the evening papers in the city of Chattanooga; that defendant Shipp was the sheriff of Hamilton County and defendants Matthew Galloway and Jeremiah Gibson, among others, were his deputies; that the deputies as well as the sheriff were fully advised of the action of the Supreme Court, and were informed and had every reason to believe, from current reports and rumors conveyed to them, that an attempt would be made on the evening of the nineteenth or early in the morning of the twentieth, by a mob composed of a large number of armed men, to force an entrance into the county jail for the purpose of taking Johnson therefrom and lynching him; that notwithstanding said information and said reports the sheriff withdrew from the jail early in the evening of the nineteenth the usual and customary guard, and left in charge thereof only the night jailer—defendant Gibson—and committed other acts and did other things evincing a disposition on the part of said sheriff to render it less difficult and less dangerous for the mob to prosecute and carry into effect its unlawful design and purpose of lynching Johnson; that about 9 o'clock in the evening of said March 19 defendants and others conspired to break into the jail for the purpose of taking Johnson therefrom and lynching him, with intent to show their contempt and disregard for the abovementioned order of this court, and prevent it from hearing the appeal of Johnson; that pursuant to this conspiracy and in order to show their contempt and disregard for said order of this court, between 9 and 12 o'clock in the evening of said March 19, at Chattanooga, Tenn., defendants, excepting Shipp

and Gibson, assembled with others, broke into the jail, took Johnson out by force, and lynched him; that Gibson was the only officer at the jail when the mob broke in, and that while the mob was in possession of the jail defendant Shipp arrived, but made no effort to prevent the mob from taking Johnson from the jail; that defendants Shipp and Gibson were in sympathy with the mob while pretending to perform their official duty of protecting Johnson, and that they aided and abetted the mob in prosecution and performance of the lynching; that all of these acts were committed by defendants with the intent upon their part to utterly disregard the above-mentioned order of this court and to prevent the court from hearing Johnson's appeal.

The answers on questions of fact consisted of a general denial and, except in the cases of Shipp, Gibson and Williams, the setting up of an alibi by each defendant. Williams admits that he was at the jail a short time before and at the time Johnson was taken from it by the mob, and that he followed the mob and witnessed the lynching, but denies participating in the acts of the mob.[1]

Certain preliminary questions of law were raised by defendants and passed upon by the court. 203 U. S. 563.[2] It was held that the complaint sufficiently set forth a contempt of this court; that it was unnecessary for the purposes of this proceeding to determine whether or not the Circuit Court had jurisdiction of the *habeas corpus* proceedings or whether this court had jurisdiction to entertain the appeal, as those were questions for this court to determine and for no other tribunal; and that the answers of the defendants, under oath, disavowing intent did not purge them.

The case then came on to be heard on the question whether the allegations of the information were made out.[3]

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[1] For abstracts of answers of defendants, see page 447, *post.*

[2] For opinion of Mr. Justice Holmes see page 457, *post.*

[3] For order appointing commissioner to take testimony, etc., see page 471, *post.*

The following is a sufficient *resumé* of the facts admitted or undisputed:

January 23, 1906, a rape was committed upon a white woman in or near Chattanooga, Hamilton County, Tenn.

At that time and at all times hereinafter mentioned defendant Shipp was the duly elected, qualified and acting sheriff of Hamilton County, Tenn., and as such sheriff had and exercised full charge and control of the county jail located in Chattanooga, and was the legal custodian under the laws of Tennessee of all persons duly committed in said county under the laws of the State to confinement and imprisonment within the jail, and the defendants Matthew Galloway and Jeremiah Gibson were duly appointed, qualified and acting deputy sheriffs under Shipp.

January 25 Shipp and his deputies arrested Ed Johnson, a negro, in or near Chattanooga, charged with the crime.

Late in the afternoon of the same day Johnson was, by order of the judge of the state criminal court, taken by Sheriff Shipp to Dayton and from there to Nashville, where he was kept until the day of his trial, February 6. Johnson was removed and kept away from Chattanooga during this period because of fear that he would be lynched.

The night of January 25 a large mob attacked the jail at Chattanooga, where Johnson was supposed to be confined.

Three of Shipp's deputies were at the jail, and, with the assistance given them by the police, the chairman of the safety committee, and others, prevented the taking of any prisoners from the jail.

At the suggestion of the deputies the mob appointed a committee to go through the jail and satisfy itself that Johnson was not there.

Even after this committee had reported that the persons whom the mob sought were not in the jail, it was necessary to use force to put the mob out of the jail yard.

The dangerous character of this committee and the mob and their anger at not being able to find Johnson is shown by the

testimony of the prosecuting officer for Hamilton County; the judge of the criminal court of that county; and defendant Galloway.

One other night, about the same time, the officers thought there was to be a mob. The militia was called out twice about that time to protect the jail against a mob which sought to take Johnson's life.

January 26 a special grand jury was convened, and the next day indicted Johnson for the crime above referred to.

February 6 Johnson was brought to Chattanooga from Nashville and his trial commenced that day in the criminal court of Hamilton County. February 9 he was convicted and sentenced to death.

The date of execution was originally fixed as March 13, but on or about March 11 was changed by the governor to March 20.

No appeal to the Supreme Court of the State was taken by the lawyers appointed by the court to defend Johnson.

Two daily papers were published in Chattanooga—The Times, a morning paper, and The News, an evening paper, both having a large circulation. Three competent and leading attorneys had been appointed by the court to defend Johnson, and one of them made a statement, which was published in The Chattanooga Times of February 10, as to the reasons why an appeal was not prosecuted in Johnson's behalf. He depicts the mental strain that he and his associates had been under, and the weight of the burden of the responsibility upon them. He says that when the jury brought in a verdict of guilty "we, as the attorneys, had to settle the question whether the case would be appealed to the Supreme Court." He asked the trial judge to appoint three other lawyers to counsel and advise with them and help to share the responsibility, and three well-known lawyers were designated, who met with the three counsel for the petitioner and considered the matter.

"We discussed the recent mob uprising and the state of unrest in the community. It was the judgment of all present

that the life of the defendant, even if the wrong man, could not be saved; that an appeal would so inflame the public that the jail would be attacked and perhaps other prisoners executed by violence. In the opinion of all of us a case was presented where the defendant, now that he had been convicted by a jury, must die by the judgment of the law, or else, if his case were appealed, he would die by the act of the uprising of the people."

* * * * * * * *

"In view of all the conditions, it was the unanimous vote that the law ought to be allowed to take its course if Judge McReynolds were satisfied with the verdict, and if he were to approve it and pass judgment of death on it."

He then relates an interview had thereupon with the accused. His right of appeal was explained to him, "that the Supreme Court met in September next; that an appeal would stay the judgment until that time; that we did not see any reasonable ground to suppose that the Supreme Court would reverse the sentence, and that we feared an appeal would cause mob violence against him."

* * * * * * * *

"Without giving all that occurred at the jail, he said to us that he did not want to die by a mob; that he would do as we thought best. He said he would go over to the court house and tell the judge that he did not have anything more to say than that he was not the guilty man.

"I want the people to know that the foregoing facts moved us to allow the law to take its course under the verdict of the jury and the judgment of Judge McReynolds. Six lawyers settled it in this way after the calmest reflection and under the keenest sense of the great responsibility.

"In view of the awfulness of the crime committed, I beg that the sheriff and every peace officer of Chattanooga and Hamilton County will still try to get all possible further light, and if any person anywhere knows anything whatever tending to show or reflect light on either the guilt or innocence of the

defendant, I beg that such person make known all that he may know to us or to Attorney-General Whittaker."

On the afternoon Johnson was convicted he was secretly taken from Chattanooga to Knoxville because of fear of mob violence to him.

From the time the crime was committed until after Johnson's trial the people of Chattanooga were greatly excited over the crime and Johnson's alleged connection with it, and there was great apprehension on the part of the people as well as the officers that attempts would be made to lynch Johnson.

It was because of this intense excitement and the feeling that speedy execution of Johnson might prevent his being lynched that Johnson was so quickly indicted and tried.

While the trial was in progress extra deputies were sworn in and an unusual number of guards were kept around the court house and at the jail at night.

Guns to be used in protecting the jail against a mob were purchased.

March 3 Johnson filed a petition for a writ of *habeas corpus* in the United States Circuit Court for the Northern Division of the Eastern District of Tennessee.

March 10, 1906, the petition was denied, the Circuit Court ordering that Johnson be remanded to the custody of the sheriff of Hamilton County, Tenn., to be detained by him for ten days in which to enable petitioner to prosecute an appeal from said order, and in default of the prosecution of said appeal within that time to be then further proceeded with under the sentence.

This order was made public through the press.

Johnson was at Knoxville, where he had been kept since his conviction, for hearing upon his petition, and was taken back to Chattanooga, March 11.

Saturday, March 17, application was duly presented by Johnson to Mr. Justice Harlan of the Supreme Court of the United States (Circuit Justice of the Sixth Circuit), at Washington, asking that an appeal be allowed to that court from the order

of the Circuit Court, denying Johnson's petition for a writ of *habeas corpus*. This appeal was allowed by Mr. Justice Harlan on the same day.

March 18, The Chattanooga Times published notice that application for said appeal had been made.

The same day Judge Clark, of the United States Circuit Court, received a telegram from Mr. Justice Harlan, which was communicated to Sheriff Shipp on the afternoon of that day, that he had allowed appeal to accused in *habeas corpus* case of Ed Johnson; that the transcript would be filed the next day, and motion also be made by Johnson's counsel for formal allowance of appeal by the Supreme Court.

March 19, The Chattanooga Times published news of the allowance of the appeal by Mr. Justice Harlan, in which it said, among other things:

"From these authorities it was learned that the granting of an appeal in a case like this acted to supersede all process in the state courts. No stay is necessary, according to the authorities, and the statute is self-operative. Pending a decision of the appeal there can be no execution by any state authority."

March 19 an order was made by the United States Supreme Court, allowing an appeal to that court from the final order of the Circuit Court denying petition for writ of *habeas corpus*, and directing that all proceedings against the appellant be stayed, and that the custody of appellant be retained pending the appeal.

About 1 o'clock in the afternoon of said March 19 the following telegram was delivered to a telegraph company for transmittal to the addressee:

"Washington, March 19, 1906.

"To Sheriff of Hamilton County, Tenn., Chattanooga, Tenn.

"Supreme Court of United States has allowed Ed Johnson appeal from Judge Clark's order, and directed all further proceedings stayed, and custody of Johnson retained pending

appeal here. See Section 766, Revised Statutes of the United States.

"JAMES H. MCKENNEY,
"*Clerk Supreme Court, U. S.*"

This was received by the telegraph office at Chattanooga about 3.30 on the same afternoon and delivered between 4 and 5 o'clock on that afternoon.

About 2 o'clock on the afternoon of the nineteenth Judge McReynolds told Sheriff Shipp that the Supreme Court had granted a stay in the Johnson case, and that thereafter Johnson was a Federal prisoner.

Between 2 and 4 of the afternoon of March 19 the following telegram was received by Judge Clark, and by his secretary communicated to Sheriff Shipp, at the jail, about 5 o'clock that afternoon, with a copy of the statute therein referred to:

"Washington, D. C., March 19, 1906.

"Hon. C. D. Clark, United States Court, Chattanooga, Tenn.

"Court has just allowed appeal in Johnson's case, and ordered all further proceedings against him delayed and custody retained pending appeal here. It will be well to call attention of state officers immediately to Section 766 of Revised Statutes.

"JOHN M. HARLAN."

The statute referred to reads (including the proviso added March 3, 1893):

"Pending the proceedings on appeal in the cases mentioned in the three preceding sections and until final judgment therein, and after final judgment of discharge, any proceedings against the person imprisoned or confined or restrained of his liberty, in any State court, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed null and void.

"*Provided*, That no such appeal shall be had or allowed after

six months from the date of the judgment or order complained of."

Shipp understood that thereupon Johnson was held as a Federal prisoner.

There was published and circulated in Chattanooga, in the evening paper published in that city, on March 19, about 4 o'clock, an account of said action of the Supreme Court, under the headlines, "An Appeal is Allowed. Ed Johnson Will Not Hang To-morrow." This reads, in part:

"The gallows in the Hamilton County jail has again been disappointed in the case of Ed Johnson, convicted by the state courts of rape and sentenced to death. The hanging will not take place to-morrow morning, as scheduled."

The news of the action of the court was also posted on a newspaper bulletin.

After hearing of the stay Shipp says that he made no effort and gave no orders to have deputies or others guard the jail, but left the night jailer, defendant Gibson, there alone.

The county jail at Chattanooga, in which Johnson was confined on the nineteenth, consisted of four stories, two above ground and two below ground. Entrance to the jail was on the third floor, counting from the bottom. In the front part of the building, on this third floor, was an office section. An iron door led from this section into the jail proper; that is, the protected part of the building, where the prisoners were kept. Johnson was confined on the top floor. To reach him from outside the jail it was necessary to go through the offices, through the iron door between the offices and the jail proper, up a flight of stairs, through a steel-barred door, right behind which was a circular door consisting of heavy steel bars several inches apart, which revolved so as to make a passage. Passing through this circular door one came into a corridor around which were cells having iron doors which could be locked. It was in one of these cells that Johnson was confined.

The jail was located in a populous neighborhood and there were houses around it.

In the evening of the nineteenth a white male prisoner was removed from the upper floor of the county jail in Chattanooga, leaving only Johnson and a white woman on that floor.

This same man had been removed in the same way at the time of the first attempt to lynch Johnson.

About half-past 8 or 9 that night a number of men entered the jail and went directly and without resistance to the door leading to Johnson's corridor. There is a conflict of evidence as to whether the door leading from the offices to the jail proper was locked during the evening, but if it was locked when the mob came it was easily broken down.

Gibson was the only officer there at the time, and he was on the top floor with Johnson.

Keys were obtained from him without resistance, but, as the lock on the door leading to the corridor where Johnson's cell was located had been broken by a member of the mob, the keys would not work.

The mob, with sledge and ax, then began to break the bolts on the corridor door.

About twelve men were actively engaged in breaking down the door and in all subsequent events of the lynching. Some of these men were masked.

A crowd of spectators began to gather around the jail soon after the mob reached it, and continued to gather in and around the jail until Johnson was taken out. This crowd was variously estimated from a few to 150 or more.

It took over an hour to break the bolts on the corridor door.

Two men then went through the circular door and in a few minutes brought Johnson out with his arms tied with a rope.

When Johnson was thus brought out, the dozen men or so composing the mob grabbed him.

This mob took Johnson from the jail to the county bridge over the Tennessee River, which was about six blocks from the jail.

Johnson was taken from the jail a little after 10 o'clock.

From the foregoing it is apparent that there was no inter-

ference or attempted interference of any consequence with the mob before it left the jail, and there was none after it left.

The crowd which had gathered around the jail followed the mob down to the bridge.

When the bridge was reached the mob took Johnson a little beyond an arc light, put a rope around his neck, threw it over a beam, and swung him up.

At the bridge the mob actively engaged in lynching Johnson were close to him and separated by a space from the crowd of spectators.

The first time Johnson was swung up, the rope broke or slipped and he fell. He was swung up a second time and shot. After some shots were fired, Johnson again fell, and while lying on the ground was again shot. It was about ten minutes after the mob had reached the bridge until Johnson was killed.

It is apparent that a dangerous portion of the community was seized with the awful thirst for blood which only killing can quench, and that considerations of law and order were swept away in the overwhelming flood. The mob was, however, willing at the first attempt to accept prompt administration of the death penalty adjudged at a trial conducted according to judicial forms, in lieu of execution by lawless violence, but delay by appeal, or writ of error, or *habeas corpus* was not to be tolerated.

Under then existing statutory provisions appeals might be taken to this court from final decisions of the Circuit Courts in *habeas corpus* in cases, among others, where the applicant for the writ is alleged to be restrained of his liberty in violation of the Constitution or of some law or treaty of the United States, and if the restraint was by any state court, or by or under the authority of any State, further proceedings could not be had against him pending the appeal. Rev. Stat., §§ 763, 764, 766; Act of March 3, 1885, c. 353, 23 Stat. 437.

In this instance an appeal was granted by this court, and proceedings specifically ordered to be stayed. The persons who hung and shot this man were so impatient for his blood

that they utterly disregarded the act of Congress as well as the order of this court.

As heretofore stated, the defendants to the information remaining to be dealt with on the facts are Shipp, Galloway, Gibson, Nolan, Williams, Justice, Padgett, Mayse and Ward. Of these, Shipp was the sheriff and Galloway and Gibson two of his deputies. The others are charged with active participation in the lynching. It is contended that the lynching was not expected to occur on the nineteenth, and the evidence of the United States District Judge, and some clergymen and others was given to the effect that they had no such anticipation. The event showed that they were wrong, and it is plain the danger might be very great and yet remain unperceived by the adherents of order and peace.

It will be remembered that the crime was committed on January 23, and Johnson was arrested January 25. That night a mob attacked the jail in which he was supposed to be and ascertained that he was not there. Johnson was kept in Nashville from that day until his trial commenced, February 6. On his conviction, February 9, he was taken away from Chattanooga and kept away until March 11, the day after his petition for *habeas corpus* was denied.

It must be admitted that intense feeling against Johnson existed from the time of the commission of the crime until after his conviction, and that this feeling frequently manifested itself, although Johnson was not in Chattanooga from the time of his arrest until his trial began. The intensity of this feeling and the great apprehension of the officers of mob violence is shown in the testimony of defendants' own witnesses, describing the precautions and secrecy exercised by them in the way they took Johnson in and out of Chattanooga, as well as by the fact that they kept him away from Chattanooga from the day of his arrest until March 11, two days before the time set for his execution, with the exception of the three days he was there attending his trial. Undoubtedly the public believed that Johnson would be executed on March 13,

until the reprieve to March 20 was granted on March 11; and after the petition for *habeas corpus* was denied by the Circuit Court believed that Johnson would then be executed on the twentieth.

Sheriff Shipp testifies that inflammatory reports of the *habeas corpus* proceedings and efforts to appeal the case to the Supreme Court were sent out by the newspapers on March 11, and because of that he had fear of mob violence to Johnson. The efforts made by Johnson's attorneys to obtain an appeal were kept before the public by the newspapers.

March 16 The Chattanooga Times published a statement that a negro attorney had gone to Washington to obtain an appeal from the order denying the petition for *habeas corpus*. The article said:

"People here are decidedly anxious as to whether Johnson is to suffer death for his crime next Monday or escape for an indefinite period by reason of intervention of the court at Washington. More unrest on the subject exists than was anticipated when Johnson was brought back to the county.

* * * * * * * *

"During the recent days of suspense as to his execution the desire for information has been feverish, and telephones at localities where information has been thought to be obtainable have been kept busy by inquirers."

In The News, published the evening of March 19, there was an editorial reviewing the local proceedings, which concluded:

"All of this delay is aggravating to the community. The people of Chattanooga believe that Johnson is guilty and that he ought to suffer the penalty of the law as speedily as possible. If by legal technicality the case is prolonged and the culprit finally escapes, there will be no use to plead with a mob here if another such crime is committed. Such delays are largely responsible for mob violence all over the country."

The assertions that mob violence was not expected and that there was no occasion for providing more than the usual guard

of one man for the jail in Chattanooga, are quite unreasonable and inconsistent with statements made by Sheriff Shipp and his deputies that they were looking for a mob on the next day. Officers and others were heard to say that they expected a mob would attempt to lynch Johnson on the twentieth. There does not seem to be any foundation for the belief that the mob would be considerate enough to wait until the twentieth. If the officers expected a mob at all, as they say that they did, they cannot shield themselves behind the statement that they expected it on the twentieth, the day that had been appointed for Johnson to die, and did not expect it the night before. But no orders had been given and nothing had been done up to half-past eight o'clock on the night of the nineteenth to protect Johnson from the mob which was, according to their present statements, expected the next day.

Testimony was given by a servant in Shipp's house that a week before Johnson was lynched Shipp was heard to say that if the execution were stayed Johnson would be mobbed. This was, however, disputed by Shipp and relatives of his who were there at the time.

On May 28, at Birmingham, Alabama, defendant Shipp himself, in an interview reported and printed the next morning in The Birmingham Age-Herald, said:

"'The first I knew of the mob was through a telephone message I received from The Chattanooga Times office, for they had cut the wires at the county jail immediately upon their arrival. I dressed as quickly as possible and went to the jail, and found a crowd of about seventy-five people around it, most of them being in disguise. I made my way through the crowd into the jail and began remonstrating with them against taking any drastic steps. They seized me and took me upstairs, locking me up in a bathroom. The members of the mob told me they meant no violence to me. I argued with them against doing anything at all, since the law had so far taken its proper course. *I am frank to say that I did not attempt to hurt any of them, and would not have made such an attempt if I could.*

In the first place, I could have done no good, as I was overwhelmed by numbers.

" 'The Supreme Court of the United States was responsible for this lynching. I had given that negro every protection that I could. For fourteen days I had guarded and protected him myself. The authorities had urged me to use one or two military companies in doing so, but I told them I would land the negro in jail, which I did, individually.

" 'Many nights before the lynching there had been a sufficient guard around the jail. *I had looked for no trouble that night and, on the contrary, did not look for it until the next day.* That night no one was on duty except the jailer, which is the usual guard at our jail, as well as in other counties.

" 'In my opinion the act of the Supreme Court of the United States in not allowing the case to remain in our courts was the most unfortunate thing in the history of Tennessee. I was determined that the case should be put in the hands of the law, as it was. The jury that tried the negro Johnson was as good as ever sat in a jury box.

" 'The people of Hamilton County were willing to let the law take its course until it became known that the case would not probably be disposed of for four or five years by the Supreme Court of the United States. The people would not submit to this, and I do not wonder at it.

" 'These proceedings in the United States Supreme Court recently appear to me to be only a matter of politics. I do not wish to appear in the light of defying the United States court, but I did my duty. I am conscious of it, thoroughly conscious of it, and I am ready for any conditions that may come up.' "

The testimony of the reporter that Shipp made these statements was corroborated by the evidence of another reporter who interviewed Shipp on the following day regarding them, and is not denied by Shipp except in an immaterial particular. From this it appears that defendant Shipp looked for trouble on the twentieth, but, as he says, not that night; that he did

not attempt to hurt any of the mob, "and would not have made such an attempt if I could."

He evidently resented the necessary order of this court as an alien intrusion, and declared that the court was responsible for the lynching. According to him, "the people of Hamilton County were willing to let the law take its course until it became known that the case would not probably be disposed of for four or five years by the Supreme Court of the United States." "But," he added, "the people would not submit to this, and I do not wonder at it." In other words, his view was that because this court, in the discharge of its duty entered the order which it did, that therefore the people of Hamilton County would not submit to its mandate, and hence the court became responsible for the mob. He took the view expressed by several members of the mob on the afternoon of the nineteenth and before the lynching, when they said, referring to the Supreme Court, that "they had no business interfering with our business at all." His reference to the "people" was significant, for he was a candidate for reëlection and had been told that his saving the prisoner from the first attempt to mob him would cost him his place, and he had answered that he wished the mob had got him before he did.

It seems to us that to say that the sheriff and his deputies did not anticipate that the mob would attempt to lynch Johnson on the night of the nineteenth is to charge them with gross neglect of duty and with an ignorance of conditions in a matter which vitally concerned them all as officers, and is directly contrary to their own testimony. It is absurd to contend that officers of the law who have been through the experiences these defendants had passed through two months prior to the actual lynching did not know that a lynching probably would be attempted on the nineteenth. Under the facts shown, when the sheriff and his deputies assert that they expected a mob on the twentieth, they practically concede the allegation of the information that they were informed and had every reason to believe that an attempt would be made on the evening

of the nineteenth or early on the morning of the twentieth.

In view of this, Shipp's failure to make the slightest preparation to resist the mob; the absence of all of the deputies, except Gibson, from the jail during the mob's proceedings, occupying a period of some hours in the early evening; the action of Shipp in not resisting the mob and his failure to make any reasonable effort to save Johnson or identify the members of the mob, justify the inference of a disposition upon his part to render it easy for the mob to lynch Johnson, and to acquiesce in the lynching. After Shipp was informed that a mob was at the jail, and he could not do otherwise than go there, he did not and in fact at no time hindered the mob or caused it to be interfered with, or helped in the slightest degree to protect Johnson. And this in utter disregard of this court's mandate and in defiance of this court's orders.

Let us recapitulate the facts bearing immediately on defendant Shipp.

About 9 o'clock on the night of the nineteenth the judge before whom Johnson was tried, and the attorney who prosecuted him, communicated with Sheriff Shipp at his house, saying that there were persons around the jail who looked suspicious, and suggesting that the sheriff had better go down to the jail.

At that time a report was generally circulated in the city that a mob was at the jail to lynch Johnson.

Shipp lived only a few blocks from the jail. He reached the jail about nine. He was alone. A number of people were in the jail and outside of it when he arrived. He anticipated a mob was inside.

Without stopping to speak to any of these people he rushed inside of the jail to the foot of the stairs leading to the floor Johnson was on. There he was taken hold of by five or six men and carried upstairs. The men who took hold of him had no firearms.

At first he was put in a bathroom, and then was released and stood around near the corridor door, where the mob was at

work, with three or four unarmed men around him. He made no effort to get away or use force in opposing the mob. He did not attempt to use his pistol or call for help. After the corridor door had been broken in, either Shipp or defendant Gibson told the mob which cell Johnson was in. When the mob left the jail with Johnson, Shipp did not follow or make any effort to rescue Johnson or get others to help rescue him. He was not locked up when the mob left the jail, but was left entirely free.

When the crowd following the lynchers was about two blocks from the jail, Shipp came out of the building alone and unguarded. To a request made by a man at that time to go and identify members of the mob, Shipp replied that it would be dangerous and foolish. This request was made before the shooting occurred.

A special deputy met Shipp at the jail just after Johnson had been taken out and before he was shot. Shipp told him that the mob had Johnson. Shipp was quiet, and made no effort to go after the lynchers, or to reach the police or militia or others.

When he reached the jail he could have gone about three blocks to the police station and got the police.

No alarm bell was rung at the court house that night, although it was rung the night of the attempted lynching January 25, and it drew out a big crowd. No attempt was made by Shipp or others to summon a posse. He sent no one after deputies. He made no effort to send any one for help.

It is testified that some time after the mob had left the jail for the bridge, Shipp sent Galloway and Clark down to the bridge, but he made no effort to go himself.

There was in the crowd around the jail and at the scene of the lynching a substantial number of law-abiding men of good character.

That assistance in suppressing the mob might have been easily obtained if effort had been made is shown by the testimony of the chairman of the board of safety, who testifies that at the time of the first lynching in going four or five

blocks to the jail he gathered about 16 men to help put down the mob.

The militia was drilling on the night of the nineteenth between 8 and 10.30 in the armory, a well-known place, three blocks from the jail. It was not called upon to assist in suppressing the mob, although it had been called out twice before by the governor, and was bound to respond to another call by him.

The governor had given assurances that any help asked for would be given, and we have no doubt he would have responded, for he would have had the honor of Tennessee in his keeping.

Numerous witnesses testify that no firearms were displayed by the mob except that one of their number was in the office of the jail with a Winchester rifle, and one pistol was exhibited to a reporter when the door was being broken open.

No deputies put in an appearance while the mob was at the jail or during the lynching, except Frank Jones, who approached the jail with a prisoner, but upon seeing the mob immediately left with the prisoner, and excepting Matt Galloway, who was seen in the crowd.

From the time he reached there, about 6 o'clock, until the mob came, Gibson was the only officer in charge of the jail. But there was much evidence that customarily many deputies were there nightly, and that several were present on the night of the nineteenth until just before the irruption of the mob.

Heavy iron chains were sometimes used as additional guards upon circular doors in the jail, such as that leading to Johnson's corridor. These were locked by the prisoners on the inside. During the trial of Johnson these chains were used on the circular doors. But none were on the circular door leading to Johnson's cell on the nineteenth. It also appears that Johnson's cell door was not locked.

Winchester rifles which were kept to defend the jail against mob violence were, at the time the mob attacked the jail on

the nineteenth, in a show case in the office. These were taken out of the show case by the mob and unloaded.

Although Shipp was in the midst or near the members of the mob for about an hour when they were in the jail, he did not seek to obtain information so that he could identify any of them, and he testifies that he does not know any member of the mob.

Only one conclusion can be drawn from these facts, all of which are clearly established by the evidence—Shipp not only made the work of the mob easy, but in effect aided and abetted it.

Gibson is involved in the same condemnation though under less responsibility. We think belief on his part that a mob would attempt to enter the jail and lynch Johnson on the night of the nineteenth must be presumed.

The day jailer left the jail some time after six o'clock, and transferred the keys to Gibson, the night jailer. Gibson's 15-year old boy was with him, but went to the opera house at 8.30. Gibson was in charge of the jail more than two hours before the arrival of the mob, and he made no effort to summon assistance to repel the attack, although necessarily he must have known that he alone could only offer slight resistance. Mrs. Baker, a white woman, confined on the same floor with Johnson, testified that Gibson, soon after arriving at the jail, when she had gone down stairs to get a letter written, said to her that a mob was coming, and directed her to go to her room, and when the mob was at the jail came to her door and told her that no one would hurt her. Gibson admits the last statement, but denies the first.

He testifies that when he heard the mob he went into the hospital cell, located on the top floor, and sat down on a lounge, and as soon as the mob got upstairs he handed over to them his pistol and the keys, including a key to the door of Johnson's cell; that he did not try to use the pistol, or to resist the mob by force; that from the top floor he could have gone through the kitchen into the yard and back of the jail, but he

made no effort to do so, although it took the mob some ten minutes after he knew they were there to break through the door between the outer door and the jail proper; that he just gave up and made no effort at all to resist the mob or rescue Johnson after they had left the jail; that although the men were bold in their work, he failed to recognize any one excepting Nick Nolan.

Galloway was a deputy sheriff from the time Johnson was convicted until after the lynching, and was told by the sheriff after the mob had left for the bridge to go down there, and did so, but Johnson was then dead. He was criminal court deputy, and served criminal court papers and made arrests. But he had no charge of the jail or keeping of prisoners except when officially so assigned. He had no connection with the jail or the prisoners at any time after Johnson was brought from Knoxville on the tenth or eleventh of March. He testified that he had heard nothing while attending to his duties that made him think Johnson was in danger; was a member of the Eagle Club, and was there on evening of the nineteenth, at 7.45, not having heard prior thereto anything about any impending lynching. His first information of the lynching was after 10 o'clock, when he went to the jail at once. There he met the sheriff, who asked him to go to the bridge, which he did, but Johnson was dead. We think Galloway must be acquitted of the charges in the information.

This brings us to a consideration of the case in respect of the six defendants, who are charged as members of the mob and participants in its action.

As to Williams and Nolan, there is direct testimony to their participation in the lynching, and we do not think that the evidence relied on to weaken that conclusion is sufficient to do so.

As to Padgett and Mayse, there is testimony of statements on their part on the afternoon of the nineteenth and the morning of the twentieth, which, if believed, demonstrates their guilt. We have carefully examined and analyzed the evidence to impeach the principal witness to these conversations, and

also to make out alibis, but we cannot accept it as convincing.

We hold that the case as to Justice and Ward fails on the evidence.

In our opinion it does not admit of question on this record that this lamentable riot was the direct result of opposition to the administration of the law by this court. It was not only in defiance of our mandate, but was understood to be such. The Supreme Court of the United States was called upon to abdicate its functions and decline to enter such orders as the occasion, in its judgment demanded, because of the danger of their defeat by an outbreak of lawless violence. It is plain that what created this mob and led to this lynching was the unwillingless of its members to submit to the delay required for the appeal. The intent to prevent that delay by defeating the hearing of the appeal necessarily follows from the defendants' acts, and if the life of any one in the custody of the law is at the mercy of a mob the administration of justice becomes a mockery. When this court granted a stay of execution on Johnson's application it became its duty to protect him until his case should be disposed of. And when its mandate issued for his protection was defied, punishment of those guilty of such attempt must be awarded.

The rule will be discharged as to the defendants Galloway, Justice and Ward, and made absolute as to the other defendants.

Rule discharged as to defendants Galloway, Justice and Ward, and made absolute as to defendants Shipp, Gibson, Williams, Nolan, Padgett and Mayse. Attachments to issue, returnable on Tuesday, June 1.[1]

MR. JUSTICE MOODY did not hear the argument and took no part in the disposition of the case.

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[1] For proceedings on the return of the attachment on June 1, see p. 483, *post.*

MR. JUSTICE PECKHAM, with whom concurred MR. JUSTICE WHITE and MR. JUSTICE MCKENNA, dissenting.

I dissent from the opinion and judgment of the court in this case, and I think its importance requires a statement of the reasons for my dissent. In regard to the crime which was perpetrated by the mob upon the person of the negro there can be but one opinion. I take it that all intelligent and respectable citizens who are cognizant of the facts agree that it was murder, without one extenuating circumstance to relieve its atrocious character. The important question, however, is, first, as to the sheriff—whether he is guilty of the charge made against him in the information filed in this proceeding. The charge, as contained in the information, upon which such a vast amount of evidence has been taken, is that the sheriff, and many other persons, conspired together for the purpose of breaking and entering the county jail and taking therefrom the negro Johnson, in order to lynch him, with the intent to thereby show their contempt and disregard of the order of this court and to prevent the hearing of the appeal.

A careful consideration of the case leaves me with the conviction that there is not one particle of evidence that any conspiracy had ever been entered into or existed on the part of the sheriff, as charged against him. It is not alone that the evidence preponderates in his favor, but it seems to me there is no material evidence against him, certainly none that rises higher than the merest possible suspicion, founded upon evidence of facts which are in themselves wholly inconclusive, and just as consistent with innocence as with guilt. His character is shown by many witnesses to be that of the highest. Not a man in Chattanooga stands better as a man and a citizen than he does. There is not a particle of evidence to the contrary. He has lived an honored and respected citizen of that city since 1874; has held honorable official positions before the one that he now holds, and yet, as an old man, he is adjudged guilty of a contempt of this court and liable to serve

a disgraceful imprisonment because, as is insisted in this record, he did not do as much towards resisting a lawless mob as this court says he ought to have done.

The crime for which Johnson was convicted was perpetrated on a white schoolgirl on January 23, 1906, and on the twenty-fifth of that month Johnson was arrested near Chattanooga and charged with the crime. After being arrested he was taken by the sheriff, by order of the State Criminal Court, to the jail at Nashville, where he was kept until the day of his trial, February 6. The sheriff was active and intelligent in his efforts to preserve the safety of the negro. No adverse criticism is or can truthfully be made upon his conduct at that time. At the time of the arrest of the negro there is no contradiction in the evidence that there was very great excitement and a disposition evinced to lynch Johnson at once. A crowd of over a thousand, it is said, surrounded the jail on the night of January 25, where Johnson was supposed to be, but the prisoner was not in the jail, and the deputies of the sheriff (the sheriff himself, having Johnson in custody, was taking him to Nashville) exhorted the mob to disperse, and finally people were sent into the jail on behalf of the mob, and went through it to satisfy themselves that Johnson was not there. The mob thereupon dispersed. On January 26 a grand jury was convened and Johnson was indicted, and on February 6 he was brought to Chattanooga from Nashville, and his trial was commenced that day in the criminal court. On February 9 he was convicted and sentenced to death. No appeal was taken by the lawyers appointed by the court to defend him from that sentence. The lawyers said they feared the prisoner would be lynched if such an appeal were taken. On his conviction he was taken from Chattanooga to Knoxville, in the personal custody of the sheriff, to be safe from any possible violence of the mob. No mob, however, appeared, and nothing was attempted. The judge who presided at the trial of the negro, after his conviction, told the sheriff that the prisoner would be entirely safe at Chattanooga. After the

trial the excitement decreased very greatly and seemed to disappear entirely. Of this fact there is no contradiction in the evidence. On March 3 a petition for a writ of *habeas corpus* was filed in the United States Circuit Court for the Northern Division of the Eastern District of Tennessee on the part of Johnson. On March 10 the petition was denied, and the Circuit Judge ordered that Johnson be remanded to the custody of the sheriff of Hamilton County (at Chattanooga), Tenn., to be detained by the sheriff in his custody for ten days, in which to permit Johnson to prosecute an appeal from the order, and in default of the prosecution of such appeal further proceedings to be taken in the state court of Tennessee, under its sentence. Immediately after this decision Johnson was taken back to Chattanooga, arriving there March 11. Everything was quiet and there was no evidence of excitement, nor of any intention whatever to interfere with the negro. The sheriff kept watch of public sentiment for several days thereafter. He was himself going about through the city, mixing with all manner of crowds, and found not the slightest evidence that would lead any reasonable man to believe that any assault was intended upon Johnson. The sheriff stated that he did some canvassing in his election campaign during this time, and was around in the manufacturing establishments and saw no excitement and heard no talk of the case during the whole time. There was nothing at all, says the sheriff, that came to his knowledge during this time that would have put a prudent and careful man on his guard.

On March 19, the day preceding the night of the lynching, the same thing was noticed of a total lack of any evidence of any excitement or of any evidence of an intention to commit any violence. Thus from the eleventh to the nineteenth of March—from the time that Johnson was brought back from Knoxville to Chattanooga, after Judge Clark, the United States judge, had denied his petition for *habeas corpus*—the city was entirely tranquil and nothing was done which would have caused any man, even the most circumspect and pru-

dent, to believe that any violence was intended. During the time, from the eleventh to the nineteenth of March, there had been no extra guards at the jail because of these facts. No demonstration had been made against the jail and no threats made against the prisoner that anybody heard. Judge Clark, now deceased, who had been a resident of Chattanooga since 1883, was a witness in this proceeding, and stated that he had never heard anything suggested as to there being any danger to Johnson if the stay of execution were granted in his case. Judge Clark said: "It strikes me it was absolutely absurd in view of what actually occurred." The judge was also asked whether anything said at the trial of the *habeas corpus* proceedings on the part of the representatives of the State, or on the part of any one, caused him to apprehend any mob violence to this man, and the judge said, none in the least. The judge also said that he had asked his secretary on the day that he was at Chattanooga on his way to St. Augustine if he had heard of any suggestions or hints of violence or dissatisfaction with the situation, and the secretary told him that he had not. On March 19, he had, he said, called up some one of the defendants' attorneys and found out that the appeal from the order denying the *habeas corpus* had been allowed by the Supreme Court of the United States, and the judge said to the attorney that he would be there all day at his office and would leave for Florida that night. The judge said the reason he made that announcement was that he had known that Johnson had been taken to another jail prior to this, and that he was brought out of the Knoxville jail when the petition for *habeas corpus* was brought up before him (Judge Clark). "Therefore," Judge Clark said, "on account of that, after getting Mr. Justice Harlan's telegram, I would have ordered the man to any jail where it was desired to send him . . . if it had appeared that the prisoner was in great or real danger—if that had appeared to me—I am quite sure that I would have made the order of my own motion, or would have called up his attorney and suggested that he make an application for

his removal." The following question was also put to the judge: "Q. Judge Clark, I will ask you if the attorney to whom you talked or any other attorney for the defendant Johnson, or any other person, suggested to you the necessity or even the propriety of taking steps to protect your prisoner, the Federal prisoner Johnson? A. I never heard the remotest suggestion, and I did not think the man was in any danger. I thought it was simply the noise that is generally made by people who really do not expect to do anything. . . . I will say that I had heard no suggestion and that I had no thought that there was any danger on hand anywhere." If there had been any evidence of danger or the possibility thereof, would not the attorneys of the negro who were engaged in the prosecution of their *habeas corpus* proceedings have responded to the judge, and asked for the removal of the negro to another jail? They did not ask for it because, as is perfectly evident, they shared the general opinion that there was no danger; that the former danger had passed, and there was no reason for further action.

The same kind of evidence was given by the most respectable men in the community—editors, reporters, railway agents, large employers of men, clergymen, lawyers, doctors and business men, citizens of the place, and also by the chief of police of the city. Not one of them apprehended danger of mob violence at that time. All of these men were cognizant of the facts as to the prior attempts at lynching and as to the high state of excitement which existed at that time. But they all agreed that such excitement had entirely passed and that there was not the least danger to be apprehended. One of these ministers, the Rev. Mr. Boswell, had been a resident of the city for nearly four years, and was a member of what is termed the Pastors' Union of Chattanooga. He was also a fraternal delegate from the Pastors' Union to the Central Labor League, composed of delegates from every labor organization in the city, and, as a member of the Pastors' Union, he coöperated with the Central Labor League as a fraternal

delegate. He also preached on an average twice a week in the various shops in the city. He said that at the time of the arrest the public feeling was intense and that it subsided with the beginning of the trial. He was present during most of the trial. After the trial was over he found no talk that would cause him to apprehend that there might be an attempt to lynch the prisoner. He had, he said, preached a sermon on lynching after the first attempt was made and had taken the position that it was a violation of good citizenship, and did not mince his words at all, and yet with all these opportunities to know the state of public feeling he said that there was nothing that would arouse apprehension on his part, or, so far as he could see, on the part of any prudent man, that there was any lynching threatened. And this, too, after it was known that this court had allowed the appeal from Judge Clark's order. The evidence of the other witnesses was of the same character, and there were unanimous expressions of opinion by the witnesses upon the hearing of this case, that there was no question of danger of mob violence to be apprehended up to the very last moment; and yet counsel for the Government have regarded it as part of the evidence of the guilt of the sheriff as a conspirator that he acted as if he did not apprehend any violence, and that he took no steps to prevent it on the day in question. No one else had any idea that there was any danger and no one else was looking for it. The men who testified that there was no apprehension of mob violence were men who were specially cognizant of the state of public opinion at that time. The counsel for the Government insisted that it was the duty of the sheriff to have had the jail guarded on that day by extra guards, and that his failure to do so was evidence of his being guilty of the conspiracy as alleged in the information. Although the fact was announced in the morning papers of the nineteenth that the allowance of the appeal had been granted by this court, there was during the day no evidence of excitement and no hostile demonstration or suspicion of it against the prisoner, and no evidence of any fact going to

show any projected formation of a mob or the least probability of any lynching or any attempt that night. Under these circumstances, on March 19 the sheriff went home about half-past six in the evening, leaving things at the jail the same as usual. Suppose, as a matter of judgment, the sheriff should have proceeded as if this almost universal sentiment as to the absence of all danger was erroneous, or not well founded, and that as matter of good sense he should have had the jail guarded, is it possible that he can be properly convicted of contempt while he agreed with this public sentiment and acted accordingly? At any rate, he went home as usual, and was sitting at his desk in his home when the telephone sounded some time about nine o'clock and he recognized, upon going to it, the voice of the Attorney General, Whittaker, who asked him if he knew what was going on at the jail, and the sheriff said, "No," and the Attorney General said, "You had better go down there." He went down there as rapidly as he could, running most of the way and walking rapidly for the rest, and, being under the care of a physician for a difficulty of the stomach, he was much exhausted when he arrived at the jail, where a large number of men were assembled, many of them armed, and they immediately surrounded and took possession of him. Many of them were masked and were waiting for their comrades to bring Johnson down. The sheriff expostulated and remonstrated with these men and asked them to desist, when they seized him. He was seized from behind, and he testified that he did not know but that they were going to do him some violence, and he reached back for his gun, which he had in his pocket. They assured him that they did not intend to hurt him and then they seized and rushed him up the stairs and carried him into a hallway, where he was kept a prisoner until after the crowd had got Johnson and left the jail with him. The sheriff was sixty-three years of age at this time, and, on account of his physical condition, unable in any event to have offered any great resistance. There were at least ten or fifteen of the men around him who were armed, and the

sequel proved that many more in the crowd were also armed. Others were standing back looking on. Whether the sheriff might possibly have been quicker with his gun and taken it out of his pocket and shot some of them, is not certain, from the evidence, but the odds of even ten or fifteen to one are somewhat large, and that he did not kill, or attempt to kill, any of them is no evidence whatever of complicity with these miscreants, and certainly no evidence of contempt of this court. It seems to me most extraordinary that even an official under these circumstances can be found guilty of a contempt because in fact he did not resist to the death.

Argument has also been made against the sheriff, based on the fact that on his way from the house to the jail he did not seek out the militia, a company of which is said to have been engaged in drilling that night in its drill room, and ask for assistance immediately at the jail. It may be that such would have been a wise course, but he was acting on the spur of the moment and under a call to come immediately to the jail, and he was not sure of what was going on, and in seeking the aid of the militia he was not certain to succeed in obtaining immediate assistance. At any rate, the mere fact that he did not think of it or stop to do it is no evidence whatever to show that his failure to seek its aid was criminal. I think the conspiracy part of the information is absolutely without evidence to support it.

It is, however, argued that the sheriff did not otherwise do all that he should have done to prevent this infamous crime, and hence that he is guilty of a contempt. As evidence of this fact the Government refers to the interview of May 28 between the sheriff and a newspaper reporter in Birmingham. On that day, at the time of the interview, news had been received of the action of this court ordering certain persons to show cause as for contempt. In this interview Sheriff Shipp said that the first he knew of the mob was through a telephone message; that he went to the jail and made his way through the crowd, and remonstrated with them against taking any drastic steps.

They seized him and took him upstairs, locking him in a bathroom. The members of the mob told him they meant no violence to him. He argued with them against doing anything at all, since the law had so far taken its proper course, and the interview went on with this statement: "I am frank to say that I did not attempt to hurt any of them, and would not have made such an attempt if I could. In the first place, I could have done no good, as I was overwhelmed by numbers." The sheriff's statement that he made no attempt to hurt any of the mob, and would not have made such an attempt if he could, must be taken with the rest of his statement, in which he said that "in the first place, he could have done no good by it, as he was overwhelmed by numbers." There is no doubt of the truth of that statement. He was one man against, at the very least, ten or fifteen or more resolute men, armed and assembled for the purpose of getting this negro, and surrounded by a still larger crowd in the jail yard, and there is not the slightest evidence that they were unarmed. Their subsequent action shows an unnecessary supply of guns. It is true, the sheriff might possibly have drawn his gun and fired at the masked men as he came into the jail and succeeded in killing one and perhaps more of the members of the mob, but it is absolutely true that it would have done no good even then, because with such odds against him his struggles could have resulted only in his being actually overwhelmed and possibly killed, while the negro would not have been saved. The sheriff occupied no vantage ground from which to repel an attack and where his first assailant would stand a good chance of being killed by him. He was not only in the power of the mob who had him in custody, but he was also without any one to appeal to for aid. Those who were bystanders knew of the sheriff's difficulty without further appeal by him, and yet they seemed to feel no desire to interfere or else recognized the uselessness at that time of any effort.

The evidence of witnesses for the Government showed without contradiction that the sheriff came to the jail running as

fast as he could; that he pushed through the crowd, shoved the men aside and entered the inside of the enclosure, never stopping at all, and the moment he arrived at the jail door he was set upon and seized by four or five men and overpowered, and he talked to and expostulated with the crowd, trying to reason with them and to get them to stop. When asked if the sheriff made any show of force, the Government witness said, "Well, he didn't have any chance to," and the question being repeated, the witness said, "Well, he did, yes, but he was overpowered," that " he resisted their efforts to hold him," by "trying to pull away." (Evidence of Curtis, one of the reporters on The Chattanooga Times, and a witness for the Government.) The evidence of another reporter, Mr. Chivington, and a Government witness, was to the same effect, that the sheriff was seized by four or five men and overpowered, and carried upstairs, and that he appealed to the mob not to lynch the negro. The witness also said that at this time, just as the sheriff was seized, the witness imagined he saw the sheriff "like he was going to draw a pistol, but before he could move any further there were five or six fellows grabbed him and carried him bodily to the top of the stairs."

All this time there was not an offer from a single man to aid the sheriff when they saw him seized, nor did any of them spread any alarm or ask for any outside aid, and the sheriff says he did not ask for it because he knew it would be useless to make any such appeal to the persons there, and that every one there knew the situation, and the overwhelming numbers of the crowd surrounding the premises and in the jail.

Of course, as the witnesses heard the sheriff expostulating with and begging the crowd to do no harm to the negro, if there had been the least disposition on the part of any one to come to his aid the opportunity to do so was quite open and plain.

The appearance of the sheriff after the taking of the negro, and the effect of the whole occurrence upon him is stated in the evidence, about which there is not the slightest contradic-

tion. He was greatly excited, and almost in a faint. He was as white as a sheet, and said to the witness, "My God! I did everything I could." He also said in the course of the interview with the witness, "'My God! they have ruined me.' He had all the appearance of a man who was ready to collapse. You could barely understand what he said. His voice was in a tremble, like a voice filled with emotion." This is the evidence of Mr. Horan, and it is nowhere contradicted. And yet the Government claims that in such a case the sheriff should be imprisoned for a contempt of this court because he did not do more in the way of resistance to an overwhelming force, and did not foresee with more clearness than any one else what was to happen on the night of the nineteenth, and take measures accordingly to guard the safety of the negro. It seems to me that the opinion of the court is founded upon this view.

Then, again, this is not a question as to whether possibly the sheriff might have done more than he did. Some men, under such circumstances, might perhaps have earlier attempted to draw their guns, and would possibly only have ceased resistance with their lives. But when one is really overpowered, superior force makes efforts at resistance futile, if not foolish. Other men might do less than this man did and still be absolutely innocent of a contempt. The question is not whether this invalid old man did everything that he possibly could have done up to the last extremity and at the risk of his life in the performance of his duty as sheriff. To be free from any contempt of this court it was not necessary that the sheriff should have stood by the prisoner at the peril of his own life or that he should have sacrificed it in an unsuccessful attempt against overwhelming odds to prevent the mob from taking the prisoner out of his custody. The sheriff, under circumstances such as are detailed in this case, should be freed from the charge of contempt if he were not guilty of any conspiracy with others to lynch the prisoner, and if he honestly and fairly did what he could in the way of remonstrance and exhortation to prevent the lynching. Being in the power of the mob, he was not

called upon to sacrifice his life in a desperate and hopeless attempt to save his prisoner against odds, such as appeared in this case, or else take the risk of being adjudged guilty of a contempt of court. But what could the sheriff have done more than he did do? That he was in the power of these men is absolutely without contradiction from the evidence. If he had had his pockets full of pistols he could have done nothing with them, as the evidence shows, the moment he was seized by the crowd. His statement that the mob took action because of the allowance of the writ of error by this court, which they thought might involve great delay, and that the mob would not stand for that, is but the expression of an opinion by the sheriff as to the reason for the lynching. He does not and did not pretend to justify the action. In all probability that was the reason—a dislike of the interference of this court—a reason utterly without justification and disgraceful to those who entertained it. But the sheriff surely cannot be properly convicted because he simply truthfully stated the sentiments which in his judgment actuated the mob. It is not a crime to entertain an opinion as to what moved a mob under these circumstances nor can this court properly, in my judgment, convict an official of contempt because he stated his belief that the mob acted from this most disgraceful reason. Nor is the opinion, as expressed, the least evidence of the guilt of the sheriff of the contempt with which he is charged, or of any conspiracy to commit it.

In the interview the sheriff also said he had looked for no trouble that night, and on the contrary did not look for it until the next day. It will be remembered the next day was the one appointed for carrying into execution the sentence of the state court, and when the day should pass without the sentence being carried into execution the sheriff said afterwards that he apprehended there might be trouble. But that was the next day, and the trouble apprehended would be founded upon the happening of that day, and there was an abundance of time in which to prepare for what might then be attempted. What-

ever the sheriff may have thought of the delay which might be caused by the appeal to this court, or however ill-founded his opinion as to the probable length of that delay, his thoughts on the subject furnish no evidence even tending to show that he conspired with the mob or that he would not do what he could to protect his prisoner when the exigency arose and the time for action arrived. He may have thought there would be great delay, and for that reason did not wonder the people would hate to submit to it. All this, however, is mere evidence as to what it was supposed a mob might do the next day, but is, as I have repeated already, no evidence of conspiracy on the part of the sheriff to aid the mob, and none that he was guilty of a contempt in not resisting or attacking it up to the point of imperilling his life in a futile attempt to protect his prisoner. It seems to me that the sheriff is being held to a degree of responsibility far beyond any reasonable limit, and not justified by the evidence contained in the record.

The Government based its argument for a conviction of the sheriff very largely upon the interview above referred to, and which I have commented on at some length. Strike that out and there is really nothing whatever on which to base the shadow of a claim for a conviction. For the reasons given I think the interview itself is wholly insufficient as evidence of the guilt of the sheriff, and I think the rule to show cause should be discharged as to him. I also think the evidence is too slight upon which to convict the jailer.

I am authorized to say that MR. JUSTICE WHITE and MR. JUSTICE MCKENNA concur in this dissent.

For proceedings on June 1, under the order of the court, see page 483, *post.*

APPENDIX TO UNITED STATES *v.* SHIPP.

On May 28, 1906, the Attorney General moved for leave to file an information for contempt and on the same day the following order was made.

UNITED STATES OF AMERICA, COMPLAINANT, *v.* JOHN F. SHIPP *et al.* } October Term, 1905.

On motion of *Mr. Attorney General Moody*, of counsel for complainants, leave is hereby granted to file an information for contempt herein.

The information referred to on the motion of the Attorney General and in the order is as follows:

In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, complainants, *v.* JOHN F. SHIPP, FRANK JONES, Matthew Galloway, C. A. Baker, T. B. Taylor, Fred Frauley, George Brown, Jeremiah Gibson, Marion Perkins, Joseph Clark, "Nick" Nolan, "Sheenie" Warner, Luther Williams, Paul Pool, William Marquette, William Beeler, Claude Powell, Charles J. Powell, "Bart" Justice, John Jones, A. J. Cartwright, R. F. Cartwright, Henry Padgett, William May, Frank Ward, John Varnell, and Alfred Hammond, defendants. } October Term, 1905. Original. No. 26.[1]

Information.

To the honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come the United States of America by William H. Moody, their Attorney-General, and in their behalf inform the court as follows:

[1] October Term, 1906, No. 12, original; October Term, 1907, No. 5, original; October Term, 1908, No. 5, original.

1. That on the 11th day of February, 1906, one Ed Johnson, a citizen of the United States and a resident and citizen of the State of Tennessee, and a colored person of African descent, was convicted of the crime of rape in the criminal court of Hamilton County, held at the city of Chattanooga, in the State of Tennessee, and said court thereupon sentenced the said Ed Johnson to suffer the penalty of death.

2. That thereafter, to wit, on the 3d day of March, 1906, and before the date set for the execution of the said Ed Johnson, a petition for a writ of habeas corpus, signed by the said Ed Johnson, as petitioner, was duly presented to the United States Circuit Court for the Northern Division of the Eastern District of Tennessee, in which it was alleged, among other things, that upon the trial of the said Ed Johnson in the criminal court of Hamilton County in the State of Tennessee for the crime of rape, for which he had been convicted, said petitioner had been denied a trial by a fair and impartial jury, and had been denied the aid of counsel in violation of the fifth and sixth amendments to the Federal Constitution, and that said petitioner was also denied rights secured to him under the fourteenth amendment to the Federal Constitution; that thereafter, to wit, on the 10th day of March, 1906, the application of the said Ed Johnson for a writ of habeas corpus came on for hearing before the said United States Court for the Eastern District of Tennessee upon the petition, return, answer, and replication, and upon the testimony of witnesses given orally in open court, and after argument of counsel, the said Circuit Court ordered that said petition be dismissed, and that the writ of habeas corpus prayed for in said petition be denied. It was further ordered by the said Circuit Court of the United States that said petitioner be remanded to the custody of the sheriff of said Hamilton County in the said State of Tennessee, to be detained by said sheriff in his custody for the period of ten days in which to enable said petitioner to prosecute an appeal from said order, should he be so advised and should an appeal lie from said order, and in default of the prosecution of an appeal within said time to be then further proceeded with by the court of the State of Tennessee under its sentence; that thereafter, to wit, on the 17th day of March, 1906, an application was duly presented by the said Ed Johnson to the Hon. John M. Harlan, an associate justice of the Supreme Court of the United States, assigned to the Sixth Circuit, asking that an appeal be allowed to the Supreme Court of the United States from the judgment rendered in the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee on March 10, 1906, denying his, the said Ed Johnson's, application for a writ of habeas corpus, as aforesaid, which said appeal was on the same

day duly allowed by Mr. Justice Harlan; that thereafter, to wit, on the 19th day of March, 1906, a motion was duly made in the Supreme Court of the United States by Mr. E. M. Hewlett, counsel for and representing the said Ed Johnson, for an order allowing an appeal to the Supreme Court of the United States from the judgment of the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee, rendered on the 10th day of March, 1906, denying his, the said Ed Johnson's, application for a writ of habeas corpus, which motion was thereupon granted by the Supreme Court of the United States and an order duly made and entered by the Chief Justice in the words and figures following, to wit:

"Ed Johnson, Appellant, v. The State of Tennessee.

"On motion of Mr. E. M. Hewlett, of counsel for the appellant, it is ordered by the court that an appeal from the Circuit Court of the United States for the Eastern District of Tennessee be, and the same is hereby, allowed, and that all proceedings against the appellant be stayed, and the custody of the said appellant be retained pending this appeal.

"Per Mr. Chief Justice Fuller."

All of which more fully appears from the record in the case entitled "Ed Johnson, Appellant, v. The State of Tennessee," on file in the office of the clerk of this court.

3. This honorable court is further informed of the following facts, which are alleged and stated by the Attorney-General solely upon information and belief:

That on the same day, to wit, the said 19th day of March, 1906, and after the making and entering of said order, as aforesaid, the clerk of the Supreme Court of the United States duly notified by telegraph John F. Shipp, the sheriff of said Hamilton County, in the State of Tennessee, of the making and entering said order, as aforesaid, and of the contents thereof, to wit, that all proceedings against the said Ed Johnson were ordered stayed by the said Supreme Court and that the custody of the said Ed Johnson by the said John F. Shipp, as sheriff of said Hamilton County, should be retained by him, the said John F. Shipp, pending the determination of said appeal in the Supreme Court; that said telegram informing the said John F. Shipp of the action of this honorable court was received by said sheriff before 6 o'clock on the evening of the said 19th day of March, 1906; that in addition to the notification by telegraph of the action of this court in allowing said appeal and staying proceedings against the said Ed Johnson, as aforesaid, there was published and circulated in the said city of Chattanooga

in the evening papers on the said 19th day of March, 1906, a full account of the action of the Supreme Court of the United States in allowing an appeal and granting a stay of further proceedings on the part of the state courts against the said Ed Johnson until the determination of said appeal before the Supreme Court of the United States.

4. That during all the times herein mentioned the above-named defendant, John F. Shipp, was the duly elected, qualified, and acting sheriff of Hamilton County, in the State of Tennessee, and as such sheriff had and exercised full charge and control of the county jail, located in the city of Chattanooga, in said county, and was the legal custodian under the laws of Tennessee of all persons duly committed in said county under the laws of said State to confinement and imprisonment within said jail; that the above-named defendants, Frank Jones, Matthew Galloway, C. A. Baker, T. B. Taylor, Fred Frauley, George Brown, Jeremiah Gibson, Marion Perkins, and Joseph Clark, and each of them, were, during all the times herein mentioned, the duly appointed, qualified, and acting deputy sheriffs of said county and State; that said sheriff and said deputy sheriffs and each of them before the hour of 6 o'clock on the evening of the said 19th day of March, 1906, were fully advised and informed of the action taken by the Supreme Court of the United States with respect to the appeal of the said Ed Johnson, as hereinbefore set forth; that the said Ed Johnson was then and there a prisoner confined and restrained of his liberty in the said county jail and in the lawful custody and control of said sheriff and said deputy sheriffs under a commitment duly issued out of the criminal court of said Hamilton County, and under and pursuant to the orders of the said United States Circuit Court for the Northern Division of the Eastern District of Tennessee and the Supreme Court of the United States made and entered as aforesaid; that said sheriff and said deputy sheriffs on the said 19th day of March, 1906, after having been advised of the action of the Supreme Court of the United States, as aforesaid, were informed, and had every reason to believe, from current reports and rumors conveyed to them and each of them, that an attempt would be made on the evening of said day or early in the morning of the following day, by a mob composed of a large number of armed men, to force an entrance into the said county jail for the purpose of taking therefrom by violence and unlawful means the said Ed Johnson and putting him to death; that notwithstanding said rumors and said reports which were conveyed to said sheriff and his said deputies, as aforesaid, the said sheriff withdrew from said jail early in the evening of said day the usual and customary guard and left in charge thereof only the night jailor, to wit, Deputy Sheriff

Jeremiah Gibson, and committed other acts and did other things, evincing a purpose and disposition on the part of said sheriff to render it less difficult and less dangerous for said mob to prosecute and carry into effect its unlawful design and purpose, to wit, the lynching of the said Ed Johnson, designed and planned as aforesaid.

5. That thereafter, to wit, at about the hour of 9 o'clock on the evening of the said 19th day of March, 1906, at the city of Chattanooga in the said county and State, the above-named defendants, John F. Shipp, Frank Jones, Matthew Galloway, C. A. Baker, T. B. Taylor, Fred Frauley, George Brown, Jeremiah Gibson, Marion Perkins, Joseph Clark, "Nick" Nolan (whose true first name is to complainants unknown), "Sheenie" Warner (whose true first name is to complainants unknown), Luther Williams, Paul Pool, William Marquette, William Beeler, Claude Powell, Charles J. Powell, "Bart" Justice (whose true first name is to complainants unknown), John Jones, A. J. Cartwright, R. F. Cartwright, Henry Padgett, William May, Frank Ward, John Varnell, and Alfred Hammond, and each of them, and a large number of other persons whose names are to complainants unknown, did then and there willfully, unlawfully, and wrongfully combine, conspire, confederate, and agree to break and enter the said county jail of Hamilton County for the purpose of taking therefrom the person of the said Ed Johnson to lynch and murder him, the said Ed Johnson, with the intent then and there had and entertained by the said defendants, and each of them, to show their contempt and disregard for the order of this honorable court made, entered, issued, and published, as aforesaid, and for the purpose of preventing this honorable court from hearing the appeal of the said Ed Johnson, allowed by this court, as aforesaid, and for the purpose of preventing the said Ed Johnson from exercising and enjoying a right secured to him by the Constitution and laws of the United States; that in the prosecution and futherance of said unlawful conspiracy, made and entered into as aforesaid, and in order to show their contempt and disregard for the said order of this honorable court, and in order to prevent this court from hearing said appeal, said defendants and each of them did then and there do the things and commit the acts more particularily described, as follows, to wit:

That between the hours of 9 and 12 o'clock on the evening of the said 19th day of March, 1906, at the city of Chattanooga, in the county and State aforesaid, a large number of persons, including the above-named defendants, with the exception of the said John F. Shipp, the sheriff of said county, and the said Jeremiah Gibson, deputy sheriff of said county, assembled in the vicinity of said county jail, and thereupon

said mob unlawfully and wrongfully entered said jail and with force and arms broke open the cell in which the said Ed Johnson was then and there confined as a prisoner, and with force and violence and against the will of him, the said Ed Johnson, took him, the said Ed Johnson, from said jail to a point a short distance therefrom and hanged him, the said Ed Johnson, by the neck until he was dead; that at the time said mob entered said jail, as aforesaid, the only person in charge thereof was the said deputy sheriff, Jeremiah Gibson; that while the mob was in possession of said jail the said sheriff, John F. Shipp, arrived at said jail, but made no effort to prevent said mob or any of the members thereof from taking the said Ed Johnson from said jail; that the said John F. Shipp and the said Jeremiah Gibson were in truth and in fact in sympathy with said mob and, while pretending to perform their duty as officials of said county and State in affording protection to the said Ed Johnson, who was then and there in their lawful custody and control, the said John F. Shipp and the said Jeremiah Gibson and each of them did in truth and in fact aid and abet said mob and the members thereof in the prosecution and performance of their unlawful act in lynching and murdering the said Ed Johnson, as aforesaid; that during all this time the above-named defendants and each of them, and the said John F. Shipp and the said Jeremiah Gibson and each of them then and there well knew that the Supreme Court of the United States had made, entered, issued and published the order in the manner hereinbefore set forth; that all of said acts were then and there committed by said defendants and each of them, and the other members of said mob whose names are to complainants unknown, with the intent then and there had and entertained by them and by each of them to show their contempt and utter disregard for the order of this honorable court made and entered as aforesaid, and in order to prevent this honorable court from hearing the appeal of the said Ed Johnson, which appeal had been perfected and allowed, as aforesaid.

6. Wherefore, the United States of America, the complainants herein, through their Attorney-General, respectfully request this honorable court that in consideration of the acts committed by the above-named defendants and each of them, as hereinbefore set forth, it will issue and direct the marshal of this court to serve upon said defendants and each of them a rule to show cause, if any there be, on a day certain why said defendants and each of them should not be punished as and for a contempt of this honorable court.

WILLIAM H. MOODY,
The Attorney-General of the United States.

WASHINGTON, D. C., *May 25th*, 1906.

On May 28, 1906, rule to show cause was entered as follows:

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, COMPLAINANTS, *v.* JOHN F. SHIPP AND OTHERS. } October Term, 1905. No. 26. Original.

On consideration of the information filed herein,

It is now here ordered by the court that cause be shown by the above-named defendants and each of them before this court, at the city of Washington, on Monday, October 15th, 1906, at twelve o'clock noon of that day, or as soon thereafter as counsel can be heard, why they and each of them should not be punished as and for a contempt of this court.

And October 15, 1906, the marshal of the Supreme Court of the United States made the following return:

Came to hand at my office the 4th day of June, A. D. 1906, and for the purpose of serving the same, I, J. M. Wright, marshal of the Supreme Court of the United States, do hereby authorize and deputize William A. Dunlap, United States marshal for the Eastern District of Tennessee, or any of his deputies, to serve the within rule to show cause on the parties named therein, and make due return thereof.

In testimony whereof I hereunto subscribe my name, at the city of Washington, this 4th day of June, A. D. 1906.

J. M. WRIGHT,
Marshal of the Supreme Court of the United States.

Came to hand at my office in Knoxville, Tenn., this the 7th day of June, 1906, and executed on the following named defendants, at time and place set opposite their names, by summoning them to appear before the United States Supreme Court in the city of Washington, D. C., on Monday, the 15th day of October, 1906, at 12 o'clock noon, and by leaving a copy of this writ with each of the said named defendants, to wit:

Joseph F. Shipp (sheriff), Chattanooga, June 8th, 1906. Dunlap, marshal.

Frank Jones (deputy sheriff), Chattanooga, June 8th, 1906. Dunlap, marshal.

Mathew Gallaway (deputy sheriff), Chattanooga, June 9th, 1906. Welch, D. M.

C. A. Baker (deputy sheriff), Chattanooga, June 9th, 1906.

T. B. Taylor (dept. sheriff), Chattanooga, June 8th. Dunlap, U. S. M., at Chattanooga.

Fred Frauley (dept. sheriff), June 8th. Dunlap, U. S. M., at Chattanooga.

Geo. Brown (dept. sheriff), June 9th. Gresham, D. M., at Chattanooga.

Jeremiah Gibson (dept. sheriff), June 9th. Gresham, D. M., at Chattanooga.

Marion Perkins (dept. sheriff), June 8th. Dunlap, U. S. M., at Chattanooga.

Jas. Clark (dept. sheriff), June 9th. Gresham, D. M., at Chattanooga.

Nick Nolan, June 8th. Welch, D. M., at Chattanooga.

"Cheeney" Warner, June 8th. Dunlap, U. S. M., at Chattanooga.

Luther Williams, June 8th. Dunlap, U. S. M., at Chattanooga.

Wm. Marquet, June 8th. Dunlap, U. S. M., at Chattanooga.

Wm. Beeler, June 8th. Dunlap, U. S. M., at Chattanooga.

Claud Powell, June 9th. Welch, D. M., at Chattanooga.

Chas. H. Powell, June 9th. Welch, D. M., at Chattanooga.

Bart Justice, June 8th. Dunlap U. S. M., at Chattanooga.

Johnnie Jones, June 9th. Welch, D. M., at Chattanooga.

A. J. Cartwright, June 8th. Welch, D. M., at Chattanooga.

R. T. Cartwright, June 8th. Welch, D. M., at Chattanooga.

Henry Padgett, June 8th. Welch, D. M., at Chattanooga.

Wm. May, June 9th. Welch, D. M., at Chattanooga.

Frank Ward, June 8th. Welch, D. M., at Chattanooga.

John Varnell, June 8th. Dunlap, U. S. M., at Chattanooga.

Alford Handman, June 9th. Gresham, D. M., at Chattanooga.

The defendant Paul Pool not to be found in my district; said to be in Mobile, Ala.

This July 26th, 1906.

(Signed) W. A. DUNLAP,
U. S. Marshal, E. Dist. of Tennessee.

[Similar authorizations for service of defendant Paul Pool by the United States marshals for the Southern District of Alabama, Western District of Texas, Southern District of California and returns by them of "not found."]

Came to my hand, as aforesaid and returned executed by service on

all defendants except Paul Pool, who, after diligent search, as shown by certificates herewith could not be found.

Witness my hand and seal this 15th day of October, A. D. 1906.

J. M. WRIGHT,
Marshal Supreme Court of the United States.

On October 15, 1906, leave was granted on application of counsel to file answers of the defendants.

Certain of the answers are as follows:

Joint answer of Joseph F. Shipp, sheriff, and the deputy sheriffs, Frank Jones,[1] Matt. L. Galloway,[1] C. A. Baker,[1] Thomas B. Taylor,[1] George W. Brown,[1] Jeremiah Gibson, Fred Frauley,[1] Marion Perkins[1] and Joseph C. Clark.[1]

Judson Harmon,
Clift and Cooke, } Attorneys.
Robert Pritchard,

To the honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come Joseph F. Shipp, Frank Jones, Matthew Galloway, C. A. Baker, T. D. Taylor, Fred Frauley, George Brown, Jeremiah Gibson, Marion Perkins, and Joseph Clark, defendants, and, admitting their official characters as alleged in the information herein, but protesting that they have each and all never nor in anywise been lacking in obedience to the authority and respect for the dignity of this honorable court, for cause why the prayer of said information should not be granted as against them respectfully show:

I.

They first respectfully submit whether they or any of them ought to be interrupted in the discharge of their duties under the laws of Tennessee and put to trouble and expense by being required to answer before this honorable court the charges made against them in the information, because they are advised and believe, and so aver, that said charges, even if true, would be, and ought to be treated as, crimes under the laws of Tennessee and contempt of the judicial authority thereof only, and not offenses against the authority or dignity of this

[1] The rule to show cause was subsequently discharged as to these defendants.

honorable court, by reason of the following acts which are each and all established by the record herein:

The petition filed in the Circuit Court of the United States by Ed. Johnson for a writ of habeas corpus, mentioned in the information and, with the complete record of the proceedings thereon, made part of said information by reference, did not in any way or in any respect whatever allege a lack of jurisdiction in the court of the State of Tennessee in which said Johnson was convicted, either to try him on said charge or to adjudge the sentence imposed on him under which he was in custody of said Shipp, as sheriff, as stated in the information.

It is not averred in said petition that the alleged denials of rights secured to said Johnson by the Constitution of the United States, or any one of such denials, were made by virtue or under color of the constitution, laws, or rules of judicial practice of the State of Tennessee. On the contrary it appears from said petition that each and every of such alleged denials of right was and is charged as being due to the individual action of officials and other citizens of said State in violation of their duties under the constitution and laws thereof.

And these defendants are advised and believe, and so aver, that according to the repeated and uniform decisions of this honorable court the Circuit Court of the United States, in which said petition for habeas corpus was filed, had no right or authority whatever to inquire into any of the matters alleged therein, but that the same were cognizable only by the Supreme Court of Tennessee, which, as shown by the record herein, had full power and authority under the constitution and laws of said State, properly to deal with and dispose of each and every complaint made in said petition with reference to the indictment, trial, and sentence of said Johnson. So that said petition for a writ of habeas corpus was, on the face thereof, merely an attempt on the part of said Johnson to obtain from the Circuit Court of the United States instead of from the Supreme Court of Tennessee a review of said proceedings for alleged errors therein.

Said record, which contains all the evidence offered by either party in said Circuit Court of the United States, shows that each and all the allegations of said petition for a writ of habeas corpus concerning the denial of rights to said Johnson by said criminal court of Tennessee, were both false and unfounded.

There was no proof whatever that he was denied the aid of counsel; on the contrary it appears that, as he was unable to employ counsel, said criminal court appointed three lawyers of high standing to conduct his defense, and that they did so, as he himself admits, with ability, fidelity, and zeal.

There was no proof whatever that said Johnson ever made or had any ground for objection to the selection or character of the juries which indicted and tried him, or of either of them. On the contrary it appears that his counsel forbore to make such objection on learning the facts.

There was no proof whatever that his attorneys were denied the right to apply for a change of venue or a continuance. On the contrary, it appears that they forbore to make application therefor, and that the time for said trial, as originally fixed by the court, was postponed by the consent of counsel for both parties, and that the trial was had at the time so agreed on.

There was no evidence whatever that his trial was not public, or that any of his relatives or friends were prevented from attending the same. On the contrary the proof shows that precautions were merely taken, at the request of his own counsel, to prevent the attendance of disorderly persons only; that such precautions were withdrawn when the first day of the trial showed them to be needless, and that during each and all of the three days the trial lasted there was a large attendance of the public.

There was no proof whatever that he was compelled to give evidence against himself. On the contrary, it appears that he rose, without any objection by himself or his counsel, when requested by a juror, in order to afford the girl he was charged with assaulting a better view; and that the exclamation of a juror, which occurred after the testimony had all been given, was treated by all, including the prisoner and his counsel, as the effect of the proof on an emotional nature, not as evidence that the juror was not impartial when accepted and sworn, and consequently nothing was said or done by the prisoner's counsel with reference to such occurrence, although they had full opportunity.

There was no proof whatever that when new counsel took up his case after his conviction they were denied the right to file a motion for a new trial, or to present a bill of exceptions, or to appeal to the Supreme Court of Tennessee. On the contrary, it appears that no motion for a new trial was presented until after the time allowed for such motions by the reasonable and long-established rules and practice of the court had expired, although said counsel had ample time to prepare and file the same before such expiration; and that said counsel took no steps whatever towards preparing or presenting a bill of exceptions or taking an appeal, although the court remained in session for an entire week after the conviction of said Johnson and for five consecutive days after said counsel first appeared.

By reason of the foregoing facts appearing undisputed on the

record herein, these defendants are advised and believe, and so aver, that said petition for a writ of habeas corpus was not an appeal in good faith to the power and authority vested by the Constitution and laws of the United States in said Circuit Court; that said Circuit Court of the United States had no right or authority to entertain said petition and thereby interfere with the proceedings had and taken by the judicial authority of the State of Tennessee; and that consequently the order of said Circuit Court dismissing said petition was not appealable to this honorable court under the decisions and rules of practice thereof and the Constitution and laws of the United States.

They, therefore, humbly pray the consideration and judgment of the court in the premises and that said information be dismissed as against them.

II.

If and in case the court shall find and decide the foregoing cause shown to be insufficient, then these defendants, as further cause why they and each of them should not be punished as for contempt of this honorable court, as prayed in said information, severally and collectively plead and say, that the charges made against them and each of them respectively in said information are not true, and to each and every of said charges, that they are not guilty.

Wherefore these defendants each and all most humbly pray that the rule herein issued against them be discharged.

The separate answer of defendant Nick Nolan by *Lewis Shepherd, Fleming & Shepherd,* attorneys, contained averments as follows:

He denies that he had any connection with or had anything to do with the mob which attacked the jail of Hamilton County, Tennessee, on the evening and night of the 19th day of March, 1906, when Ed. Johnson was taken from jail and lynched. This defendant had no knowledge or information whatever by rumor or otherwise that a mob was to be formed or was forming to lynch and murder said Ed. Johnson.

He did not at any time combine, conspire, confederate, or agree with the persons named in said information or any or either of them, or with any other person or persons to break and enter the jail of Hamilton County for the purpose of taking therefrom the person of Ed. Johnson to lynch and murder him. He did not participate with

the mob that broke the jail or with the mob which lynched and murdered said Ed. Johnson. He did not know beforehand that a mob was to be formed to lynch said Ed. Johnson, and he did not in anyway aid, abet, counsel, or advise the lynching of said Ed. Johnson, and did not know anything about the formation of the mob or its work until after the affair was over, and did not approve the action of the mob in lynching and murdering the said Ed. Johnson.

Defendant was informed after Johnson was hanged that the mob attacked the jail at or about the hour of nine o'clock p. m., March 19, 1906.

At that time the defendant was at his place of business on Whiteside street, in South Chattanooga, about two miles from the Hamilton County jail. About 9.30 o'clock p. m. of said date he left his place of business and went to the saloon of John Nolan, in South Chattanooga, on Whiteside street. He remained at this saloon until 10 o'clock p. m., at which time the saloon was closed in pursuance of an ordinance of the city of Chattanooga requiring all saloons to close at 10 o'clock p. m. After the said saloon closed, defendant remained there or thereabouts with the proprietor, John Nolan, discussing a question of politics until about 10.30 o'clock p. m., at which time he went to his home on Aiken street, in South Chattanooga, where he remained until next morning.

This defendant denies that he ever at any time did any act to show contempt and disregard for the order of this honorable court or to prevent this court from hearing the appeal of the said Ed Johnson. He has always entertained the very highest respect for this honorable court.

The answers of the defendants Henry Padgett and William Mayse, against whom the rule was made absolute, and of defendants Claude Powell, Charles J. Powell, Bart Justice, John Jones, John Varnell and Alfred Handman, as to whom the rule was discharged, by the same attorneys, were similar in form *mutatis mutandi* as to the allegations as to the whereabouts of each defendant respectively.

The answer of the defendant Paul Werner, *W. H. Cummings* and *G. W. Chamlee*, attorneys, as to whom the rule was subsequently discharged, denied participation and alleged absence from the place where Ed Johnson was lynched.

The answer of defendant Luther Williams, *W. H. Cummings* and *G. W. Chamlee,* attorneys.

1st. That he is advised that the Supreme Court of the United States of America had no jurisdiction of the cause of *Ed Johnson, Complainant,* v. *The State of Tennessee,* and that all proceedings had by the United States Supreme Court in the matter of *Ed Johnson, Complainant,* v. *The State of Tennessee* were null and void and illegal.

2d. That the original petition for a writ of habeas corpus that was sued out by the said Ed Johnson, complainant, against the State of Tennessee was, as this respondent is advised, addressed to the United States District Court at Chattanooga, Tennessee, and that the original proceedings were presented and tried before the Hon. C. D. Clark, judge of the United States court, not at Chattanooga, Tennessee, but at Knoxville, Tennessee, at chambers, and he is advised that from the dismissal of said petition for the writ of habeas corpus held at chambers that there is no appeal and that the appeal that the said Ed Johnson undertook to perfect was, in law, ineffective and that this honorable court did not acquire jurisdiction of the case, because a transcript was presented and filed in this honorable court.

3d. He is advised that Ed Johnson was not a United States prisoner, but that he was a state prisoner, and under the charge of state officials, and that in order to make him a United States prisoner a different proceeding than that which was had in this cause would be required to make said proceedings valid under the law.

4th. That if Ed Johnson was, as a matter of law, a United States prisoner at the time that he was lynched, that no notice of that fact had ever been conveyed to this respondent by any person whomsoever.

5th. That under the law of the United States and the facts of this case he is advised that this honorable court had no jurisdiction to proceed with said cause of *Ed Johnson, Appellant,* v. *The State of Tennessee,* under the facts as alleged in Johnson's petition, and that the case would, upon motion or demurrer, had to have been dismissed or stricken from the docket according to the rule laid down in the case of *Caleb Powers* v. *The Commonwealth of Kentucky.*

6th. Not waiving any of his rights as stated in the foregoing pleas for want of jurisdiction by this honorable court in this case, but pleading and relying upon the same as a full and complete defense to this case, this defendant, Luther Williams, now comes and for further answer to the rule in this cause, and answering so much and such parts of said information as he is informed is material and proper for him to answer, says:

That he was not an officer and that he did not have Ed Johnson in his charge, care, or custody at any time or place whatsoever.

He says that he is a business man and runs a saloon at No. 630 Market street, in the city of Chattanooga, Tennessee, and that his place of business is on the east side of Market street, between Sixth street and Seventh street; and that the county jail of Hamilton County, Tennessee, is on the west side of Walnut street, between Sixth and Seventh streets, and that between the county jail and his place of business there is one cross street.

He further says that the first notice that he had of a mob intending to assemble at the jail or were assembling at the jail in Chattanooga on the night of March 19, 1906, was that about 9.30 to 10 o'clock p. m., some one came in his saloon and called attention of those present there that a mob had assembled at the county jail for the purpose of lynching a negro. Inquiry being made, it developed that it was Ed Johnson.

Under a law of the city of Chattanooga, all saloons were required to close at ten o'clock p. m. every night except Saturday night, and then at 11 o'clock on Saturday night. March 19, 1906, was on Monday night, as affiant now remembers, and it was nearly closing time when he received his first information about a mob at the county jail. He knew that if trouble was about to occur in that neighborhood that all saloons ought to close in order to prevent members of the mob becoming intoxicated and committing violence, and for this reason he immediately closed his saloon and in a few minutes went up to the county jail, which was a distance of about 200 yards, and when he got there a mob was in control of the jail. A large crowd of men had their faces covered and were disguised so that no one could tell who they were and were proceeding to break down the doors of the jail, and in a very short time after his arrival Johnson was taken out and carried to the county bridge and lynched.

This respondent saw the lynching; was on the bridge where he could witness the entire trouble as a spectator with hundreds of other people who were on the bridge at the time.

He is well known to a number of people who were at his saloon on the night that Johnson was lynched and who were about the county jail as spectators at the time, and he was not disguised; made no effort to conceal his own identity; he had no part whatever in aiding or counseling the mob to lynch Ed Johnson and had nothing in the world to do with the entire trouble. Just like people go to see a great fire or anything else of excitement that is about to happen, he went up to the jail to see what the mob was doing and what was going to happen to Johnson.

He denies that he was a member of said mob or that he had anything to do either by word or action, aiding, or abetting in the alleged lynching, or that he counseled or conspired or confederated with any person or persons whomsoever to lynch the said Ed Johnson.

He denies that he endeavored or conspired or confederated or agreed together or formed a combination with any person to break or enter the county jail or to lynch the said Ed Johnson or to do any other act to prevent this honorable court from hearing and determining the appeal of the said Ed Johnson, or to show any contempt for this honorable court, and he denies each and every allegation made in the information against him in this cause, that by implication could be construed to mean that he had aided or consented to the lynching of the said Ed Johnson, or committed any other act or conspired, confederated, or agreed to commit any other act, or agreed for any other person to commit any act towards the lynching of the said Ed Johnson, or to break or enter the county jail of Hamilton County, Tennessee, or to prevent this honorable court from hearing the appeal of the said Ed Johnson, or to show his contempt for the orders of this honorable court, or to do any other act that would be disrespectful of this honorable court.

He says that he is not a lawyer, does not know what it takes to vest this honorable court with jurisdiction of this case, but makes the plea as to the jurisdiction upon the advice of his lawyers in this cause; but independent of his pleadings that he can prove that he had no part in the lynching of Ed Johnson, and that on the merits of his case he stands ready to show to this honorable court that he is entirely innocent of the charge made against him, and that if an opportunity is afforded him he will be pleased to present his evidence to sustain his contention as made in his answer.

He says that after Ed Johnson was lynched that the great crowd that had congregated at the bridge began to disperse and that he went to his home, where he spent the remainder of the night; that this was between ten and eleven o'clock, as he believes.

Wherefore this respondent says that he denies each and every allegation made against him in this cause.

And now having fully answered, he prays to be dismissed from the requirements of said rule to show cause why he should not be punished for a contempt of this honorable court.

The answer of defendants William Marquette, *Joe V. Williams*, attorney; James William Beeler, *Head & Ford*, attorneys; Frank Ward, *John A. Hood*, attorney, as to whom

the rule was subsequently discharged, denied all participation in the lynching of Ed Johnson and asserted an alibi and was accompanied by numerous affidavits as to defendants' whereabouts at the time.

Defendants A. J. Cartwright and R. T. Cartwright, *Shumate & Maddox* and *John H. Early*, attorneys, as to whom the rule was subsequently discharged, answered denying all knowledge and participation in the lynching of Ed Johnson, and asserting that they were elsewhere at the time.

On November 12, 1906, on motion of *Mr. Solicitor-General Hoyt*, the court assigned the cause for hearing on the preliminary questions of law, without prejudice, on Monday, December 3.

Motion to set down for hearing on preliminary questions of law, without prejudice, etc.

The Attorney-General calls up this information in contempt and shows the court that the answers of all the defendants are now on file, excepting the answer of Paul Pool, who has not been located and was not served with process and seems to be a fugitive.

The answers in general set up an alibi or deny connection with the mob or knowledge of its formation, and plead not guilty. Certain of the answers also rely upon the contention that this court had no jurisdiction of the Johnson case. The answer of Shipp and his deputies prays that the information be dismissed as against them, because the Circuit Court of the United States had no right or authority to entertain Johnson's petition for habeas corpus, and that consequently the order of the Circuit Court dismissing the petition was not appealable to this court.

These averments and contentions raise the question of the jurisdiction to entertain Johnson's case in the Circuit Court and in this court, and consequently the question of the jurisdiction of this court in this proceeding and other related preliminary questions of law.

The Attorney-General therefore respectfully suggests that the court set the case down for hearing under the information and answers upon these preliminary questions of law, and further suggests that the court shall, if it sees fit, define the nature and scope of these ques-

tions for discussion in the briefs and at the oral argument. Further, the Attorney-General expressly states that this application to set the case down for hearing is made without prejudice to the right of the Government to proceed thereafter as it may be entitled to do and as it may be advised, upon the merits of the case, by taking testimony under the claims of alibi and the pleas of not guilty, thereafter presenting the case for final hearing and determination upon the issues of fact thus made.

The Attorney-General also suggests that the preliminary hearing on the questions of law, for which application is now made, be set for December 3 next at the head of the call for that day, and that in any order which the court may now see fit to make in the premises it will frame the order so as to operate without prejudice to the ulterior progress of the case on the merits.

WILLIAM H. MOODY,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

Argument was heard December 4 and 5, 1906.

For the United States *The Solicitor General* (*Henry M. Hoyt*) with whom the *Attorney General* (*William H. Moody*) was on the brief.

For the defendants *Mr. Judson Harmon, Mr. Lewis Shepherd, Mr. G. W. Chamlee* and *Mr. Robert B. Cooke,* with whom *Mr. Robert Pritchard, Mr. Martin A. Fleming* and *Mr. T. P. Shepherd* were on the brief.

[For abstracts of the arguments and briefs see 203 U. S. 563–570.]

On December 24, 1906, the preliminary questions of law were decided by the court.

The headnote (prepared by the Reporter) is as follows, 203 U. S. 563:

Even if the Circuit Court of the United States has no jurisdiction to entertain the petition for *habeas corpus* of one convicted in the

state court, and this court has no jurisdiction of an appeal from the order of the Circuit Court denying the petition, this court, and this court alone, has jurisdiction to decide whether the case is properly before it, and, until its judgment declining jurisdiction is announced, it has authority to make orders to preserve existing conditions, and a willful disregard of those orders constitutes contempt.

Where the contempt consists of personal presence and overt acts those charged therewith cannot be purged by their mere disavowal of intent under oath.

In contempt proceedings the court is not a party; there is nothing that affects the judges in their own persons and their only concern is that the law should be obeyed and enforced.

After an appeal has been allowed by one of the justices of this court, and an order entered that all proceedings against appellant be stayed and his custody retained pending appeal, the acts of persons having knowledge of such order, in creating a mob and taking appellant from his place of confinement and hanging him, constitute contempt of this court, and it is immaterial whether appellant's custodian be regarded as a mere state officer or as bailee of the United States under the order.

MR. JUSTICE HOLMES delivered the following opinion, 203 U. S. 571–575.

This is an information charging a contempt of this court, and is to the following effect. On February 11, 1906, one Johnson, a colored man, was convicted of rape, upon a white woman, in a criminal court of Hamilton County, in the State of Tennessee, and was sentenced to death. On March 3 he presented a petition for a writ of *habeas corpus* to the United States Circuit Court, setting up, among other things, that all negroes had been excluded, illegally, from the grand and petit juries; that his counsel had been deterred from pleading that fact or challenging the array on that ground, and also from asking for a change of venue to secure an impartial trial, or for a continuance to allow the excitement to subside by the fear and danger of mob violence; and that a motion for a new trial and an appeal were prevented by the same fear. For these and other reasons it was alleged that he was deprived of various constitutional rights, and was about to be deprived of his life without due process of law.

On March 10, after a hearing upon evidence, the petition was denied, and it was ordered that the petitioner be remanded to the custody of the sheriff of Hamilton County, to be detained by him in his

custody for a period of ten days, in which to enable the petitioner to prosecute an appeal, and in default of the prosecution of the appeal within that time to be then further proceeded with by the state court under its sentence. On March 17 an appeal to this court was allowed by Mr. Justice Harlan. On the following Monday, March 19, a similar order was made by this court, and it was ordered further "that all proceedings against the appellant be stayed and the custody of said appellant be retained pending this appeal."

The sheriff of Hamilton County was notified by telegraph of the order, receiving the news before six o'clock on the same day. The evening papers of Chattanooga published a full account of what this court had done. And it is alleged that the sheriff and his deputies were informed, and had reason to believe, that an attempt would be made that night by a mob to murder the prisoner. Nevertheless, if the allegations be true, the sheriff early in the evening withdrew the customary guard from the jail and left only the night jailer in charge. Subsequently, it is alleged, the sheriff and the other defendants, with many others unknown, conspired to break into the jail for the purpose of lynching and murdering Johnson, with intent to show contempt for the order of this court and for the purpose of preventing it from hearing the appeal and Johnson from exercising his rights. In furtherance of this conspiracy a mob, including the defendants, except the sheriff, Shipp, and the night jailer, Gibson, broke into the jail, took Johnson out and hanged him, the sheriff and Gibson pretending to do their duty, but really sympathizing with and abetting the mob. The final acts, as well as the conspiracy, are alleged as a contempt.

The defendants have appeared and answered, and certain preliminary questions of law have been argued which it is convenient and just to have settled at the outset before any further steps are taken. The first question, naturally, is that of the jurisdiction of this court. The jurisdiction to punish for a contempt is not denied as a general abstract proposition, as, of course, it could not be with success. *Ex parte Robinson*, 19 Wall. 505, 510; *Ex parte Terry*, 128 U. S. 289, 302, 303. But it is argued that the Circuit Court had no jurisdiction in the *habeas corpus* case, unless Johnson was in custody in violation of the Constitution, Rev. Stat., § 753, and that the appellate jurisdiction of this court was dependent on the act of March 3, 1891, c. 517, § 5 (26 Stat. 827), *Ex parte Lennon*, 150 U. S. 393, and by that act did not exist unless the case involved "the construction or application of the Constitution of the United States." If the case did not involve the application of the Constitution, otherwise than by way of pretense; it is said that this court was without jurisdiction, and that its order

might be condemned with impunity. And it is urged that an inspection of the evidence before the Circuit Court, if not the face of the petition, shows that the ground alleged for the writ was only a pretense.

We regard this argument as unsound. It has been held, it is true, that orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt. *Ex parte Sawyer*, 124 U. S. 200; *Ex parte Fisk*, 113 U. S. 713; *Ex parte Rowland*, 104 U. S. 604. But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument and to take the time required for such consideration as it might need. See *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U. S. 379, 387. Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time. Rev. Stat. § 766. Act of March 3, 1893, c. 226, 27 Stat. 751. The fact that the petitioner was entitled to argue his case shows what needs no proof, that the law contemplates the possibility of a decision either way, and therefore must provide for it. Of course the provision of Rev. Stat. § 766, that until final judgment on the appeal further proceedings in the state court against the prisoner shall be deemed void, applies to every case. There is no implied exception if the final judgment shall happen to be that the writ should not have issued or that the appeal should be dismissed.

It is proper that we should add that we are unable to agree with the premises upon which the conclusion just denied is based. We cannot regard the grounds upon which the petition for *habeas corpus* was presented as frivolous or a mere pretense. The murder of the petitioner has made it impossible to decide that case, and what we have said makes it unnecessary to pass upon it as a preliminary to deciding the question before us. Therefore we shall say no more than that it does not appear to us clear that the subject-matter of the petition was beyond the jurisdiction of the Circuit Court, and that, in our opinion, the facts that might have been found would have required the gravest and most anxious consideration before the petition could have been denied.

Another general question is to be answered at this time. The de-

fendants severally have denied under oath in their answer that they had anything to do with the murder. It is urged that the sworn answers are conclusive, that if they are false the parties may be prosecuted for perjury, but that in this proceeding they are to be tried, if they so elect, simply by their oaths. It has been suggested that the court is a party and therefore leaves the fact to be decided by the defendant. But this is a mere afterthought to explain something not understood. The court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case. On this occasion we shall not go into the history of the notion. It may be that it was an intrusion or perversion of the canon law, as is suggested by the propounding of interrogatories and the very phrase, purgation by oath (*juramentum purgatorium*). If so, it is a fragment of a system of proof which does not prevail in theory or as a whole, and the reason why it has not disappeared perhaps may be found in the rarity with which contempts occur. It may be that even now, if the sole question were the intent of an ambiguous act, the proposition would apply. But in this case it is a question of personal presence and overt acts. If the presence and the acts should be proved there would be little room for the disavowal of intent. And when the acts alleged consist in taking part in a murder it cannot be admitted that a general denial and affidavit should dispose of the case. The outward facts are matters known to many and they will be ascertained by testimony in the usual way. The question was left open in *Ex parte Savin*, 131 U. S. 267, with a visible leaning toward the conclusion to which we come, and that conclusion has been adopted by state courts in decisions entitled to respect. *Huntington* v. *McMahon*, 48 Connecticut, 174, 200, 201. *State* v. *Matthews*, 37 N. H. 450, 455. *Bates's Case*, 55 N. H. 325, 527. *Matter of Snyder*, 103 N. Y. 178, 181. *Crow* v. *State*, 24 Texas, 12, 114. *State* v. *Harper's Ferry Bridge Co.*, 16 W. Va. 864, 873. See *Wartman* v. *Wartman*, Taney, 362, 370. *Cartwright's Case*, 114 Massachusetts, 230. *Eilenbecker* v. *Plymouth County*, 134 U. S. 31. Whether or not Rev. Stat. § 725 applies to this court, it embodies the law so far as it goes. We see no reason for emasculating the power given by that section, and making it so nearly futile as it would be if it were construed to mean that all contemnors willing to run the slight risk of a conviction for perjury can escape.

The question was touched, in argument, whether the acts charged constitute a contempt. We are of opinion that they do, and that their character does not depend upon a nice inquiry, whether, after the order

made by this court, the sheriff was to be regarded as bailee of the United States or still held the prisoner in the name of the State alone. Either way, the order suspended further proceedings by the State against the prisoner and required that he should be forthcoming to abide the further order of this court. It may be found that what created the mob and led to the crime was the unwillingness of its members to submit to the delay required for the trial of the appeal. From that to the intent to prevent that delay and the hearing of the appeal is a short step. If that step is taken the contempt is proved.

These preliminaries being settled the trial of the case will proceed.

MR. JUSTICE MOODY took no part in the decision.

And on December 24, 1906, the following entry appears of record:

The opinion of the court on the preliminary questions of law herein was delivered by MR. JUSTICE HOLMES (MR. JUSTICE MOODY took no part) and the cause was ordered to proceed.

On January 14, 1907, there was filed the following:

Motion to arrest defendants and require recognizances to abide the future orders of the court.

The court having decided the preliminary questions of law herein against the defendants and ordered the case to proceed, the Attorney-General moves the court to order writs of attachment to issue that the said defendants may be brought into court and required to enter into recognizances, in such sums, respectively, as to the court shall seem adequate and proper, conditioned for their appearance whenever required and to abide the future orders of the court herein, said recognizances to be given, with good and sufficient sureties, approved by this court, unless it shall seem to the court appropriate that the said defendants, or any of them, should be permitted to appear and furnish such recognizances before the judge of the Circuit Court of the United States for the Eastern District of Tennessee, in conformity with or by analogy to the provisions of section 1014 of the Revised Statutes of the United States, in which event it is further moved that the sureties be approved by the said judge and by the justice of this court assigned to the Sixth Circuit.

CHARLES J. BONAPARTE,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

The motion on behalf of the defendant Shipp and his deputies prayed that the witnesses named

Be ordered to be subpœnaed to attend at such time and place as the court may designate for hearing the testimony in this cause, and that it be ordered by the court that the costs incurred by the process of subpœna, including the fees and mileage of said witnesses, be paid by the United States, in the same manner that similar costs and fees are paid in case of witnesses subpœnaed in behalf of the United States, or in lieu of this that the court, if it deems the same expedient, direct that the testimony be taken in this cause by a commissioner duly appointed and to sit at Chattanooga or some other designated point in the Southern Division of the Eastern District of Tennessee.

The motions on behalf of several of the defendants also prayed that:

Affiant is not possessed with sufficient means and is actually unable to pay the fees of said witnesses, and he prays the court to order them to be subpœnaed, and to direct that the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpœnaed in behalf of the United States.

On January 14, 1907, there was filed the following:

Motion for the summoning of witnesses and to take testimony herein.

In order that the facts may be ascertained by the court as to the connection of the defendants herein with the matters which the court has held constituted contempt of its authority, the Attorney-General moves the court to take testimony herein as to the complicity of the defendants in such matters, and to examine, under oath, to be administered by the court, any witnesses ordered to be summoned in behalf of the United States or of the defendants, subpœnas therefor to be issued by the clerk of this court, with full rights of cross-examination and objection as to the admission of evidence and the competency of witnesses to counsel for both parties; such evidence to be taken in open court unless it shall appear to the court appropriate to appoint a commissioner or examiner to receive and record the same, and then to report such testimony, with any exceptions thereto made as aforesaid, forthwith to the court.

CHARLES J. BONAPARTE,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

And also motions on behalf of certain of the defendants for the summoning of witnesses at the expense of the Government.

On January 14, 1907, *Mr. Attorney General Bonaparte*, of counsel for the complainant, submitted to the consideration of the court a motion to arrest the defendants herein and to require them to enter into recognizances to abide the future orders of the court and also a motion as to taking testimony herein, and leave was granted to counsel for defendants to file a brief in reply thereto.

And afterwards, to wit, on January 17, 1907, defendants Shipp and others filed the following brief:

MOTION FOR ARREST, ETC.

The only object of issuing attachments is to bring before the court the parties charged with contempt so that they may be heard, if defense they have. Rapalje on Contempts, § 100.

This course is discretionary with the court when there is any other mode of procedure open. The usual practice is by a rule to show cause. (Rapalje on Contempts, § 9, 103; *United States* v. *Anonymous*, 21 Fed. Rep. 761.)

The Government did not ask for attachments in the information, but very properly followed the usual practice, praying only for the issuance and service of "a rule to show cause, if any there be, on a day certain, why said defendants and each of them should not be punished as and for a contempt of this honorable court."

According to some authorities the personal appearance of the parties might have been required. (Rapalje on Contempts, § 109.) But the Government acquiesced in their appearance by counsel and by answers personally signed and verified.

The preliminary matters set up in those answers have been held insufficient cause, and the proceeding now stands as to each defendant on his denial, under positive oath, of the offense charged. This is surely sufficient cause as against an information verified only on information and belief until the Government produces proof. We submit that the production of that proof is now the only course open to it.

The Government has waived its right to an interlocutory attachment, if it had such right. It has waived the personal attendance of the defendants in answer to the rule. Now, as against their sworn denials, it asks, merely on its naked information, that the defendants

be arrested and committed in default of bail. There is no attempt to show any facts to justify a different course from that taken in the prayer of the information.

We submit that to grant this motion would subject the defendants to hardship and indignity which the state of the record does not justify and which would violate the presumption of innocence this court has so strongly upheld.

As to Joseph F. Shipp, sheriff, and his deputies, all this has peculiar force. They are officers of justice of the State of Tennessee. Their time is required in the service of the courts and the preservation of the peace in that State. Courtesy to the State and the tribunals they serve makes regard for the presumption of their innocence highly appropriate as well as just.

MOTION TO TAKE TESTIMONY.

We consent, of course, to the taking of testimony. We consent, too, for the convenience of the court, that the testimony be taken by some disinterested person to be appointed by the court for that purpose.

We pray, however, that the person so appointed be directed to take the testimony at Chattanooga, where all the witnesses on both sides reside. If it should be found that any reside elsewhere we consent to taking their testimony wherever desired.

I am informed and believe, and so state to the court, that the defendants are almost without exception unable to bear the expense of traveling to Washington and remaining there during the hearing, as they would have to do or submit to a practical denial of justice. To compel them to attend a hearing away from home would be in itself a severe punishment, and trial should precede punishment. The analogies of the Constitution and the laws, too, make the place where the offense is charged to have been committed the appropriate one for the taking of the proof. As the sheriff and all his deputies are parties, their absence from their homes would also work harm to the course of business in the courts and to the preservation of the peace of their county.

Respectfully submitted.

Mr. Judson Harmon, Clift & Cooke and *Mr. Robert Pritchard,* attorneys for Joseph F. Shipp and others.

On January 21, 1907, the following entries appear of record, viz.:

October Term, 1906. No. 12. Original.

On consideration of the motion to require the defendants herein to enter into recognizances for their appearances hereafter,

It is now here ordered by the court that the defendants in this cause enter into their personal recognizances in the penal sum of $1,000 each, conditioned to abide the further orders of the court before the judge of the District Court of the United States for the Eastern District of Tennessee.

On consideration of the motion as to the taking of testimony herein,

It is now here ordered by the court that a commissioner will be appointed to take the testimony of witnesses at Chattanooga, in the Eastern District of Tennessee, and counsel on both sides are given ten days in which to agree upon a fit person for such appointment and communicate the nomination to the court.

On January 25, 1907, the *Attorney General* filed the following:

Suggestion in reply to brief for certain defendants on motion to take testimony.

In the brief filed by certain of the defendants reasons are suggested why the testimony should be taken at Chattanooga, and the court's order directing that it shall be taken before a commissioner appears to designate Chattanooga as the place. The Attorney-General now respectfully requests the court to reconsider this designation and to designate the city of Washington, at least for the purpose of taking the testimony of witnesses for the United States, for the following reasons:

1. The defendants themselves need not attend the hearings in Washington unless, as is unlikely, they wish to be personally present, and their counsel will probably find it no serious hardship to come to Washington.

2. If the defendants are, in fact, inconvenienced and suffer some hardship through loss of time or money, or both, these are ordinary and necessary incidents of their situation. They rest under a charge which must be tried. A prima facie case has been made out, in the

sense that proofs against them are now to be offered and they are called upon to meet the charge. It may be fairly assumed that it is not wholly without their own fault that they are in this position. Defendants generally must attend the trial court at its usual place of session, either personally or by counsel. The official duties of some among them need not, and should not, change that rule in this case. The entire sheriff's force need not be withdrawn from Hamilton County merely to listen to the testimony for the United States; and it is right and customary, not harsh and arbitrary, to bring witnesses from any part of a district to the court. The court does not go to them. The entire country is the district in the present case, and the court only sits in Washington; the city of Washington, then, is the natural place for the taking of the testimony. This is none the less true because an officer of the court and not the court itself is to take the testimony, and because the defendants have the right to be present, if they are not compelled to be present.

3. It seems to us very important that the testimony should be taken under the eye and direct control of the court, to afford opportunities for immediate reference to the court by, and instructions from the court to, the commissioner in connection with unexpected incidents which may readily occur during the examination of witnesses in a case like this one, wholly without precedent.

4. Finally, it is submitted that the locality where this terrible occurrence took place, and where (as appears from the crime itself, from the record in Johnson's case, and from the oral argument herein on the preliminary questions of law) the feelings of certain portions of the community have been and are still greatly excited, is an unsuitable place for this examination, at least of the witnesses for the United States. In that locality the real facts can not be elicited in a calm and dispassionate atmosphere, free from the danger that local prejudice and a sense of personal insecurity may stifle or check the full and frank utterances of the witnesses for the prosecution; and the Attorney-General deems it his duty to advise the court that confidential information in the possession of the Department of Justice, of a character entitled to credit, indicates that witnesses for the United States may reasonably, and will in fact, entertain apprehensions of danger to themselves if they testify at Chattanooga.

On January 28, 1907, on motion of *Mr. Solicitor General Hoyt*, leave was granted counsel for the defendants to file briefs in opposition to the suggestions of the *Attorney General* as to taking testimony in this cause and on January 29, 1907,

on behalf of certain defendants there was filed the following brief opposing the motion of the *Attorney General* to require witnesses to be examined at Washington, D. C., instead of Chattanooga, Tenn.

The court is familiar with the proceedings of this cause, and this brief is presented in opposition to a motion of the Attorney-General, which motion means, if granted, that all the witnesses for the Government in these cases must be examined at Washington, D. C., instead of at Chattanooga, Tennessee.

The reason why the defendants oppose this motion is that they are all poor men, except the sheriff, and not able to pay the expenses of going from Chattanooga to Washington and there remaining, with their attorneys, during the time that the Government will be taking its proof. It cannot be said that this proof can be heard in their absence, because the charges are serious, and the court has laid down the rule that in contempt cases the defendants are entitled to meet the witnesses face to face. If this hearing is to be had at Washington and the proof taken there, it will practically amount to a denial of justice, because the defendants do not know what the Government's proof will be, nor just which of the defendants are liable to be affected by any witness. It is necessary, therefore, for all of them to be present at this hearing. The defense of the officers and the alleged lynchers is not necessarily the same, and there is no one attorney in the case in a position to represent them all; so that it becomes necessary for most all the attorneys who have been actively engaged in these cases to attend these hearings. We say that there is no reason in the world why the witnesses for the Government should not tell the facts about this case at Chattanooga, Tennessee, just as freely as at any other place. And if after the hearing has commenced at Chattanooga any witness is intimidated, the court has power to change the place of the hearing and also to punish the offending party, if such a case were possible. Public opinion is in a mood now to hear freely, frankly, and unreservedly all the facts of this case at Chattanooga without intimidation towards anybody.

To take these witnesses away from Chattanooga and deprive these defendants of the right to meet them face to face, as must necessarily result, is a great hardship upon them, and particularly so if they are innocent, as they claim to be, and especially on account of their poverty.

Many of these defendants have heretofore filed their affidavits showing that they are unable to pay the expenses of their own wit-

nesses to the city of Washington, and they now appeal to your honors not to have this hearing at Washington, because it imposes hardships upon them that they cannot bear, and is as to some of them a denial of justice.

We most respectfully and earnestly insist that there is no sound reason or foundation for the argument that the witnesses for the Government will testify to facts in Washington, D. C., that they are unwilling to tell at the home of the witnesses and when surrounded by their own families and friends. Besides, the law is sufficient to protect the witnesses, and there ought not to be a precedent established by this court that its commissioner or examiner was unable to get the truth out of witnesses because of the sentiment at the place of the hearing being reported as favorable to the accused when the law presumes the accused innocent of the charges against him.

We most earnestly submit that this honorable court should not make an order in these cases that will prevent the defendants from having the fullest opportunity to show their innocence in this case, and for that reason the motion of the Attorney-General should be overruled.

Geo. W. Chamlee, Lewis Shepherd, attorneys.

On January 31, 1907, the following nomination to the court of a commissioner to take the testimony was filed.

The Attorney-General has the honor to report that counsel of record for the defendants unite with him in the nomination to the court of James D. Maher, Esq., of the District of Columbia, to take the testimony of the witnesses in this cause.

And on the same day *Mr. Solicitor General Hoyt,* of counsel for the complainant, submitted the nomination to the consideration of the court.

On February 2, 1907, there was filed the following answer of Joseph F. Shipp, sheriff, and his deputies, to suggestion of *Attorney General* as to taking testimony.

The Attorney-General asks this court to reconsider its order designating Chattanooga as the place of taking testimony in this case, and requests that the city of Washington be designated, at least for the purpose of taking testimony of witnesses for the United States.

And now come the defendants, Joseph F. Shipp, Frank Jones, Matthew Galloway, C. A. Baker, T. V. Taylor, Fred Frawley, George Brown, Jeremiah Gibson, Marion Perkins, and Joseph Clark, defendants, being the said sheriff and his deputies, and respectfully show to the court that the granting of said request would work great hardship upon them and might result in actual injustice.

These defendants were, at the time of the happening of the matters and things complained of in the information of the Attorney-General, officers of Hamilton County, Tennessee, sworn to uphold the law, and occupying positions which the public welfare required should be filled by persons who respected the law, and who would obey it.

The information not only charges them with failure to uphold the law, but with having become parties to a conspiracy to dethrone the law and substitute in its place mob violence, the antithesis of law.

A conviction of these defendants under the charges of the information involves not only the crime and infamy of perjury, but the guilt of conspiracy to murder.

These defendants have heretofore, prior to the filing of the information in this case, enjoyed the respect and confidence of their fellow-citizens, and it is of the utmost importance to them that their good names be not destroyed unless they are convicted after a full, fair, and impartial trial.

It is not the purpose of the United States to inflict wrong upon any of its citizens, however humble. These defendants verily believe that the granting of the request of the Attorney-General would do them grievous wrong. Every one of these defendants is entitled to be confronted by the witnesses against him. It has been shown by affidavits that many of them are not able to attend the taking of the testimony at Washington. It would be impossible for all of the counsel for all of the defendants to be present all the time, and a false witness might escape proper cross-examination and might leave an impression of truth. The presence of the defendants, when witnesses for the prosecution are being examined, is an important right, one that should not be denied. The defendants are not only entitled to the aid of counsel, but counsel are entitled to the assistance of the defendants.

It is true that these defendants rest under a charge which must be tried, but they submit that they are entitled to a trial which will give them the right to be present, so that they may have the privilege accorded to the meanest criminal of being faced by their accusers. This right will be practically denied should the testimony be taken in Washington.

The Attorney-General suggests that it may be fairly assumed that

it is not wholly without their own fault that these defendants are placed in the position which they would be placed were his request granted, but these defendants are unable to reconcile this assumption with the presumption of innocence which the law accords to them.

Answering the further suggestion that Washington is the proper place for the hearing of testimony because the court sits at Washington for the whole United States, these defendants say that the court has already decided that it will not hear oral testimony and has allowed counsel for both parties to nominate a commissioner to take the testimony.

The suggestion contained in paragraph three (3) is equally without merit, because it is impossible to conceive of this tribunal allowing separate hearings on every "unexpected incident which may readily occur during the examination of witnesses," it being the duty of the commissioner to act upon exceptions to testimony, as well as "unexpected incidents."

Finally, these defendants solemnly deny the averments contained in the fourth paragraph of the suggestion of the Attorney-General. They deny that there is any foundation in fact for the serious and unusual charge, confessedly based upon secret information to which neither the defendants nor this honorable court have access, that Chattanooga is, for any reason, an unsuitable place to take the testimony of witnesses. They deny that the real facts cannot be elicited there in "a calm and dispassionate atmosphere." They deny that the testimony would be colored or suppressed by local prejudice or any sense of personal insecurity, or that full and frank utterance of the truth by witnesses for or against these defendants would be "stifled or checked." Whatever may be the character of the "confidential information" to which the Attorney-General refers, these defendants deny that any witness for the United States could reasonably or would, in fact, entertain any apprehension whatever of danger if he testified at Chattanooga.

Defendants respectfully submit that the charges contained in said paragraph 4 that the feelings of the community are excited, that the truth would be suppressed from prejudice or from a sense of personal insecurity, or from any other cause, are based upon information of an unreliable character or upon a mistaken conception of the facts.

The "confidential" character of the information referred to by the Attorney-General precludes an investigation of its reliability by these defendants; but in opposition thereto these defendants present herewith the affidavits of D. L. Snodgrass, J. W. Bachman, C. A. Lyerly, Wm. L. Frierson, J. T. Moseley, T. S. Wilcox, G. G. Fletcher and

M. M. Allison, whose positions in the community indicate their character and standing. Wherefore these defendants pray, etc.

On February 4, 1907, the following order appointing commissioner to take testimony was entered:

This cause coming on to be heard in respect of the appointment of a special commissioner to take testimony herein, and the parties, duly appearing by their counsel, having agreed upon a fit person for such appointment and communicated their nomination to the court:

It is ordered that Mr. James D. Maher, a resident of the District of Columbia, be, and he is hereby, appointed a commission to take and return the testimony in this proceeding, with the powers of a master in chancery, as provided in the rules of this court; but said commissioner shall not make any findings of fact or state any conclusions of law.

It is further ordered that the taking of the testimony shall be commenced at the city of Chattanooga, in the Eastern District of Tennessee, as soon as possible, at such place as the commissioner shall designate, reasonable notice thereof to be given counsel on both sides, and be proceeded in with all convenient speed; and the commissioner is hereby authorized also to take testimony elsewhere if that shall be agreed on by counsel or appear to be necessary, with leave to him or to either of the parties to apply to the court for such orders in that regard as they may be advised.

Said commissioner shall promptly report to the court the testimony taken by him, without findings of fact or conclusion of law, and shall receive such compensation as may hereafter be determined, and his actual expenses, an itemized statement of which shall accompany his report.

On February 6, 1907, the oath of James D. Maher as commissioner herein was filed in the words and figures following, viz.:

I, James D. Maher, commissioner appointed by the Supreme Court of the United States to take and return the testimony in the cause of The United States of America, complainant, *vs.* John F. Shipp et al. (No. 12, Original, October term, 1906), do solemnly swear that I will faithfully and impartially discharge and perform all the duties de-

volved on me as such commissioner, according to the best of my ability and understanding. So help me God.

JAMES D. MAHER.

Subscribed and sworn to before me this 5th day of February, 1906.

[SEAL.] JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

The Commissioner proceeded to Chattanooga and executed the commission.

The following stipulations were entered into as to the taking of testimony and appear in the record:

In this cause it is stipulated and agreed that after the testimony is reduced to typewriting it shall be submitted to counsel for the several parties and promptly examined, and unless counsel find material errors in the same the testimony may be signed by the commissioner, with the same force and effect as if signed by each witness. In the event material errors are found, they shall be called to the attention of the commissioner and the usual course shall be taken in reference thereto.

In this cause, to save the time and expense of taking proof as to the matters hereinafter referred to, it is stipulated and agreed as follows:

That on the 11th day of February, 1906, one Ed Johnson, a citizen of the United States and a resident and citizen of the State of Tennessee, and a colored person of African descent, was convicted of the crime of rape in the criminal court of Hamilton County, held at the city of Chattanooga, in the State of Tennessee, and said court thereupon sentenced the said Ed Johnson to suffer the penalty of death.

That on the 3d day of March, 1906, and before the date set for the execution of the said Ed Johnson, a petition for a writ of *habeas corpus*, signed by the said Ed Johnson as petitioner, was duly presented to the United States Circuit Court for the Northern Division of the Eastern District of Tennessee in which it was alleged, among other things, that upon the trial of the said Ed Johnson in the criminal court of Hamilton County, in the State of Tennessee, for the crime of rape, for which he had been convicted, said petitioner had been denied a trial by a fair and impartial jury, and had been denied the aid of counsel in violation of the fifth and sixth amendments to the Federal Constitution, and that said petitioner was also denied rights secured to him under the fourteenth amendment to the Federal Constitution;

that thereafter, to wit, on the 10th day of March, 1906, the application of the said Ed Johnson for a writ of *habeas corpus* came on for hearing before the said United States Court for the Eastern District of Tennessee upon the petition, return, answer, and replication, and upon the testimony of witnesses given orally in open court, and after argument of counsel the said Circuit Court ordered that said petition be dismissed and that the writ of *habeas corpus* prayed for in said petition be denied, and further ordered that said petitioner be remanded to the custody of the sheriff of said Hamilton County, in the State of Tennessee, to be detained by said sheriff in his custody for the period of ten days in which to enable said petitioner to prosecute an appeal from said order should he be so advised and should an appeal lie from said order, and in default of the prosecution of an appeal within said time to be then further proceeded with by the court of the State of Tennessee under its sentence.

That thereafter, on the 17th day of March, 1906, an application was duly presented by the said Ed Johnson to the Hon. John M. Harlan, an associate justice of the Supreme Court of the United States, assigned to the sixth circuit, asking that an appeal be allowed to the Supreme Court of the United States from the judgment rendered in the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee on March 10, 1906, denying his, the said Ed Johnson's, application for a writ of *habeas corpus*, as aforesaid, which said appeal was on the same day allowed by Mr. Justice Harlan.

That on the 19th day of March, 1906, a motion was duly made in the Supreme Court of the United States by counsel for and representing the said Ed Johnson for an order allowing an appeal to the Supreme Court of the United States from the judgment of the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee, rendered on the 10th day of March, 1906, denying his, the said Ed Johnson's, application for a writ of *habeas corpus*, which motion was thereupon granted by the Supreme Court of the United States and an order duly made and entered by the Chief Justice in the words and figures following, to wit:

ED JOHNSON, APPELLANT,
vs.
THE STATE OF TENNESSEE.

On motion of *Mr. E. M. Hewlett*, of counsel for the appellant, it is ordered by the court that an appeal from the Circuit Court of the United States for the Eastern District of Tennessee be, and the same is hereby, allowed, and that all proceedings against the appellant be

stayed, and the custody of the said appellant be retained pending this appeal.

Per Mr. Chief Justice Fuller.

That there was also published and circulated in said city of Chattanooga in the evening paper on the said 19th day of March, 1906, before six o'clock p. m., an account of the action of the Supreme Court of the United States in allowing an appeal and granting a stay of further proceedings on the part of the state courts against the said Ed Johnson until the determination of said appeal before the Supreme Court of the United States.

That during all the times herein mentioned, and on and subsequent to March 19th, 1906, the above-named defendant, J. F. Shipp, was the duly elected, qualified, and acting sheriff of Hamilton County, in the State of Tennessee, and as such sheriff had and exercised full charge and control of the county jail, located in the city of Chattanooga, in said county, and was the legal custodian under the laws of Tennessee of all persons duly committed in said county under the laws of said State to confinement and imprisonment within said jail; and that the defendants, Frank Jones, Matthew Galloway, C. A. Baker, Fred Frauley, George Brown, Jeremiah Gibson, Marion Perkins, and each of them, were, during all the times herein mentioned, and on and subsequent to March 19, 1906, the duly appointed, qualified, and acting deputy sheriffs of said county and State under the said J. F. Shipp.

It is further agreed that this stipulation may be offered before the commissioner by either the complainant or defendant as evidence of any part or all of the matters hereinbefore stipulated. Provided, however, that no admission is made as to the competency or relevancy of any of the facts above stated, this stipulation being merely intended as proof of the facts above stipulated with the same force and effect as if duly proven by the testimony of witnesses and to be subject in all respects to the same exceptions as the testimony of witnesses would be; all parties expressly reserving the right to except to any portion of this stipulation when introduced in evidence upon any ground relating to the competency, relevancy, or admissibility of the subject-matter to which this stipulation relates.

The following took place before the Commissioner:

Mr. Assistant Attorney General Sanford: I thought that had been submitted to all of the counsel. It was so intended. That, I understand, is agreed to by all of the counsel and we will have it drawn up in proper form.

In regard to the matter of the telegram sent by the clerk of the Supreme Court of the United States, it was agreed by counsel to whom the matter has been mentioned that the Commissioner's personal statement may be taken as evidence in the matter of when that telegram was sent and its contents.

The COMMISSIONER: This telegram was sent by myself, for the clerk, on the day it is dated, March 19th, in the neighborhood of one o'clock in the afternoon. I delivered it personally at the telegraph office in the corridor of the House of Representatives in the Capitol at Washington, and pre-paid it; and this copy was made under my direction before I left Washington.

The copy was put in the record.

On October 14, 1907, the United States moved the court to file the reports of James D. Maher, esquire, special commissioner herein, as to the taking of testimony and as to his expenses.

And on October 14, 1907, on motion of *Mr. Assistant Attorney General Sanford,* of counsel for the complainant, it was ordered that the testimony taken herein be opened, published, and filed; also on same day and on motion of *Mr. Assistant Attorney General Sanford,* of counsel for the complainant, leave was granted to file the reports of the Commissioner as to the taking of testimony and as to his expenses in connection therewith, and also stipulations of counsel as to facts, as to the taking of the testimony, and as to the misnomer of certain defendants.

On October 14, 1907, a motion was made for leave to file stipulations as to misnomer of certain defendants, as to taking of testimony, and as to certain agreed facts.

And on October 14, 1907, the reports of the Commissioner as to taking testimony and as to expenses were filed as follows:

To the honorable the Supreme Court of the United States:

The undersigned commissioner appointed by an order entered in this cause on the 4th day of February, 1907, to take and return such evidence as the parties to said cause should produce, respectfully reports

to the court that pursuant to the said order he opened the commission conferred on him in the United States court room in the city of Chattanooga, State of Tennessee, on Tuesday, February 12, 1907, at 10 o'clock a. m., and, the counsel for the respective parties being present, proceeded to execute the said commission on that day and on the 13th, 14th, and 15th days of the same month, when, on the suggestion of the counsel for the complainant, an adjournment was taken. Pursuant to notice given by the undersigned to counsel for the respective parties, the taking of testimony in the cause was resumed at the same place on Monday, June 10, 1907, and continued on the 11th, 12th, 13th, 14th, 15th, 17th, 18th, 19th, 20th, 21st, 24th, 25th, 26th, 27th, 28th, and 29th days of the same month, on which last-named day, the parties not offering any more testimony, the commission was closed.

The said commission was executed by receiving the testimony of the several witnesses named in the testimony, who were sworn to testify to the truth, the whole truth, and nothing but the truth before giving their evidence, and the testimony so given by them was taken down by a stenographer in the presence of the undersigned, and is herewith submitted, together with the exhibits offered in evidence.

Said testimony and exhibits, contained in 20 typewritten volumes containing 2,283 pages, have been deposited with the clerk of this honorable court.

Respectfully submitted.

JAMES D. MAHER,
Commissioner.

To the Honorable the Supreme Court of the United States:

Pursuant to the order of this honorable court entered on the 4th day of February, 1907, appointing the undersigned as commissioner to take and return the testimony in the above-entitled cause and directing a statement of actual expenses incurred in the taking of said testimony to be submitted, I beg leave to state that it became necessary to travel to the city of Chattanooga, Tennessee, on two separate occasions—in February and June, 1907—and the expenses of the commissioner were as follows:

In February:		
Railroad fares	$48 15	
Cabs and baggage	1 60	
Room at hotel	15 00	
Meals	16 15	
Telegrams	1 46	
	$82 36	$82 36

Amount carried forward		$82 36
In June:		
Railroad fares	$43 00	
Cabs and baggage	2 50	
Hotel bill	83 75	
Meals on trains and at club	5 75	
Telegrams	1 69	
	$136 69	$136 69
Making a total of		$219 05

Respectfully submitted.

JAMES D. MAHER,
Commissioner.

On November 4, 1907, the following order was made:

It is now here ordered by the court that Mr. James D. Maher, the commissioner appointed by this court to take and return the testimony in this cause, be, and he is hereby, allowed the sum of $800.00 in full for his compensation and expenses, and that said sum be paid by the complainant herein.

And on April 22, 1908, the following motion for leave to take additional testimony was made:

The Solicitor-General appearing for and on behalf of the United States, moves the court to reopen the hearing of testimony in this case and to reappoint Mr. James D. Maher as commissioner for the purpose of taking and returning additional testimony to the court in this behalf.

In support of this motion the Solicitor-General shows and represents to the court that under the original order of reference to the said commissioner the Government and the defendants took their testimony in the city of Chattanooga, Tenn., in the year 1907, and closed their case in June of that year; that said commissioner subsequently made his report as to the taking of testimony, which was opened, published, and filed pursuant to an order of court; that while, since the taking of testimony was closed as aforesaid, the Government has made no further effort to find additional testimony, the Department of Justice recently and unexpectedly was informed that two persons who were not examined on the former hearing were eye-

witnesses of part of the incidents connected with the lynching of the prisoner, Ed Johnson, which is involved in this information, and could identify two of the defendants herein as connected therewith; that the department thereupon caused this matter to be inquired into through the office of the United States attorney for the Eastern District of Tennessee, and was advised by him that these two persons will so testify and will identify two of the defendants in question.

The Solicitor-General further represents and shows to the court that he is advised that these two parties did not previously make known their knowledge of these facts in reference to this matter on account of fear, and that there was no means by which the Government could have been previously advised as to the information which they possessed or could have obtained their testimony on the former hearing.

The Solicitor-General further represents and shows to the court that this application for leave to take additional testimony is not made for purposes of delay, but solely that justice may be done and all material evidence brought to the attention of the court.

He therefore prays that the taking of testimony may be reopened, and that the said James D. Maher may be reappointed as commissioner, with the same powers as under his original appointment, and may be directed to proceed at an early and convenient date to the city of Chattanooga, Tenn., there to take the testimony of the two witnesses in question, together with any rebuttal testimony which any of the defendants may desire to offer in that behalf, or further testimony which may be rendered necessary in behalf of the Government by reason of such rebuttal evidence, if any, and to report such additional testimony to the court.

Respectfully submitted.

HENRY M. HOYT,
Solicitor-General.

The defendants submitted the following answer to motion for leave to take additional testimony:

The defendants Joseph F. Shipp, Frank Jones, Matthew Galloway, C. A. Baker, Fred Frawley, and Marion Perkins, appearing by their attorneys, Judson Harmon, Robert Pritchard, James J. Lynch, M. H. Clift, and Robert B. Cooke; the defendants T. B. Taylor and George Brown, appearing by their attorney, T. W. Stanfield; the defendant Jeremiah Gibson, appearing by his attorneys, Clift & Cooke; the defendant Joseph Clark, appearing by his attorneys, Spears & Lynch; the defendants Claude Powell, Nick Nolen, Chas. J. Powell, Bart

Justice, John Jones, Henry Padgett, William May, John Varnell, and Alfred Handman, appearing by their attorneys, Lewis Shepherd and Shepherd & Fleming; the defendants "Sheenie" Warner and Luther Williams, appearing by their attorney, G. W. Chamlee; the defendant William Beeler, appearing by his attorneys, Ford & Chamlee and G. W. Chamlee; the defendants W. J. Cartwright and R. F. Cartwright, appearing by their attorneys, S. P. Maddox and John H. Early; the defendant Frank Ward, appearing by his attorneys, G. W. Chamlee and John A. Hood; and the defendant William Marquette, appearing by his attorney, Joe V. Williams, answering the petition of the Solicitor-General for leave to take additional testimony in this case say:

1. It is true that much proof has been taken in this case both by the Government and the defendants, and the defendants closed their proof in June, 1907; the report of the commissioner has been made and the testimony opened, published, and filed. It is likewise probably true that the Government made no effort to find additional evidence after the closing of the testimony.

2. These defendants take it for granted that the statement that the Department of Justice has received the information set out in the motion is true. But they call the attention of the honorable court to the vague and meagre statements of the motion upon this subject. The names of the two persons who are supposed to have been eye-witnesses of "part of the incidents connected with the lynching of the prisoner, Ed Johnson," are not given. The nature of the "part of the incidents" they saw is not stated. The names of the "two defendants" whom it is supposed these witnesses "could identify as connected therewith" are not given.

3. While these defendants submit that they are entitled to be furnished with the names of the two witnesses, they do not insist upon this because the motion suggests that "these two parties did not previously make known their knowledge of these facts in reference to this matter on account of fear." Defendants aver that nothing whatever has occurred, so far as their knowledge or information extends to support the suggestion that any concealment of facts has been induced by fear of any sort.

4. But there are many defendants to the information in this case and many of them have separate defenses and the defendants are not all represented by the same counsel. The defense has been onerous and expensive. It is inferrible from the statements of the motion that only two defendants will be interested in the additional testimony sought to be taken. To save the expense of the attendance of all the defendants and the attorneys for all of them, these defendants

respectfully submit that they are entitled to be furnished with the names of the two defendants who will be affected by the proposed additional testimony. After the testimony of the two witnesses in question shall have been taken, the defendants affected thereby should have reasonable time within which to collect and adduce evidence in rebuttal.

Defendants therefore offer no resistance to the motion further than to insist that before it is allowed they should be furnished with the names of the two defendants whom it is proposed to identify by the witnesses, and that such additional time be allowed as may be necessary for collecting and adducing rebuttal evidence.

On May 4, 1908, *Mr. Solicitor General Hoyt* submitted a motion for leave to take additional testimony herein, and for the reappointment of James D. Maher as Commissioner to take and return said testimony, and the following order was made on May 18, 1908:

On consideration of the motion for leave to take additional testimony herein, and that James D. Maher be appointed commissioner to take the same, it is now here ordered by the court that said motion be, and the same is hereby, granted, due notice of the names of the particular defendants affected by the proposed evidence to be given and leave being granted to give evidence in rebuttal.

On October 13, 1908, *Mr. Solicitor General Hoyt* presented the reports of the commissioner appointed to take additional testimony herein, and submitted an oral motion as to the matter of his compensation, and on his motion it was ordered that the additional testimony taken herein be opened, published and filed.

On the same day, October 13, 1908, the following reports of the Commissioner were filed:

To the Honorable the Supreme Court of the United States:

The undersigned commissioner appointed by an order entered in this cause on the 18th day of May, 1908, to take and return such additional evidence as the parties to said cause should produce, respectfully reports to the court that pursuant to the said order he proceeded to the city of Chattanooga, Tennessee, on the 28th day of June, 1908, and opened the commission conferred on him in the

United States court room in said city on the first day of July, 1908, at 10 o'clock a. m., and, the counsel for the respective parties being present, proceeded to execute the said commission on that day and the day following, on which last-named day the parties not offering any more testimony the commission was closed. The said commission was executed by receiving the testimony of the several witnesses named in the said testimony, who were sworn to testify to the truth, the whole truth, and nothing but the truth before giving their evidence, and the testimony so given by them was taken down by a stenographer in the presence of the undersigned and is herewith submitted.

Said testimony, comprising 175 typewritten pages, has been deposited with the clerk of this honorable court.

Respectfully submitted.

JAMES D. MAHER,
Commissioner.

To the Honorable the Supreme Court of the United States:

Pursuant to the order of this honorable court entered on the 18th day of May, 1908, appointing the undersigned as commissioner to take and return additional testimony in the above entitled cause, I beg leave to state that I proceeded to the city of Chattanooga, Tennessee, on June 28, 1908, and returned to the city of Washington on July 3, 1908, and that my expenses were as follows . . . $64.35

Respectfully submitted, JAMES D. MAHER, *Commissioner.*

On October 14, 1908, the following order was made:

It is now here ordered by the court that Mr. James D. Maher, the commissioner appointed by order of this court, entered herein on May 18th, 1908, to take and return additional testimony in this cause, be, and he is hereby, allowed the sum of $200.00 in full for his compensation and expenses, and that said sum be paid by the complainant herein.

On October 13, 1908, a motion was made by the *Attorney-General* to dismiss as to certain defendants.

The Attorney-General, on behalf of the United States, moves that the information herein be dismissed as to the defendants Paul Pool, T. B. Taylor, William Beeler, John Jones, Marion Perkins, C. A. Baker, Claude Powell, Charles J. Powell, A. J. Cartwright, R. F. Cartwright, John Varnell, Joseph Clark, Fred Frauley, Paul or "Sheenie" Warner, Alfred Hammond, William Marquette, and George Brown, and that they be discharged from their respective recognizances

entered into pursuant to an order of this honorable court made herein on the 21st day of January, 1907, without prejudice, however, to the right of the United States to prosecute this proceeding as to each and all of the other defendants herein with the same force and effect as if the proceeding against the above-named defendants were not dismissed.

Testimony has been taken and the cases of all parties closed. All of the testimony has been reported by the commissioner, printed, published, and filed pursuant to an order of the court.

Efforts to serve Paul Pool with process in this proceeding have been unsuccessful. He left Chattanooga soon after the lynching and has never since been located, according to our information.

The proof fails to disclose any evidence implicating defendants T. B. Taylor, William Beeler, John Jones, Marion Perkins, C. A. Baker, Claude Powell, Charles J. Powell, A. J. Cartwright, R. F. Cartwright, or John Varnell in the acts complained of in the information.

The defendant John Jones is not the John Jones which the Government witnesses testify to having seen in the lynching party. The witnesses stated positively that he was not the same party.

On October 13, 1908, on motion of *Mr. Solicitor General Hoyt*, of counsel for the complainant, it was ordered by the court that the information herein be, and the same is hereby, dismissed as to the defendants, Paul Pool, T. B. Taylor, William Beeler, John Jones, Marion Perkins, C. A. Baker, Claude Powell, Charles J. Powell, A. J. Cartwright, R. F. Cartwright, John Varnell, Joseph Clark, Fred Frauley, Paul or "Sheenie" Warner, Alfred Hammond, William Marquette and George Brown.

On March 2 and March 3, 1909, the case was duly argued and submitted to the Supreme Court of the United States and on May 25, 1909, that honorable court rendered its decision; the opinion of the court was delivered by Mr. Chief Justice Fuller,[1] and on that day the following order was duly entered.

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[1] In which MR. JUSTICE HARLAN, MR. JUSTICE BREWER, MR. JUSTICE HOLMES and MR. JUSTICE DAY concurred. See p. 426, *ante*, for dissenting opinion of MR. JUSTICE PECKHAM, in which MR. JUSTICE WHITE and MR. JUSTICE MCKENNA concurred; MR. JUSTICE MOODY did not sit.

UNITED STATES OF AMERICA, ss:

The President of the United States, To the Marshal of the Supreme Court of the United States,
Greeting:

(SEAL) Whereas it has been made to appear to the Supreme Court of the United States that Joseph F. Shipp, Jeremiah Gibson, Luther Williams, Nick Nolan, Henry Padgett and William Mayse have been adjudged by the said court, now in session at the city of Washington, in the District of Columbia, to be in contempt of said court.

We, therefore, command you that you attach the said Joseph F. Shipp, Jeremiah Gibson, Luther Williams, Nick Nolan, Henry Padgett and William Mayse, so as to have their bodies before the said Supreme Court of the United States at the city of Washington, in the District of Columbia, on the first day of June, 1909, at 12 o'clock noon of that day, to answer the said court of the said contempt, by them lately committed against it, as it is said, and further, to do and receive what our said court shall in that behalf consider.

Hereof fail not, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 25th day of May, A. D. 1909.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

And thereafter and on June 1, 1909, the marshal produced the defendants named before this honorable court and a motion having been made for leave to file a petition for rehearing the following order was made:

The marshal of this court made return to the attachment heretofore issued herein by producing the bodies of the defendants, Joseph F. Shipp, Jeremiah Gibson, Luther Williams, Nick Nolan, Henry Padgett and William Mayse, who appeared in open court in their proper persons, and thereupon the Solicitor General moved the court for sentence upon the said defendants above named, and counsel for the said defendants moved the court for leave to file a petition for rehearing—

Whereupon, upon consideration, It is now here ordered by the court that leave be, and the same is hereby, granted to file motions for leave to file petitions for rehearing herein within thirty days.

It is further ordered that the said above named defendants be re-

manded to the custody of the United States marshal for the Eastern District of Tennessee, he having been deputized by the marshal of this court to serve the attachment herein, to be released on entering into recognizances in the penal sum of one thousand dollars each, conditioned to abide the further order of the court, before the judge of the District Court of the United States for the Eastern District of Tennessee.

And thereafter the following proceedings took place, as appears by the following certificate:

Before me, the District Judge of the United States for the Eastern District of Tenneesse, personally came, in open court, in the District Court of the United States for the Southern Division of the Eastern District of Tennessee, the marshal of said court, and produced the bodies of the defendants Joseph F. Shipp, Jeremiah Gibson, Luther Williams, Nick Nolan, Henry Padgett and William Mayse, who appeared in open court in their proper persons; and there was at the same time exhibited to me a copy of an order entered in this cause by the Supreme Court of the United States on June 1, 1909, directing that said defendants be released from custody on entering into recognizances before me in the penal sum of one thousand dollars each, conditioned to abide the further order of the Supreme Court of the United States;

Whereupon each of said defendants, Joseph F. Shipp, Jeremiah Gibson, Luther Williams, Nick Nolan, Henry Padgett and William Mayse, did, in open court, enter into his recognizance before me as required by said order of the Supreme Court, and did acknowledge himself to be indebted to the United States of America in the penal sum of one thousand dollars, such obligation to be void upon condition that he should abide the further order of said Supreme Court in the premises; otherwise to remain in full force and effect; and each of said defendants was thereupon released by the marshal from custody.

In witness whereof, I have hereunto set my hand this fourth day of June, 1909.

EDWARD T. SANFORD,
Judge of the United States District Court
for the Eastern District of Tennessee.

On June 28, 1909, a petition for rehearing was filed on behalf of defendant Williams.

On June 30, 1909, a petition for rehearing was filed on behalf of defendants Shipp and Gibson.

On July 1, motions of defendants Padgett, Mayse and Nolan for leave to file petitions for rehearing were filed.

ED JOHNSON *v.* THE STATE OF TENNESSEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

No. 2. Docketed March 19, 1906; Abatement announced May 24, 1909.

Case abated on account of death of appellant.

THIS is the appeal referred to in the statement of the case of *United States* v. *Shipp*, No. 5, original, *ante*, p. 386. The order allowing the appeal was granted and the case docketed March 19, 1906. On that day the appellant was killed under the circumstances set forth in the statement of the case in *United States* v. *Shipp*, *ante*, p. 386. No further proceedings were had in the case. On May 24, 1909, after announcing the decision in *United States* v. *Shipp*, holding that certain of the defendants in that case were guilty of contempt of this court for their conduct in connection with the killing of the appellant in this case, the Chief Justice announced that this case had abated owing to death of appellant.

Mr. E. M. Hewlett was attorney for appellant on motion for allowing the appeal.

THE CHIEF JUSTICE: Appeal abated by death of appellant, and case dismissed.

PER CURIAM OPINIONS DELIVERED BY THE SUPREME COURT OF THE UNITED STATES FROM MARCH 1, 1909, TO THE END OF OCTOBER TERM, 1908.

MATTER OF HUDSON OIL & SUPPLY CO., PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION DIRECTED TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. —. Original. Submitted February 23, 1909.—Decided March 1, 1909.

Writ of prohibition to prohibit Judges of the District Court from applying any part of proceeds of sale under decrees of admiralty court of same district of vessels belonging to a bankrupt, and surrendered by the receiver for adjudication of the maritime liens, to the payment of the receiver's expenses and commissions in connection with such vessels, until all maritime liens had been paid in full, refused.

A PETITION in bankruptcy having been filed by one James Hughes, and a receiver of his property appointed, petitioner and others filed libels in the admiralty court in the same district as the bankrupt court to enforce maritime liens on a number of vessels owned by the bankrupt, and, after attachment by the marshal, the receiver surrendered the vessels; decrees of condemnation and sale were rendered, the vessels sold and proceeds deposited in the registry of the court. The petitioner alleged that although neither the receiver nor the trustees subsequently appointed had appeared in the proceedings as intervenor or otherwise, the bankrupt court had directed the clerk of the court before distributing to the libellants the proceeds of sale, which were insufficient to pay all the maritime claims for which the vessels were sold, all expenses, commissions and counsel fees of the commissioner.

The petitioner asked for a writ of prohibition against the Judges of the District Court to prohibit them from making any order in the admiralty court withdrawing in favor of the bankrupt estate any of the proceeds of the sale in admiralty until the maritime liens were paid.

Mr. de Lagnel Berier for petitioner contended that under § 688, Rev. Stat., this court had jurisdiction to issue the writ, and that it was no objection thereto that the occasion arose in a collateral matter. *Re Rice*, 155 U. S. 396. Also that the admiralty court had full jurisdiction over the proceeds after the receiver relinquished the vessels, but it had no jurisdiction to pay over moneys in its registry to a stranger, or for non-maritime liens, and that the receiver's expenditures and commissions were non-maritime liens (*The Mary K. Campbell*, 31 Fed. Rep. 840; *The Monte*, 12 Fed. Rep. 333; *The Oceano*, 148 Fed. Rep. 131); and if there was any lien under the bankrupt act it did not follow the proceeds into the admiralty court.

Per Curiam: Motion for leave to file a petition for writ of prohibition denied.

MATTER OF FRANK McWILLIAMS, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION DIRECTED TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. —. Original. Submitted February 23, 1909.—Decided March 1, 1909.

Leave to file petition for writ of prohibition similar to that applied for in preceding case refused.

THIS case arose out of the same facts as the preceding case

and affected the proceeds of one of the vessels, and the same contention was made for petitioner.

Mr. Richard D. Currier for petitioner.

Per Curiam: Motion for leave to file a petition for writ of prohibition denied.

SASS & CRAWFORD *v.* THOMAS.

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

No. 122. Submitted March 15, 1909.—Decided March 22, 1909.

On authority of *Laurel Oil Co.* v. *Morrison*, 212 U. S. 291,[1] writ of error to review a judgment of the Circuit Court of Appeals for the Eighth Circuit in a case coming from the United States court for the Indian Territory dismissed.

THIS case was commenced in the United States court for the Southern District of the Indian Territory and resulted in a

[1] The headnote in *Laurel Oil Co.* v. *Morrison* is as follows:

"Where a statute provides for an appeal or a writ of error to a specific court it must be regarded as a repeal of any previous statute providing for an appeal or a writ of error to another court. *Brown* v. *United States*, 171 U. S. 631.

"Decisions of the Court of Appeals of the United States for the Indian Territory are final except as made subject to review by some express statutory provision.

"The provisions in § 12 of the act of March 3, 1905, c. 1479, 33 Stat. 1081, for appeals and writs of error from the United States courts in Indian Territory to the United States Court of Appeals in the Indian Territory, and from that court to the United States Circuit Court of Appeals for the Eighth Circuit are exclusive; and there is now no appeal or writ of error in such cases from the Circuit Court of Appeals of the Eighth Circuit to this court."

judgment for the plaintiff (defendant in error here) which was affirmed by the Court of Appeals of the United States for the Indian Territory, and subsequently by the Circuit Court of Appeals for the Eighth Circuit.

Mr. W. A. Ledbetter for plaintiff in error.

Mr. A. C. Cruce and *Mr. W. I. Cruce* for defendants in error.

Per Curiam: The writ of error is dismissed for want of jurisdiction on authority of *Laurel Oil Co.* v. *Morrison,* 212 U. S. 291, decided February 23, 1909.

MATTER OF CONSOLIDATED RUBBER TIRE COMPANY, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION.

Original. Submitted April 5, 1909.—Decided April 12, 1909.

Leave to file petition for writ of prohibition to prohibit the United States Circuit Court from retaining jurisdiction of a case, denied.

An action for infringement of patent rights was commenced in the Circuit Court of the United States for the Southern District of New York by one William A. Ferguson, whose citizenship is not disclosed, against the petitioner, a corporation of New Jersey, on patents alleged to have been assigned to the plaintiff by the Reilloc Tyre Company, a British corporation.

The petitioner (defendant in that action) moved to dismiss on the ground that the court did not have jurisdiction of the parties. That motion having been denied, it submitted its petition to this court for a writ of prohibition, contending that the assignee, whose citizenship does not appear, of a cause of action which accrued to an alien, cannot maintain an action

thereon in a Federal court in a district other than that whereof defendant is an inhabitant.

Mr. Charles W. Stapleton for petitioner.

Per Curiam: Motion for leave to file petition for writ of prohibition denied.

GILA BEND RESERVOIR & IRRIGATION COMPANY *v.* LINN.

SAME *v.* GILA WATER COMPANY.

No. 199 of October Term, 1897, and No. 226 of October Term, 1905.—Submitted March 8, 1909.—Decided March 15, 1909.

Motions for leave to file petitions for leave to file bills of review in the lower court denied.

THESE cases were in this court before. See 171 U. S. 685; 202 U. S. 270; 205 U. S. 279.

Mr. E. S. Clark for petitioner.

Per Curiam: Motions for leave to file bills of review in the lower court denied.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* HENRIE.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 648. Motions to dismiss or affirm and for damages.—Submitted April 2, 1909.—Decided April 19, 1909.

Writ of error to review judgment of the state court dismissed without opinion for want of jurisdiction, there being no Federal question, or if any, it was raised too late.

THIS was an action for damages in which the defendant in

error (plaintiff below) had recovered judgment for death of her husband, which had been affirmed by the Supreme Court of the State and a petition for a rehearing denied by that court.

The motion to dismiss was based on the grounds that the contention of the plaintiff in error that the construction of the safety appliance act of March 2, 1893, was involved was raised for the first time on the motion for rehearing in the Supreme Court of the State, and that the opinion of the court denying the motion showed that the defendant below not having brought these points to the attention of the court on trial could not raise them on the appeal, and that there was sufficient evidence to go to the jury as to whether the safety appliances worked.

Mr. William H. Arnold for defendants in error in support of motions.

Mr. Samuel W. Moore, Mr. James F. Read and *Mr. James B. McDonough* for plaintiff in error in opposition to motions.

Per Curiam: Writ of error dismissed for want of jurisdiction. *G., C. & S. Ry. Co.* v. *Texas*, 204 U. S. 411; *Behn* v. *Campbell*, 205 U. S. 407; *Leathe* v. *Thomas*, 207 U. S. 93; *Stickney* v. *Kelsey*, 209 U. S. 419; *Waters Pierce Oil Co.* v. *Texas*, 212 U. S. 86.

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY *v.* EDGAR C. WILLIAMS.

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

No. 154. Argued April 16, 1909.—Decided April 26, 1909.

Certificate dismissed on the authority of *Chicago, Burlington & Quincy Railway Company* v. *Williams*, 205 U. S. 444.[1]

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[1] The headnote in that case is as follows:

Under § 6 of the Circuit Court of Appeals Act of March 3, 1891, 26

THE certificate in this case is as follows:

The United States Circuit Court of Appeals for the Eighth Circuit, sitting at the City of St. Paul, Minnesota, on the tenth day of July, A. D. 1907, certifies that the record on file in the action above entitled, which is pending in this court upon a writ of error duly issued to review a judgment rendered in this action in favor of the defendant in error, in the United States Circuit Court for the Western District of Missouri, discloses the following facts:

The judgment which the writ of error challenges was rendered after a trial and a verdict of a jury for $5,000 damages. At the trial these facts were conclusively established: The defendant in error was injured by the negligence of the servants of the railway company while he was riding in a caboose of a cattle train under a contract between him and the railway company for the transportation of his cattle at the regular rate, in which contract the railway company had agreed to transport him free and he had agreed in consideration of the free transportation that the railway company should not be liable to him for any injury or damage, from whatever cause, which he might suffer or incur while he was so carried, that the cattle should be in his charge for the purpose of attention and care and that the railway company should not be responsible for such attention and care, but he should load, unload, water and feed them. He was not constrained, required or requested to make this contract, or one of this nature, in order to secure transportation for his cattle by the railway company at the same rate and on the same

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Stat. 826, the certificate of the Circuit Court of Appeals as to questions or propositions of law concerning which it desires instruction must present a distinct point of law, clearly stated, which can be decided without passing upon the weight or effect of the advice on which the question arises, and if not so presented this court is without jurisdiction; and where the question certified practically brings up the entire case, and this court is asked to pass upon the validity of a contract and indicate what the final judgment should be, the certificate will be dismissed and the questions not answered.

terms in its care, but he had the option to have them transported at the same rate in the care of the railway company and to ride on a passenger train from the point of shipment to the destination of the cattle for the regular fare, or to ride free in the caboose car of the cattle train under his contract to hold the railway company exempt from liability for his injuries and to care for the cattle himself. He freely exercised this option and chose the latter alternative. The danger of injury to one riding in the caboose of a cattle train is about four times the danger to one riding over the same railroad in the coach of a passenger train. Upon these facts the railway company, which had pleaded its exemption from liability under the contract, requested the court to instruct the jury to return a verdict in its favor, the court refused, an exception was taken to this ruling, and this ruling and many others have been assigned as errors and are pending in this court for determination.

And the Circuit Court of Appeals for the Eighth Circuit further certifies that other questions of law which relate to the admission of evidence are presented by the assignment of errors in this case and are pending for the decision of this court, but that the following questions of law are also presented by the assignment of errors and their decision is indispensable to a determination of this case in this court, and that to the end that this court may properly decide the issues of law presented it desires the instruction of the Supreme Court of the United States upon the following questions of law:

1. In a contract between an owner of cattle and a railway company for the transportation of the cattle at the regular rate which contains the further agreement that the owner shall be transported on the cattle train free in consideration that he contracts that the railway company shall not be liable to him for any injury or damage which he sustains while he is being so carried and that he will load, unload, feed and care for the cattle during the transportation, is his agreement that the railway company shall not be liable to him for any injury or damage which he sustains while being so carried a valid contract?

2. Where the owner of the cattle is not constrained, required or requested to make the contract described in the foregoing question in order to have his cattle transported at the regular rate, but freely chooses to make such an agreement in preference to contracting for the transportation of his cattle at the regular rate at the risk of the railway company and riding himself on a passenger train to the destination of the cattle at the regular rate, is his agreement that the railway company shall not be liable to him for any injury or damage which he sustains while being so carried a valid contract?

3. Do the facts which were established at the trial and which are set forth in the statement which precedes these questions show a valid contract by the owner of the cattle, the plaintiff below, that the railway company should not be liable to him for any injury or damage which he sustained while he was riding in the caboose of the cattle train under the contract specified in the statement?

For a precedent for this question see *Fourth Street Bank* v. *Yardley*, 165 U. S. 634, 637.

Per Curiam: In the opinion of a majority of the court this certificate is essentially the same as that disposed of in *Chicago, Burlington & Quincy Railway Company* v. *Williams*, 205 U. S. 444, and it is therefore dismissed on the authority of that decision.

MR. JUSTICE HOLMES, dissenting.

When this case was here before I felt doubts, but deferred to the judgment of the majority, as I think one should, when it does not seem that an important principle is involved or that there is some public advantage to be gained from a statement of the other side. But it seems to me that the present order is a mistake upon an important matter, and I am unwilling that it should seem to be made by unanimous consent. I think that such questions are to be encouraged as a mode of disposing of

cases in the least cumbersome and most expeditious way. The former certificate was thought to invite a consideration of mixed questions of law and fact. However that may have been, the present one puts definite questions of pure law, and I think that those questions should be answered. Even if the third should be objected to, the other two are complete in themselves. It is no objection to a question of law that the case turns upon it. That is the best of reasons for propounding it. The only objection is not to deciding the case here but to putting questions that turn upon conclusions from evidence, or that present a general statement and ask a judgment with regard to unspecified questions of law.

MR. JUSTICE WHITE and MR. JUSTICE MOODY concur in this dissent.

THOMAS *v.* SOUTH SIDE ELEVATED RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 157. Argued April 16, 19, 1909.—Decided April 26, 1909.

Writ of error to review a judgment of the state court in a condemnation proceeding, 218 Illinois, 571, dismissed without opinion for want of jurisdiction.

THIS was a writ of error to review a judgment of the Supreme Court of Illinois in a condemnation proceeding in which plaintiff in error contended that he had been denied due process of law.

Mr. George W. Thomas, pro se.

Mr. Cecil Page, with whom *Mr. Monroe L. Willard* was on the brief, for defendant in error.

Per Curiam: Writ of error dismissed for want of jurisdiction. *Stevens, Administrator,* v. *Nichols,* 157 U. S. 370; *Loeber* v. *Schroeder,* 149 U. S. 580; *Central Land Co.* v. *Laidley,* 159 U. S. 103; *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557; *Ballard* v. *Hunter,* 204 U. S. 241; *Tracy* v. *Ginsberg,* 205 U. S. 180; *Rusch* v. *John Duncan Land & Mining Co.,* 211 U. S. 526; reported below, 218 Illinois, 571.

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY *v.* STATE OF MINNESOTA *ex rel.* CITY OF MINNEAPOLIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 162. Argued April 19, 20, 1909.—Decided April 26, 1909.

Affirmed on authority of *Northern Pacific Railway* v. *Duluth,* 208 U. S. 583.[1]

THIS case involved a question almost the same as that in

[1] The headnote in *Northern Pacific Railway Company* v. *Duluth* applicable to this case is as follows:

"The right to exercise the police power is a continuing one that cannot be limited or contracted away by the State or its municipality, nor can it be destroyed by compromise as it is immaterial upon what consideration the attempted contract is based.

"The exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and uncompensated obedience to an ordinance passed in its exercise is not violative of property rights protected by the Federal Constitution; *held,* that an ordinance of a municipality of that State, valid under the law of that State as construed by its highest court, compelling a railroad to repair a viaduct constructed, after the opening of the railroad, by the city in pursuance of a contract relieving the railroad, for a substantial consideration, from making any repairs thereon for a term of years was not void under the contract, or the due process, clause of the Constitution."

Northern Pacific Railway v. *Duluth* in which it was held that a railway was not deprived of its property without due process of law by being obliged to rebuild a viaduct over streets of a city.

Mr. Rome G. Brown, with whom *Mr. Charles S. Albert* and *Mr. William R. Begg* were on the brief, for plaintiffs in error.

Mr. Frank Healy, with whom *Mr. Albert E. Clarke* was on the brief, for defendant in error.

Per Curiam: Judgment affirmed on authority of *Northern Pacific Railway Company* v. *State of Minnesota ex rel. Duluth*, 208 U. S. 583.

FIDELITY & CASUALTY COMPANY OF NEW YORK *v.* SOUTHERN RAILWAY NEWS COMPANY.

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

No. 165. Argued April 20, 1909.—Decided April 26, 1909.

Writ of error to review judgment of the Court of Appeals of Kentucky dismissed without opinion, for want of jurisdiction, notwithstanding the contention of plaintiff in error that where a state court in construing a contract departs from its established and applicable mode of procedure theretofore applied under similar circumstances due process and equal protection of the law are denied.

THIS was a writ of error to review a judgment of the Court of Appeals by which plaintiff in error contended that he had been deprived of his property without due process of law.

Mr. William H. Field for plaintiff in error.

Mr. Charles F. Taylor for defendant in error.

Per Curiam: Writ of error dismissed for want of jurisdiction. *Central Land Company* v. *Laidley,* 159 U. S. 103; *Sayward* v. *Denny,* 158 U. S. 180; *Bacon* v. *Texas,* 163 U. S. 207; *Burt* v. *Smith,* 203 U. S. 135; *Barrington* v. *Missouri,* 205 U. S. 485; *Tracy* v. *Ginzberg,* 205 U. S. 170; *Thompson* v. *Kentucky,* 209 U. S. 430.

DONOHUE *v.* EL PASO & SOUTHWESTERN RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 516. Motion to dismiss or affirm.—Submitted April 19, 1909.—Decided April 26, 1909.

Judgment of the Supreme Court of Arizona holding that ejectment should not be maintained against a railroad company where the owner had remained inactive and permitted the construction of the track affirmed without opinion on authority of *Roberts* v. *Northern Pacific Railroad Company,* 158 U. S. 1, and *Northern Pacific Railroad Company* v. *Smith,* 171 U. S. 260.

THE court below held that ejectment could not be maintained, saying in its opinion: "The only question requiring our attention, upon the record, as presented, is whether ejectment or trespass may be maintained, and we have no hesitancy in holding that they may not be. This has been determined so authoritatively that discussion by us is wholly unnecessary. In *Northern Pacific Railroad Co.* v. *Smith,* 171 U. S. 260, it is said:

"'This subject was fully considered by this court in the case of *Roberts* v. *Northern Pacific Railroad,* 158 U. S. 1, where, upon the foregoing authorities and others, it was held that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with a statute requiring either payment by agree-

ment or proceedings to condemn, remains inactive and permits it to go on and expend large sums in the work, he is estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and will be restricted to a suit for damages. See also *City of New York* v. *Pine*, 185 U. S. 93.' "

Mr. A. B. Browne, Mr. Alexander Britton and *Mr. E. E. Ellinwood* for the appellee in support of the motion.

Mr. Charles F. Ainsworth for the appellant in opposition thereto.

Per Curiam: Judgment affirmed. *Roberts* v. *Northern Pacific Railroad Co.*, 158 U. S. 1; *Northern Pacific Railroad Company* v. *Smith*, 171 U. S. 260.

LOGAN *v.* FARMERS' DEPOSIT NATIONAL BANK OF PITTSBURGH.

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

No. 745. Motion to dismiss or affirm.—Submitted April 19, 1909.—Decided April 26, 1909.

An appeal from the Circuit Court of Appeals in a bankruptcy matter dismissed without opinion on authority of *Coder* v. *Arts*, 213 U. S. 223.

THIS case came up on motion to dismiss or affirm a final decree or judgment of the Circuit Court of Appeals for the Fourth Circuit modifying a decree of the District Court of the United States for the Northern District of West Virginia in the bankruptcy proceedings of the Morgantown Tin Plate Company and rejecting all of a claim of $100,000, except $22,500.

Mr. B. M. Ambler and *Mr. A. Leo Weil* for the appellees in support of the motion.

Mr. Hector M. Hitchings for the appellants in opposition thereto.

Per Curiam: Appeal dismissed for want of jurisdiction on authority of *Coder, Trustee,* v. *Arts,* 213 U. S. 223.

Ex parte ISAAC HELLER, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

No. —. Original. Submitted April 27, 1909.—Decided May 3, 1909.

Petition for leave to file petition for mandamus to compel the Circuit Court of Appeals to take jurisdiction of a writ of error to the Circuit Court to review an order fining petitioner for contempt denied without opinion.

PETITIONER having been by decree of the Circuit Court of the United States for the Southern District of New York enjoined in an action in which the National Waistband Company was plaintiff from using the trade-mark "Excelsior" and also from stamping waistbands "Extension" and "Waistband" in a certain manner, was adjudged by the same court to be in contempt for violating the terms of the decree and fined $500. To this order in contempt petitioner sued out a writ of error from the Circuit Court of Appeals of the Second Circuit which was dismissed with the following opinion:

"It is well settled that when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured by the disobedience, it is to be reviewed only by appeal. Writ of error will lie only when the fine is clearly punitive and in vindication of the authority of the court, as is the case where the fine is made payable in whole or in part to the United States. *Matter of Christensen Eng. Co.,* 194 U. S. 458. The writ of error is dismissed; defendant's remedy is by appeal."

A motion for rehearing was denied, with the following opinion:

"We see no reason to order a rehearing, nor to certify the questions to the Supreme Court. The decisions in *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 334; and *Matter of Christensen Eng. Co.*, 194 U. S. 458, cover the case now presented. The decision of the Circuit Court of Appeals in the First Circuit (*Wilson* v. *Colculagraph Co.*, 163 Fed. Rep. 901), indicates that this order at the heel of the final decree might be reviewed by appeal."

Whereupon petitioner, asserting that the order of the Circuit Court is, notwithstanding such opinions, reviewable only by writ of error, applied to this court for a writ of mandamus to compel the Circuit Court of Appeals to take jurisdiction thereof and decide the same.

Mr. Abraham A. Berman for petitioner.

Mr. Arthur v. Briesen submitted a brief for the respondent, contending that a contempt order in an equity suit is not reviewable by writ of error if the fine be purely compensatory and not penal in its nature, as such orders are only reviewable, if at all, by appeal.

Per Curiam: Motion for leave to file petition for a writ of mandamus denied.

MISSOURI, KANSAS & TEXAS RAILWAY CO. *v.* KENNEDY.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 817. Motion to dismiss or affirm.—Submitted April 26, 1909.—Decided May 3, 1909.

Writ of error to review the judgment of the state court in a suit for damages for injuries caused by negligence of plaintiff in error dismissed without opinion for want of jurisdiction, notwithstanding contention

of plaintiff in error that its claim that the act of April 24, 1905, ch. 163, of Texas legislature was unconstitutional as depriving it of the fellow-servant defense had been duly set up at the proper time in the state court.

THE nature of this case appears above.

Mr. C. A. Culberson for the defendant in error in support of the motion.

Mr. James Hagerman, Mr. J. M. Bryson and *Mr. A. B. Browne,* for the plaintiff in error in opposition thereto.

Per Curiam: Writ of error dismissed for want of jurisdiction.

YADKIN RIVER POWER CO. *v.* WHITNEY CO.

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

No. 835. Motion to dismiss or affirm.—Submitted May 3, 1909.—Decided May 17, 1909.

Writ of error to review judgment of the state court in a condemnation proceeding dismissed without opinion for want of jurisdiction.

THIS was a special proceeding commenced by plaintiff in error to condemn land on which to establish a water power and erect an electric light plant. The state court dismissed the proceedings, and among other things as stated in its opinion, held, construing its own statutes and basing its decision upon one of a similar case in the Supreme Court of the United States, *Denver Co.* v. *Alling,* 99 U. S. 480, that the plaintiff in error has not the power of eminent domain; but, that in accepting its new charter from the legislature, it accepted it in the status in which

it was at the time of the renewal of its old charter with such changes only as were specifically made in the reënacting statute. At the time it accepted its new charter, it had lost all rights which it had ever acquired, if it had ever acquired any by express legislative enactment, the legislature of North Carolina having taken away the power of eminent domain from such companies.

Mr. Thomas Patterson, Mr. Burton Craige, Mr. Thomas J. Jerome and *Mr. W. A. Way* for defendant in error in support of the motion.

Mr. Frederick M. Leonard for plaintiff in error in opposition thereto.

Per Curiam: Writ of error dismissed for want of jurisdiction.

GRANITE BITUMINOUS PAVING CO. *v.* LANDIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MINNESOTA.

No. 528. Submitted May 3, 1909.—Decided May 17, 1909.

The Circuit Court has not jurisdiction of a suit against a number of delinquent taxpayers for assessment work where the assessment due from each taxpayer is less than two thousand dollars.

APPELLANT (complainant below) filed its bill against a large number of defendants to foreclose on special tax bills for assessment work done and for which defendant's property was liable. The assessments aggregated more than two thousand dollars, but each assessment was less than that amount. The Circuit Court dismissed the bill, holding that complainant had a separate and distinct action at law in the state court on each special tax bill, and that as each was less than two thousand dollars the Federal courts had no jurisdiction. Complainant appealed directly to this court.

Mr. W. L. Sturdevant for appellant.

There was no appearance for appellee.

Per Curiam: The Circuit Court properly held that it had no jurisdiction, for want of the jurisdictional amount, and its decree dismissing the bill is affirmed with costs.

MATTER OF HENRY C. PEARSON, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

No. —. Original. Submitted May 17, 1909.—Decided May 24, 1909.

Leave to file petition for mandamus to the Chief Justice and the associate justices of the Court of Claims to make a report to the President of the Senate on petitioner's claim denied.

As stated by the Court of Claims, Henry C. Pearson filed a claim for three months' extra pay proper as an officer in the Volunteer Service during the civil war under the act of March 3, 1865; on May 22, 1908, the United States Senate referred to the court Bill No. 7013 of the 60th Congress, First Session, authorizing the Secretary of the Treasury to reëxamine and adjust claims of persons (including petitioner) under the act of March 3, 1865. The court found that the petitioner was loyal and also made the following finding:

Henry C. Pearson was enrolled July 1, 1863, as private, Co. N, 21st Pennsylvania Cavalry Volunteers, for six months. He reënlisted for three years as a veteran volunteer on February 10, 1864, was promoted to First Lieutenant and Adjutant February 26, 1864, and was in the service of the United States in such grade of First Lieutenant and Adjutant on March 3, 1865. Said claimant continued in the service of the United States from March 3, 1865, until April 7, 1865, at which time he was discharged from the military service by order of the Secretary of War "on account of physical disability from wounds

received in action." The claim herein is neither a legal nor an equitable claim against the United States and the court is therefore without jurisdiction to liquidate the amount, the same resting in the bounty of Congress.

Thereupon this motion for mandamus was filed, the petitioner claiming that he had a clear legal right to have the Court of Claims report to the President of the Senate the amount which he would receive and the Government pay if Congress should enact into law Senate Bill No. 7013, and that it was the duty of the Court of Claims so to do under the Tucker act.

Mr. Charles F. Carusi, Mr. C. W. Pennebaker and *Mr. Eugene A. Jones* for petitioner.

Per Curiam: Motion for leave to file petition for writ of mandamus denied.

MATTER OF TOBIN, PETITIONER.

MATTER OF KRISTIANSON.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AGAINST HONORABLE PAGE MORRIS, DISTRICT JUDGE OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THAT DISTRICT.

No. —. Original. Submitted May 17, 1909.—Decided May 24, 1909.

Leave to file petition for mandamus to remand a case to the state court denied.

As stated in the petition, petitioner is plaintiff in an action against the Republic Iron and Steel Company, a corporation, commenced in the state court which had jurisdiction.

Defendant filed a bond and petition for removal, and caused

said action to be removed to the United States Circuit Court of the District of Minnesota, Fifth Division, on the ground that the plaintiff was a citizen of Minnesota and the defendant a citizen of New Jersey. Thereupon, the plaintiff made a motion before said Federal court to remand said cause of action to said state court for the reason that the said Federal court did not have jurisdiction of said cause of action or said parties because the requisite diversity of citizenship did not exist, and because the plaintiff at the time of the commencement of the action and at all times was an alien and the defendant was not a resident or citizen of the State of Minnesota.

It is conceded that the plaintiff was and is an alien and that the defendant is not a resident or citizen of the State of Minnesota. The court denied the motion to remand, and application is therefore made to this honorable court for leave to file a petition praying for a writ of mandamus as the said Circuit Court erred in denying the motion to remand for the reason that said Circuit Court could not assume and did not have jurisdiction of said cause of action or said parties without the consent of the plaintiff.

Mr. Samuel A. Anderson for petitioner.

Per Curiam: Motion for leave to file petition for writ of mandamus denied.

UNITED STATES FIDELITY & GUARANTY COMPANY *v.* UNITED STATES.

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

No. 179. Argued April 23–26, 1909.—Decided May 24, 1909.

Judgment of the lower court against a surety on the official bond of an Indian agent affirmed without opinion by a divided court.

Quære, Whether failure to give credit for vouchers because of misrepre-

sentation as to part of the amount represented by the vouchers is the enforcement of a statutory rule of accounting under the act of July 4, 1884, c. 180, 23 Stat. 76, p. 97, or the imposition of a penalty.

THIS was an action by the United States against the Guaranty Company to recover from it as surety on the official bond of one Bridgeman, an Indian agent. The facts are stated in the opinion of the Circuit Court of Appeals and appear in the extract therefrom quoted in the margin.[1]

[1] The United States brought an action in the court below against the plaintiff in error as surety upon the official bond of Morris L. Bridgeman, Indian agent of the Fort Belknap Indian Agency. The condition of the bond was that "if the said principal shall at all times during his holding and remaining in office, carefully discharge the duties thereof and faithfully disburse all public moneys, and honestly account, without fraud or delay, for the same and for all public funds, including the funds designated in Regulations of the Indian Department, as miscellaneous receipts and moneys belonging to Indians under his charge, which shall or may come into his hands, and all other funds received by him by reason of his position as United States Indian agent and for all public property placed in his charge; and if the said principal shall not knowingly present, or cause to be presented any voucher, account or claim of the character mentioned in § 8 of the Act of Congress of July 4, 1884 (23 Stats. 97) or in any manner become liable thereunder, then the above obligation to be void and of no effect; otherwise to remain in full force and virtue." The complaint alleged that the official accounts of said Morris L. Bridgeman, as agent for the Fort Belknap Indian Agency have been stated, settled and adjusted by the duly authorized and lawful officers of the government of the United States as required by law, and that upon such statement, settlement and adjustment, there was found to be due and owing to the United States from Morris L. Bridgeman as such agent on account of public moneys and public property received by him as such agent, and which he failed to disburse and account for, the sum of $11,357.07. The said sum of $11,357.07 is in the complaint made up of two items, one of $10,489.50, public moneys, the other $867.57, the value of public property. The demand for judgment was for $11,357.07 and interest thereon at six per cent per annum from April 30, 1902. The answer set up affirmative defenses, the first of which is as follows: That the said Bridgeman as such agent presented to the Commissioner of Indian Affairs for approval and payment, vouchers and accounts and claims for all money disbursed by him; that he faith-

The Circuit Court and the Circuit Court of Appeals held that the rejection of vouchers for over ten thousand dollars which contained misrepresentations as to less than two thousand dollars was not the imposition of a penalty but only the statutory rule of accounting applicable to the case, and that the agent had had an opportunity to file corrected vouchers but had not availed of it. The court below also held that the defenses that the bond had been extorted under color of law and that the criminal judgment against the agent for fraudulent vouchers

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fully disbursed for the use and benefit of the Indians of the agency all the moneys included in such vouchers, accounts and claims for which he claimed credit, excepting a sum not exceeding $2,000.00; that several of the vouchers so presented contained material misrepresentations of fact in regard to the amount due or paid, name or character of the article furnished or received or services rendered or the date of purchase, delivery or performance of service, or in some other particular, and that by reason of such false representation, the said Bridgeman was refused and denied credit for any part of either of said vouchers containing such false representations, and that this was done pursuant to § 8 of the Act of Congress of July 4, 1884; that said Bridgeman honestly and without fraud or delay accounted for all public moneys received by him as indicated except a sum not exceeding $2,000.00; that the said vouchers, accounts and claims containing such false representations amounted in the aggregate to $10,489.50 for the whole of which the said Bridgeman was denied credit. The second defense is in substance the allegation that for his malfeasance in office the said Bridgeman had been indicted and tried in the United States District Court for the District of Montana and on such trial had been convicted and sentenced to imprisonment for a period of three years, and that by reason of those facts the government should not be heard to assert any claim against the plaintiff in error for penalties incurred by the said Bridgeman in presenting such vouchers, accounts and claims containing false representations; that said judgment is a bar to the recovery of any such penalties from the plaintiff in error. The third defense is that before the execution and delivery of the bond, the Department of the Interior caused the bond to be prepared and transmitted to Bridgeman and required him to execute the same with sufficient sureties before permitting him to enter upon the duties of the office of Indian agent; that the conditions of the bond are wholly different from and in excess of the conditions required by law and vary and enlarge the duties and responsibilities of said Bridgeman

was a bar to the recovery from the surety under the bond were untenable.

Mr. J. Kemp Bartlett and *Mr. Milton S. Gunn* for plaintiff in error.

Mr. Assistant Attorney General Russell, with whom *The Attorney General* was on the brief, for defendant in error.

Per Curiam: Judgment affirmed by an equally divided court, and cause remanded to the Circuit Court of the United States for the District of Montana.

MR. JUSTICE MOODY did not sit.

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and the surety, and impose upon the latter obligations and liabilities different and in excess of those to which it would be subjected if the bond had contained the conditions provided by law and had not contained such illegal conditions; that said bond was extorted from the said Bridgeman under color and pretense of law and under color of the office of the Secretary of the Interior and is therefore void and of no effect. The defendant in error moved for judgment on the pleadings and the motion was allowed. Judgment was rendered in favor of the defendant in error and against the plaintiff in error for the sum of $14,082.75, with interest from the date thereof at six per cent. per annum and for costs.

Decisions on Petitions for Writs of Certiorari from February 24, to June 1, 1909.

No. 720. BERNARR MACFADDEN, PETITIONER, *v.* THE UNITED STATES. March 1, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Henry M. Earle* for petitioner. *The Solicitor General* for respondent.

No. 730. THE UNITED STATES, PETITIONER, *v.* DANIEL J. RIMER ET AL. March 1, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *The Attorney General* and *The Solicitor General* for petitioner. No appearance for respondent.

No. 731. GRAND TRUNK WESTERN RAILWAY COMPANY, PETITIONER, *v.* JOHN F. DEVINE, ADMINISTRATOR, ETC. March 8, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George W. Kretzinger* for petitioner. *Mr. Edward Maher* for respondent.

No. 733. LAWRENCE JOHNSON & CO., PETITIONERS, *v.* THE UNITED STATES. March 8, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Howard T. Walden* and *Mr. Henry J. Webster* for petitioners. *The Solicitor General* for respondent.

No. 734. DOWAGIAC MANUFACTURING COMPANY, PETITIONER, *v.* MCSHERRY MANUFACTURING COMPANY ET AL. March 8, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Fred. L. Chappell* and *Mr. Morison R. Waite* for petitioner. *Mr. E. E. Wood* and *Mr. Joseph Wilby* for respondents.

No. 736. THE RUBBER TIRE WHEEL COMPANY ET AL., PETITIONERS, *v.* THE GOODYEAR TIRE & RUBBER COMPANY ET AL. March 8, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas W. Bakewell, Mr. Border Bowman, Mr. Charles W. Stapleton, Mr. Frederick P. Fish* and *Mr. Clarence P. Byrnes* for petitioners. *Mr. H. A. Toulmin* for respondents.

No. 688. PATRICK LENNOX, PETITIONER, *v.* ALLEN-LANE CO. ET AL.; No. 689. PATRICK LENNOX, PETITIONER, *v.* ALLEN-LANE CO. ET AL.; No. 690. PATRICK LENNOX, PETITIONER, *v.* MELVILLE L. COBB ET AL.; No. 691. PATRICK LENNOX, PETITIONER, *v.* MELVILLE L. COBB ET AL.; No. 692. PATRICK LENNOX, PETITIONER, *v.* GEORGE S. ROSENCRANTZ ET AL.; and No. 693. PATRICK LENNOX, PETITIONER, *v.* GEORGE S. ROSENCRANTZ ET AL. March 15, 1909. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. John P. Leahy* for petitioner. *Mr. William H. Dunbar* and *Mr. Frederick P. Fish* for respondents.

No. 738. THIRD NATIONAL BANK OF CINCINNATI ET AL., PETITIONERS, *v.* ZELLA CONAWAY, ADMINISTRATRIX, ETC., ET

AL. March 22, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George M. Hoffheimer* for petitioners. *Mr. John Bassel* for respondents.

No. 745. FRANK J. LOGAN ET AL., PETITIONERS, *v.* FARMERS' DEPOSIT NATIONAL BANK OF PITTSBURGH, PA., ET AL; and No. 746. ROLLING MILL COMPANY OF AMERICA ET AL., PETITIONERS, *v.* CANTON ROLL & MACHINE COMPANY ET AL. March 22, 1909. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Hector M. Hitchings* for petitioners. *Mr. B. M. Ambler* and *Mr. A. Leo Weil* for respondents.

No. 757. SUE KIRKPATRICK ET AL., ETC., PETITIONERS, *v.* ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY. April 5, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Willard L. Sturdevant* for petitioners. *Mr. W. F. Evans* for respondent.

No. 744. FANNIE FINKS ET AL., PETITIONERS, *v.* FRED FLEMING ET AL. April 12, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. F. M. Etheridge* and *Mr. J. M. McCormick* for petitioners. *Mr. Maurice E. Locke, Mr. J. W. Terry, Mr. M. M. Crane* and *Mr. William J. McKie* for respondents.

No. 753. FRANK YESBERA, PETITIONER, *v.* THE HARDESTY MANUFACTURING COMPANY, ETC. April 12, 1909. Petition

for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas H. Tracey* and *Mr. Almon Hall* for petitioner. *Mr. Melville Church* for respondent.

No. 763. JOHN B. HECKENDORN, PETITIONER, *v.* THE UNITED STATES. April 12, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Everit Brown* and *Mr. H. J. Cookinham* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 764. THE WOLF BROTHERS & COMPANY, PETITIONER, *v.* HAMILTON-BROWN SHOE COMPANY. April 12, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Lawrence Maxwell* and *Mr. Simeon M. Johnson* for petitioner. *Mr. Paul Bakewell* and *Mr. Joseph R. Edson* for respondent.

No. 771. THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, PETITIONER, *v.* WALTER BAKER & COMPANY, LIMITED. April 12, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William Greenough* for petitioner. *Mr. Eugene P. Carver* and *Mr. Horace L. Cheyney* for respondent.

No. 772. UNITED STATES OF AMERICA, PETITIONER, *v.* DANIEL GARRIGAN. April 12, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the

Seventh Circuit denied. *Mr. Alfred S. Austrian* and *Mr. John B. Daish* for petitioner. No appearance for respondent.

No. 773. CORN PRODUCTS REFINING COMPANY, PETITIONER, *v.* GEORGE F. HARDING ET AL. April 12, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Levy Mayer* and *Mr. John B. Daish* for petitioner. *Mr. George F. Harding* for respondents.

No. 788. EAGLE OIL COMPANY ET AL., PETITIONERS, *v.* VACUUM OIL COMPANY. April 12, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Eugene Mackey* and *Mr. Cornelius D. Scully* for petitioners. *Mr. C. Schuyler Davis* and *Mr. Howard L. Osgood* for respondent.

No. 789. CORN PRODUCTS REFINING COMPANY, PETITIONER, *v.* ROBERT KING. April 12, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John B. Daish* for petitioner. *Mr. Lindorf O. Whitnel* for respondent.

No. 768. BROWN-KETCHAM IRON WORKS, PETITIONER, *v.* BANK OF COMMERCE & TRUST COMPANY ET AL. April 19, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Caruthers Ewing* for petitioner. *Mr. J. W. Canada* for respondents.

No. 792. NORTH CAROLINA MINING COMPANY, PETITIONER, *v.* G. R. WESTFELDT ET AL. April 19, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. James H. Merrimon, Mr. Charles A. Moore, Mr. Joseph J. Hooker* and *Mr. Thomas S. Rollins* for petitioner. *Mr. Alfred S. Barnard* for respondents

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No. 798. LA COMPAGNIE GENERALE TRANSATLANTIQUE, PETITIONER, *v.* PATRICK MAGUIRE. April 19, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph P. Nolan* for petitioner. No appearance for respondent.

No. 796. THE UNITED STATES, PETITIONER, *v.* BERNARD CITROEN. April 19, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *The Attorney General* and *The Solicitor General* for petitioner. *Mr. W. Wickham Smith* and *Mr. John K. Maxwell* for respondent.

No. 785. ISIDORE MEYERSON, PETITIONER, *v.* HARRY HART ET AL., ETC. April 26, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. George Ryall* for petitioner. *Mr. Benjamin N. Cardozo* for respondents.

No. 804. THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, PETITIONER, *v.* CENTRAL TRUST COMPANY OF NEW YORK ET AL. April 26, 1909. Petition for a writ of cer-

tiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. James Byrne, Mr. Carl Taylor, Mr. L. L. Lewis* and *Mr. R. B. Davis* for petitioner. *Mr. Henry W. Anderson, Mr. Arthur H. Van Brunt, Mr. Hill Carter* and *Mr. John Pickrell* for respondents.

No. 809. H. MUELLER MANUFACTURING COMPANY, PETITIONER, *v.* JOSEPH H. GLAUBER. April 26, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles E. Pickard, Mr. A. H. Adams* and *Mr. J. L. Jackson* for petitioner. *Mr. Charles C. Linthicum* and *Mr. W. Clyde Jones* for respondent.

No. 812. O. J. HILL ET AL., PETITIONERS, *v.* GEORGE W. WALKER, ETC. April 26, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George B. Webster* and *Mr. Clayton E. Emig* for petitioners. No appearance for respondent.

No. 786. A. J. FENN, PETITIONER, *v.* W. H. LOUISELLE, ETC. May 3, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. A. Herbert, Mr. Benjamin Micou* and *Mr. Richard P. Whiteley* for petitioner. *Mr. Frank T. Myers* for respondent.

No. 794. CHARLES NICKELL, PETITIONER, *v.* THE UNITED STATES. May 3, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

denied. *Mr. Thomas O'Day* and *Mr. Martin L. Pipes* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 800. WALTER S. EDDY ET AL., ETC., PETITIONERS, *v.* CAROLINE M. EDDY. May 3, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Watts S. Humphrey* and *Mr. Benton Hanchett* for petitioners. *Mr. Alfred Lucking* for respondent.

No. 801. J. A. SCRIVEN COMPANY, PETITIONER, *v.* M. M. NEWCOMER ET AL. May 3, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Arthur von Briesen* and *Mr. George W. Case, Jr.*, for petitioner. *Mr. T. S. Webb* and *Mr. Lewis M. G. Baker* for respondents.

No. 806. THE SNARE & TRIEST COMPANY, PETITIONER, *v.* FANNIE FRIEDMAN, BY HER NEXT FRIEND, SAMUEL FRIEDMAN. May 3, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Hector M. Hitchings* for petitioner. No appearance for respondent.

No. 808. WILLIAM N. CAMP, PETITIONER, *v.* LAKE DRUMMOND CANAL & WATER COMPANY. May 3, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. H. Corbitt* and *Mr. T. D. Savage* for petitioner. *Mr. Theodore S. Garnett* for respondent.

No. 810. CLAUDE W. MASON, PETITIONER, *v.* THE UNITED STATES. May 3, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. G. A. Hanson* for petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Fowler* for respondent.

No. 811. POCAHONTAS COAL & COKE COMPANY, PETITIONER, *v.* JOSEPH S. GILLESPIE. May 3, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Joseph S. Clark* and *Mr. A. W. Reynolds* for petitioner. *Mr. Holmes Conrad* and *Mr. J. W. Chapman* for respondent.

No. 813. W. S. HARLAN ET AL., PETITIONERS, *v.* THE UNITED STATES. May 3, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William W. Flournoy* and *Mr. J. F. Stallings* for petitioners. *The Attorney General* and *Mr. Assistant Attorney General Russell* for respondent.

No. 814. ROBERT GALLAGHER ET AL., PETITIONERS, *v.* THE UNITED STATES. May 3, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William W. Flournoy* and *Mr. J. F. Stallings* for petitioners. *The Attorney General* and *Mr. Assistant Attorney General Russell* for respondent.

No. 815. E. L. VICKERS ET AL., PETITIONERS, *v.* THE UNITED STATES. May 3, 1909. Petition for a writ of cer-

tiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William W. Flournoy* for petitioners. *The Attorney General* and *The Solicitor General* for the respondents.

No. 816. FREDERICK J. LISMAN ET AL., PETITIONERS, *v.* MILWAUKEE, LAKE SHORE & WESTERN RAILWAY COMPANY ET AL. May 3, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. J. Darlington, Mr. Delos McCurdy* and *Mr. Charles K. Allen* for petitioners. *Mr. Edward M. Hyzer* for respondents.

No. 818. ILLINOIS CENTRAL RAILROAD COMPANY, PETITIONER, *v.* THE UNITED STATES. May 3, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edmund F. Trabue, Mr. J. C. Doolan, Mr. Attilla Cox, Jr.*, and *Mr. Blewett Lee* for petitioner. *The Attorney General* and *The Solicitor General* for respondent

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No. 832. ADOLPH KUFFLER, PETITIONER, *v.* HINSDALE, SMITH & COMPANY ET AL. May 3, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Max J. Kohler* for petitioner. *Mr. Benjamin Tuska* for respondents.

No. 821. LUFKIN LAND & LUMBER COMPANY, PETITIONER, *v.* BEAUMONT TIMBER COMPANY, LIMITED. May 17, 1909. Petition for a writ of certiorari to the United States

Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. P. Pujo* for petitioner. No appearance for respondent.

No. 833. J. I. CASE PLOW WORKS ET AL., PETITIONERS, *v.* BRYANT & BOND COMPANY. May 17, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. F. M. Etheridge* and *Mr. J. M. McCormick* for petitioners. No appearance for respondent.

No. 837. CENTRAL OF GEORGIA RAILWAY COMPANY, PETITIONER, *v.* THE RAILROAD COMMISSION OF ALABAMA ET AL. May 17, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Henry C. Cunningham, Mr. Alexander R. Lawton, Mr. T. M. Cunningham, Jr.,* and *Mr. R. E. Steiner* for petitioner. *Mr. Alexander M. Garber* and *Mr. Samuel D. Weakley* for respondents

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No. 838. THE WESTERN RAILWAY OF ALABAMA, PETITIONER, *v.* THE RAILROAD COMMISSION OF ALABAMA ET AL. May 17, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert E. Steiner* for petitioner. *Mr. Alexander M. Garber* and *Mr. Samuel D. Weakley* for respondents.

No. 841. SOUTH AND NORTH ALABAMA RAILROAD COMPANY, PETITIONER, *v.* THE RAILROAD COMMISSION OF ALABAMA ET AL. May 17, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth

Circuit denied. *Mr. Albert S. Brandeis, Mr. Gregory L. Smith, Mr. Henry L. Stone* and *Mr. George W. Jones* for petitioner. *Mr. Alexander M. Garber* and *Mr. Samuel D. Weakley* for respondents.

No. 842. NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, PETITIONER, *v.* THE RAILROAD COMMISSION OF ALABAMA ET AL. May 17, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Albert S. Brandeis, Mr. Gregory L. Smith, Mr. Henry L. Stone* and *Mr. George W. Jones* for petitioner. *Mr. Alexander M. Garber* and *Mr. Samuel D. Weakley* for respondents.

No. 843. LOUISVILLE & NASHVILLE RAILROAD COMPANY, PETITIONER, *v.* THE RAILROAD COMMISSION OF ALABAMA ET AL. May 17, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Albert S. Brandeis, Mr. Gregory L. Smith, Mr. Henry L. Stone* and *Mr. George W. Jones* for petitioner. *Mr. Alexander M. Garber* and *Mr. Samuel D. Weakley* for respondents.

No. 845. CENTRAL TRUST COMPANY OF NEW YORK, PETITIONER, *v.* THE RAILROAD COMMISSION OF ALABAMA ET AL. May 17, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Adrian H. Joline* for petitioner. *Mr. Alexander M. Garber* and *Mr. Samuel D. Weakley* for respondents.

No. 849. CORNELL STEAMBOAT COMPANY, OWNER, ETC., PETITIONER, *v.* WILLIAM K. HAMMOND ET AL. May 17, 1909.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin* and *Mr. Amos Van Etten* for petitioner. *Mr. James Emerson Carpenter* and *Mr. Samuel Park* for respondent.

No. 850. WEST INDIA STEAMSHIP COMPANY, PETITIONER, *v.* THE CLYDE COMMERCIAL STEAMSHIPS, LIMITED, OWNER, ETC. May 17, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles S. Haight* for petitioner. *Mr. J. Parker Kirlin* and *Mr. John M. Woolsey* for respondent.

No. 851. JOHN C. LYNCH, COLLECTOR OF INTERNAL REVENUE, PETITIONER, *v.* THE UNION TRUST COMPANY OF SAN FRANCISCO ET AL. May 17, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *The Attorney General* and the *Solicitor General* for petitioner. *Mr. H. T. Newcomb* for respondent. *Mr Barry Mohun*, for the Fidelity Trust Company, filed a brief as *amicus curiæ*.

No. 852. TANG TUN ET AL., PETITIONERS, *v.* HARRY EDSELL, CHINESE INSPECTOR, ETC. May 24, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. James A. Kerr* for petitioners. *The Attorney General* and *The Solicitor General* for respondent.

No. 885. THE UNITED STATES, PETITIONER, *v.* ALBERT ECKSTEIN. May 24, 1909. Petition for a writ of certiorari to

the United States Circuit Court of Appeals for the Second Circuit granted. *The Attorney General* and *The Solicitor General* for petitioner. *Mr. Albert H. Washburn* for respondent.

No. 886. A. H. GRIGSBY, PETITIONER, *v.* R. L. RUSSELL ET AL., ADMINISTRATORS, ETC. May 24, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. John A. Pitts* for petitioner. No appearance for respondents.

No. 853. A. D. CLARKE ET UX., PETITIONERS, *v.* T. W. HARRISON. May 24, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles A. Clark* for petitioners. *Mr. T. W. Harrison* for respondent.

No. 861. THE COLORADO & SOUTHERN RAILWAY COMPANY, PETITIONER, *v.* J. J. SATTERFIELD. May 24, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Elmer E. Whitted* for petitioner. *Mr. Cone Johnson* and *Mr. J. M. Edwards* for respondent.

No. 865. LEEDS & CATLIN COMPANY, PETITIONER, *v.* AMERICAN GRAPHOPHONE COMPANY. May 24, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Hicks* for petitioner. *Mr. Philip Mauro* and *Mr. C. A. L. Massie* for respondent.

No. 868. CITY OF OWOSSO, PETITIONER, *v.* WARREN BROTHERS COMPANY. May 24, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Henry N. Paul, Jr.*, and *Mr. Joseph C. Fraley* for petitioner. *Mr. W. K. Richardson* and *Mr. James M. Head* for respondent.

No. 872. THE NEW YORK PRODUCE EXCHANGE BANK, PETITIONER, *v.* ROBERT PATERSON HOUSTON ET AL., ETC. May 24, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. James E. Kelly* for petitioner. *Mr. J. Parker Kirlin* and *Mr. Charles R. Hickox* for respondents.

No. 875. THE UNITED STATES, PETITIONER, *v.* RUSCH & COMPANY; No. 876. THE UNITED STATES, PETITIONER, *v.* TITUS BLATTER & COMPANY; and No. 877. THE UNITED STATES, PETITIONER, *v.* W. B. QUAINTANCE. May 24, 1909. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *The Attorney General* and *The Solicitor General* for petitioner. *Mr. Albert H. Washburn* for respondents.

No. 879. THE TWEEDIE TRADING COMPANY, PETITIONER, *v.* WILLIAM S. WALSH ET AL.; and No. 880. THE TWEEDIE TRADING COMPANY, PETITIONER, *v.* THE STEAMSHIP HERM, ETC. May 24, 1909. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. George Hiram Mann* for petitioner. *Mr. J. Parker Kirlin* and *Mr. Charles R. Hickox* for respondents.

No. 882. W. FRANK KINNEY, COLLECTOR, ETC., PETITIONER, *v.* SAMUEL MORRIS CONANT ET AL., EXECUTORS, ETC. May 24, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *The Attorney General* and *The Solicitor General* for petitioner. *Mr. Walter F. Angell* and *Mr. Frank H. Swan* for respondents.

No. 884. CHARLES W. PINKNEY ET AL., ETC., PETITIONERS, *v.* THE CHURCH COOPERAGE COMPANY ET AL. May 24, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Harrington Putnam* for petitioners. *Mr. J. Parker Kirlin* and *Mr. Charles R. Hickox* for respondents.

No. 887. NORFOLK COLD STORAGE & ICE COMPANY, PETITIONER, *v.* NORFOLK & WESTERN RAILWAY COMPANY. May 24, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Floyd Hughes* and *Mr. J. L. Jeffries* for petitioner. *Mr. Theodore W. Reath, Mr. R. M. Hughes* and *Mr. John H. Holt* for respondent.

No. 889. THE STEAMSHIP MIRAMAR COMPANY, LIMITED, PETITIONER, *v.* THE MUNSON STEAMSHIP LINE. May 24, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin* and *Mr. Charles R. Hickox* for petitioner. *Mr. Charles S. Haight* for respondent.

No. 890. THE NEW YORK & PORTO RICO STEAMSHIP COMPANY, PETITIONER, *v.* ARCHIBALD H. BULL ET AL., OWNERS,

ETC. May 24, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederick M. Brown* for petitioner. *Mr. J. Parker Kirlin* and *Mr. Charles R. Hickox* for respondents.

No. 864. F. S. KRETSINGER, TRUSTEE, PETITIONER, *v.* JOHN H. BROWN, AS EXECUTOR, ETC., ET AL. June 1, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry T. Rogers* for petitioner. *Mr. Henry A. Dubbs* for respondents.

No. 896. THE UNITED STATES, PETITIONER, *v.* BERLINGER, BROWN & MEYER. June 1, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *The Attorney General* and *The Solicitor General* for petitioner. *Mr. Joseph G. Kammerlohr* for respondents.

No. 897. JOHNSON R. MORRIS, PETITIONER, *v.* THE UNITED STATES. June 1, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Shepard Barclay* and *Mr. Thomas T. Fauntleroy* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM FEBRUARY 24 TO JUNE 1, 1909.

No. 155. THE TEXAS & PACIFIC RAILWAY COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* B. F. ALLEN. In error to the Supreme Court of the State of Texas. February 24, 1909. Dis-

missed with costs on motion of *Mr. W. L. Hall*, for the plaintiffs in error. *Mr. John F. Dillon, Mr. D. D. Duncan* and *Mr. W. L. Hall* for plaintiffs in error. No appearance for defendant in error.

No. 119. ALBERT H. RUSCH, PLAINTIFF IN ERROR, *v.* THE ESCANABA TIMBER LAND COMPANY. In error to the Supreme Court of the State of Michigan. February 26, 1909. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. E. C. Chapin* and *Mr. O. H. Reed* for plaintiff in error. *Mr. C. C. Lancaster* for defendant in error.

No. 122. THE EDISON ELECTRIC COMPANY, APPELLANT, *v.* THE CITY OF PASADENA ET AL. Appeal from the Circuit Court of the United States for the Southern District of California. March 16, 1909. Dismissed with costs, on authority of counsel for appellant. *Mr. H. H. Trowbridge* for appellant. *Mr. C. J. Willett, Mr. William J. Hunsaker* and *Mr. J. P. Wood* for appellees.

No. 126. W. A. HUFF, INDIVIDUALLY AND AS TRUSTEE, ETC., ET AL., APPELLANTS, *v.* WILLIAM L. BIDWELL ET AL. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. March 17, 1909. Dismissed with costs, pursuant to the tenth rule. *Mr. Augustus O. Bacon* for appellants. *Mr. Minter Wimberly, Mr. Clifford L. Anderson, Mr. N. E. Harris, Mr. Thomas B. Felder, Jr.*, and *Mr. Olin J. Wimberly* for appellees.

No. 134. SANTA RITA MINING COMPANY, PLAINTIFF IN ERROR, *v.* JAMES N. UPTON. In error to the Supreme Court of the Territory of New Mexico. March 18, 1909. Dismissed

with costs, pursuant to the tenth rule. *Mr. W. B. Childers* for plaintiff in error. No appearance for appellee.

No. 460. THE GARFIELD MEMORIAL HOSPITAL, PLAINTIFF IN ERROR, *v.* HENRY B. F. MACFARLAND ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA. In error to the Court of Appeals of the District of Columbia. March 22, 1909. Dismissed with costs on motion of *Mr. James H. Hayden* for the plaintiff in error. *Mr. James H. Hayden* for plaintiff in error. No appearance for defendants in error.

No. 116. THE PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF THE NEW YORK ELECTRIC LINES CO., PLAINTIFFS IN ERROR, *v.* WILLIAM B. ELLISON, COMMISSIONER OF WATER SUPPLY, GAS, AND ELECTRICITY OF THE CITY OF NEW YORK ET AL. In error to the Supreme Court of the State of New York. April 5, 1909. Dismissed with costs on motion of *Mr. Frederic D. McKenney,* in behalf of counsel for the plaintiff in error. *Mr. W. B. Burnet* and *Mr. J. Aspinwall Hodge* for plaintiffs in error. *Mr. F. K. Pendleton* and *Mr. Theodore Connoly* for defendants in error.

No. 646. MARIA CRUZ DE GODINES ET AL., APPELLANTS, *v.* FRANCIS H. DEXTER. Appeal from the District Court of the United States for Porto Rico. April 5, 1909. Dismissed with costs on motion of *Mr. Frederic D. McKenney,* in behalf of counsel. *Mr. Willis Sweet* and *Mr. T. D. Mott, Jr.,* for appellants. No appearance for appellee.

No. 135. THE ORDER OF RAILROAD TELEGRAPHERS, APPELLANT, *v.* THE LOUISVILLE & NASHVILLE RAILROAD COM-

PANY. Appeal from the Circuit Court of the United States for the Western District of Kentucky. April 7, 1909. Dismissed with costs, pursuant to the sixteenth rule, on motion of *Mr. T. Kennedy Helm* for the appellee. *Mr. Benjamin F. Washer* for appellant. *Mr. James P. Helm, Mr. Henry L. Stone* and *Mr. Benjamin D. Warfield* for appellee.

No. 147. EMETERIO ALVAREZ, POTENCIA MARIANO ET AL., PLAINTIFFS IN ERROR, *v.* SEVERINA LERMA MARTINEZ DE ALMEDA. In error to the Supreme Court of the Philippine Islands. April 8, 1909. Dismissed with costs, pursuant to the tenth rule. *Mr. John M. Thurston* for plaintiffs in error. *Mr. Marion Butler, Mr. Josiah M. Vale* and *Mr. Lionel D. Hargis* for defendant in error.

No. 160. HUACHUCA WATER COMPANY, APPELLANT, *v.* THE CITY OF TOMBSTONE. Appeal from the Supreme Court of the Territory of Arizona. April 14, 1909. Dismissed with costs, pursuant to the tenth rule. *Mr. Allen R. English* for appellant. *Mr. H. L. Pickett* for appellee.

No. 186. THE LOUISVILLE & SOUTHERN INDIANA TRACTION COMPANY, PLAINTIFF IN ERROR, *v.* ZACH T. LEAF. In error to the Supreme Court of the State of Indiana. April 22, 1909. Dismissed with costs, pursuant to the tenth rule. *Mr. Merrill Moores* for plaintiff in error. *Mr. George E. Sullivan* and *Mr. Horace L. B. Atkisson* for defendant in error.

No. 595. GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Circuit Court of the United States for the Southern District of

New York. April 26, 1909. Dismissed on motion of counsel for plaintiff in error. *Mr. Joseph G. Dudley* for plaintiff in error. *The Attorney General* for defendant in error.

No. 195. C. Elmer Smith et al., Executors, etc., Appellants, *v.* The King of Arizona Mining & Milling Company et al. In error to the Supreme Court of the Territory of Arizona. April 27, 1909. Dismissed with costs, pursuant to the tenth rule. *Mr. J. F. Conroy* for appellants. *Mr. Eugene S. Ives* for appellees.

No. 199. Candido Acosta, Antonio Acosta, and Anselmo Acosta, Appellants, *v.* The People of Porto Rico. In error to the Supreme Court of Porto Rico. April 28, 1909. Dismissed with costs on motion of *Mr. George H. Lamar* in behalf of counsel for the appellants. *Mr. N. B. K. Pettingill* for appellants. No appearance for appellees.

No. 718. Century Mercantile Company, Plaintiff in Error, *v.* John Hofman Company. In error to the Court of Appeals of the State of New York. April 29, 1909. Judgment reversed upon confession of error and request of defendant in error, and cause remanded to be proceeded in according to law and justice. *Mr. Herbert D. Bailey* for plaintiff in error. *Mr. John A. Barhite* for defendant in error.

No. 211. Jacintho Miguel, Plaintiff in Error, *v.* The Territory of Hawaii. In error to the Supreme Court of the Territory of Hawaii. April 30, 1909. Dismissed with costs,

pursuant to the tenth rule. *Mr. Jacintho Miguel pro se.* No appearance for defendant in error.

No. 347. THE TEXAS & PACIFIC RAILWAY COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* W. H. TUCKER, GUARDIAN, ETC. In error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas. May 3, 1909. Judgment reversed with costs upon confession of error and request of defendant in error, and cause remanded to be proceeded in according to law and justice. *Mr. John F. Dillon* and *Mr. W. L. Hall* for plaintiffs in error. *Mr. Theodore Mack* for defendant in error.

No. 433. THE TOWN OF STEAMBOAT SPRINGS ET AL., APPELLANTS, *v.* THE STEAMBOAT SPRINGS ELECTRIC COMPANY. Appeal from the Circuit Court of the United States for the District of Colorado. May 17, 1909. Dismissed with costs on motion of counsel for appellants. *Mr. Edward P. Costigan* for appellants. *Mr. Tyson S. Dines, Mr. Elmer E. Whitted* and *Mr. Peter J. Holme* for appellee.

APPENDIX.

RULES FOR PRACTICE AND PROCEDURE UNDER SECTION 25 OF AN ACT TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT, APPROVED MARCH 4, 1909, TO TAKE EFFECT JULY 1, 1909, CHAPTER 320, 35 STAT. 1075, AND PROMULGATED BY THE SUPREME COURT OF THE UNITED STATES, JUNE 1, 1909.[1]

Rules adopted by the Supreme Court of the United States for practice and procedure under section 25 of an act to amend and consolidate the acts respecting copyright, approved March 4, 1909. Chapter 320, 35 Stat. 1075. To go into effect July 1, 1909.[2]

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[1] October Term, 1908. Order. June 1, 1909.

It is now here ordered by the court that the Rules for Practice and Procedure under Section 25 of the Act to amend and consolidate the Acts respecting Copyright, approved March 4, 1909, to go into effect July 1, 1909, this day adopted and established by the court, be, and the same are hereby, promulgated as such.

[2] SEC. 25. That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) To an injunction restraining such infringement;

(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed

1.

The existing rules of equity practice, so far as they may be applicable, shall be enforced in proceedings instituted under section twenty-five (25) of the Act of March fourth, nineteen

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the sum of two hundred dollars nor be less than the sum of fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty:

First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section five of this Act, except a painting, statue or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance;

(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

(d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order;

(e) Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section one, subsection (e), of this Act: *Provided also*, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments

hundred and nine, entitled "An act to amend and consolidate the acts respecting copyright."

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serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this Act, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section one, subsection (e), by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

Rules and regulations for practice and procedure under this section shall be prescribed by the Supreme Court of the United States.

Sections 26, 27 and 34 to 40 of the Copyright Act of March 4, 1909, are as follows:

SEC. 26. That any court given jurisdiction under section thirty-four of this Act may proceed in any action, suit, or proceeding instituted for violation of any provision hereof to enter a judgment or decree enforcing the remedies herein provided.

SEC. 27. That the proceedings for an injunction, damages, and profits, and those for the seizure of infringing copies, plates, molds, matrices, and so forth, aforementioned, may be united in one action.

SEC. 34. That all actions, suits, or proceedings arising under the copyright laws of the United States shall be originally cognizable by the Circuit Courts of the United States, the district court of any Territory, the supreme court of the District of Columbia, the district courts of Alaska, Hawaii, and Porto Rico, and the courts of first instance of the Philippine Islands.

SEC. 35. That civil actions, suits, or proceedings arising under this Act may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found.

SEC. 36. That any such court or judge thereof shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by said laws, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this Act may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by

2.

A copy of the alleged infringement of Copyright, if actually made, and a copy of the work alleged to be infringed, should accompany the petition, or its absence be explained; except in cases of alleged infringement by the public performance of dramatic and dramatico-musical compositions, the delivery of lectures, sermons, addresses, and so forth, the infringement of copyright upon sculptures and other similar works and in any case where it is not feasible.

3.

Upon the institution of any action, suit or proceeding, or at any time thereafter, and before the entry of final judgment or decree therein, the plaintiff or complainant, or his authorized agent or attorney, may file with the Clerk of any Court given jurisdiction under section 34 of the Act of March 4, 1909, an affidavit stating upon the best of his knowledge, information and belief, the number and location, as near as may be, of the alleged infringing copies, records, plates, molds, matrices, etc.,

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proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants.

SEC. 37. That the clerk of the court, or judge granting the injunction, shall, when required so to do by the court hearing the application to enforce said injunction, transmit without delay to said court a certified copy of all the papers in said cause that are on file in his office.

SEC. 38. That the orders, judgments, or decrees of any court mentioned in section thirty-four of this Act arising under the copyright laws of the United States may be reviewed on appeal or writ of error in the manner and to the extent now provided by law for the review of cases determined in said courts, respectively.

SEC. 39. That no criminal proceeding shall be maintained under the provisions of this Act unless the same is commenced within three years after the cause of action arose.

SEC. 40. That in all actions, suits, or proceedings under this Act, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.

or other means for making the copies alleged to infringe the copyright, and the value of the same, and with such affidavit shall file with the Clerk a bond executed by at least two sureties and approved by the Court or a Commissioner thereof.

4.

Such bond shall bind the sureties in a specified sum, to be fixed by the Court, but not less than twice the reasonable value of such infringing copies, plates, records, molds, matrices, or other means for making such infringing copies, and be conditioned for the prompt prosecution of the action, suit or proceeding; for the return of said articles to the defendant, if they or any of them are adjudged not to be infringements, or if the action abates, or is discontinued before they are returned to the defendant; and for the payment to the defendant of any damages which the Court may award to him against the plaintiff or complainant. Upon the filing of said affidavit and bond, and the approval of said bond, the clerk shall issue a writ directed to the Marshal of the district where the said infringing copies, plates, records, molds, matrices, etc., or other means of making such infringing copies shall be stated in said affidavit to be located, and generally to any Marshal of the United States, directing the said Marshal to forthwith seize and hold the same subject to the order of the Court issuing said writ, or of the Court of the district in which the seizure shall be made.

5.

The Marshal shall thereupon seize said articles or any smaller or larger part thereof he may then or thereafter find, using such force as may be reasonably necessary in the premises, and serve on the defendant a copy of the affidavit, writ and bond by delivering the same to him personally, if he can be found within the district, or if he cannot be found, to his agent, if any, or to the person from whose possession the articles are taken, or if the owner, agent, or such person cannot be found

within the district, by leaving said copy at the usual place of abode of such owner or agent, with a person of suitable age and discretion, or at the place where said articles are found, and shall make immediate return of such seizure, or attempted seizure, to the Court. He shall also attach to said articles a tag or label stating the fact of such seizure and warning all persons from in any manner interfering therewith.

6.

A Marshal who has seized alleged infringing articles, shall retain them in his possession, keeping them in a secure place, subject to the order of the Court.

7.

Within three days after the articles are seized, and a copy of the affidavit, writ and bond are served as hereinbefore provided, the defendant shall serve upon the clerk a notice that he excepts to the amount of the penalty of the bond, or to the sureties of the plaintiff or complainant, or both, otherwise he shall be deemed to have waived all objection to the amount of the penalty of the bond and the sufficiency of the sureties thereon. If the Court sustain the exceptions it may order a new bond to be executed by the plaintiff or complainant, or in default thereof within a time to be named by the Court, the property to be returned to the defendant.

8.

Within ten days after service of such notice, the attorney of the plaintiff or complainant shall serve upon the defendant or his attorney a notice of the justification of the sureties, and said sureties shall justify before the Court or a Judge thereof at the time therein stated.

9.

The defendant, if he does not except to the amount of the penalty of the bond or the sufficiency of the sureties of the

plaintiff or complainant, may make application to the Court for the return to him of the articles seized, upon filing an affidavit stating all material facts and circumstances tending to show that the articles seized are not infringing copies, records, plates, molds, matrices, or means for making the copies alleged to infringe the copyright.

10.

Thereupon the Court in its discretion, after such hearing as it may direct, may order such return upon the filing by the defendant of a bond executed by at least two sureties, binding them in a specified sum to be fixed in the discretion of the Court, and conditioned for the delivery of said specified articles to abide the order of the Court. The plaintiff or complainant may require such sureties to justify within ten days of the filing of such bond.

11.

Upon the granting of such application and the justification of the sureties on the bond, the Marshal shall immediately deliver the articles seized to the defendant.

12.

Any service required to be performed by any Marshal may be performed by any deputy of such Marshal.

13.

For services in cases arising under this section, the Marshal shall be entitled to the same fees as are allowed for similar services in other cases.

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See NAVIGABLE WATERS, 3.

ACCOUNTS AND ACCOUNTING.

Quære, Whether failure to give credit for vouchers because of misrepresentation as to part of the amount represented by the vouchers is the enforcement of a statutory rule of accounting under the act of July 4, 1884, c. 180, 23 Stat. 97, or the imposition of a penalty. *United States Fidelity & Guaranty Co.* v. *United States*, 507.

See CONSTITUTIONAL LAW, 9.

ACCRETION.

See BOUNDARIES, 2.

ACTIONS.

Nature of probate proceeding as proceeding in rem.

A probate proceeding by which jurisdiction of the probate court is asserted over a decedent's estate for the purpose of administration is in the nature of a proceeding *in rem*, as to which all the world is charged with notice; the law of California conforms to this rule. *Goodrich* v. *Ferris*, 71.

See ATTACHMENT; CONSTITUTIONAL LAW, 4; COURTS, 2, 3; EJECTMENT; JURISDICTION, B; PENALTIES AND FORFEITURES.

ACTS OF CONGRESS.

ALIEN IMMIGRATION ACT of March 3, 1903, § 9 (see Immigration): *Oceanic Navigation Co.* v. *Stranahan*, 320; (see Penalties and Forfeitures): *Ib.*

CLAIMS AGAINST UNITED STATES, Act of February 17, 1903 (see Mandamus, 5): *Parish* v. *MacVeagh*, 124.

COPYRIGHT, Rev. Stat. § 4952, as amended by act of March 3, 1891 (see Copyright, 1, 2, 3): *Bong* v. *Campbell Art Co.*, 236.

DISTRICT OF COLUMBIA, Act of May 19, 1896, relative to drainage (see Constitutional Law, 12): *District of Columbia* v. *Brooke*, 138.

EXTRADITION, Rev. Stat. § 5278 (see Extradition, 1, 2): *Compton* v. *Alabama*, 1.

INTERSTATE COMMERCE, Rev. Stat. § 5258 (see Constitutional Law, 2): *Adams Express Co.* v. *Kentucky*, 218. Wilson Act of August 8, 1890 (see Commerce): *Ib.*

JUDICIAL SALES, Act of February 16, 1839, § 4 (see Jurisdiction, A 12): *Rogers* v. *Jones*, 196.

JUDICIARY, Rev. Stat. § 709 (see Constitutional Law, 15): *Welch* v. *Swasey*, 91; (see Jurisdiction, A 3): *Chesapeake & Ohio Ry. Co.* v. *McDonald*, 191. Section 766 (see Contempt of Court, 3): *United States* v. *Shipp*, 386.

NATIONAL BANKS, Rev. Stat. § 3411 (see Banks and Banking, 1, 2): *Merchants' Nat. Bank* v. *United States*, 33. Section 5214 (see Banks and Banking, 2): *Ib.* Sections 3411 and 5214 (see Statutes, A 3): *Ib.*

PILOTAGE, Rev. Stat. § 4236, Act of March 2, 1837 (see Pilotage, 2, 3): *Leech* v. *Louisiana*, 175.

PUBLIC OFFICERS, Act of July 4, 1884 (see Accounts and Accounting): *United States Fidelity & Guaranty Co.* v. *United States*, 507. Rev. Stat. § 1765 (see Public Officers, 1): *Woodwell* v. *United States*, 82.

ADMINISTRATION.

See ACTIONS;
CONSTITUTIONAL LAW, 9.

ADMISSION OF ALIENS.

See CONGRESS, POWERS OF, 1.

ALIENS.

See CONGRESS, POWERS OF, 1.

ALIEN IMMIGRATION.

See IMMIGRATION;
PENALTIES AND FORFEITURES.

AMBIGUITIES.

See STATUTES, A 2.

AMENDMENTS TO CONSTITUTION.

Fifth. See CONSTITUTIONAL LAW, 6;
Fourteenth. See CONGRESS, POWERS OF, 3;
CONSTITUTIONAL LAW, 9, 11, 13.

AMOUNT IN CONTROVERSY.

See JURISDICTION, A 1, 2; B.

APPARATUS.

See PATENTS, 4.

APPEAL AND ERROR.

Right to appeal or writ of error to this court in cases originating in United States court in Indian Territory.

On authority of *Laurel Oil Co.* v. *Morrison*, 212 U. S. 291, writ of error to review a judgment of the Circuit Court of Appeals for the Eighth Circuit in a case coming from the United States court for the Indian Territory dismissed. *Sass & Crawford* v. *Thomas*, 489.

See ABATEMENT;
JURISDICTION;
MANDAMUS, 1, 2.

APPLIANCES.

See MASTER AND SERVANT.

ARREST.

See EXTRADITION, 1.

ASSESSMENT AND TAXATION.

1. *Benefit of assessment work a question of fact.*

The question of special benefit of assessment work and property to which it extends is one of fact. (*Stanley* v. *Supervisors*, 121 U. S. 535, 550.) *English* v. *Arizona*, 359.

2. *Notice of report of commissioners; property owners charged with.*

Property owners who have been duly notified of the meeting of commissioners in regard to a public improvement and assessment therefor are bound to take notice of the subsequent presentation in conformity with law of the report of such commissioners. (*Lander* v. *Mercantile National Bank*, 186 U. S. 458.) *Ib.*

3. *Estoppel to attack legality of assessment.*

One who promotes an improvement and appears before the commission to protest against the amount of the assessment on his property is precluded from attacking the legality of the assessment on the ground that he had no notice. (*Wight* v. *Davidson*, 181 U. S. 371.) *Ib.*

See JURISDICTION, B.

ASSIGNMENT.

See COPYRIGHT, 1, 2.

ATTACHMENT.

As incident of suit. Where suit cannot be maintained attachment falls with it.

In the courts of the United States attachment is but an incident to a suit and falls unless the suit can be maintained, *Ex parte Railway Co.*, 103 U. S. 794; and, unless the court has jurisdiction over the person of the defendant, the suit cannot be maintained. *Laborde* v. *Ubarri*, 173.

See LOCAL LAW (PORTO RICO, 4).

BANKRUPTCY.

1. *Preferences; payments made on open account as.*

Where a creditor, who had no knowledge of the debtor's insolvency, has a claim upon an open account for goods sold and delivered during the period of four months before the adjudication in bankruptcy, the account being made of debts and credits, leaving a net amount due from the bankrupt estate, the payments made under such circumstances do not constitute preferences which the creditor is bound to surrender before proving his claim. *Yaple* v. *Dahl-Millikan Grocery Co.*, 193 U. S. 526, followed; *Pirie* v. *Trust Co.*, 182 U. S. 438, distinguished. *Wild* v. *Provident Trust Co.*, 292.

2. *Trustee's title.*

The trustee has no higher rights in regard to property sold to the bankrupt under conditional sale than the bankrupt had, and in this case *held* that the vendor was entitled to the goods unsold and the identified proceeds of those which had been sold. *Bryant* v. *Swofford Bros.*, 279.

3. *Trustee bound by agreement between receiver and vendor of goods relative to their disposition.*

Where the vendor of goods, sold to the bankrupt under conditional sale, has taken possession, before the receiver is appointed, of the unsold goods and proceeds of those sold, but surrenders the same to the receiver under an arrangement approved by the referee, providing for the administration of the estate by the receiver, and that the ultimate disposition of the goods and proceeds surrendered shall be determined by the court, the trustee subsequently appointed is bound by the agreement and cannot question whether any of the property surrendered thereunder passed under the conditional sale. *Ib.*

See JURISDICTION, A 16; PRACTICE AND PROCEDURE, 1; MANDAMUS, 2, 3; VENDOR AND VENDEE, 2.

BANKS AND BANKING.

1. *Application of exemption in* § 3411, *Rev. Stat.*

The provisions in § 3411, Rev. Stat., exempting banks from taxation on circulation, does not relate to national banks but to state banks only. *Merchants' Nat. Bank* v. *United States*, 33.

2. *National banks—Application of* §§ 3411, 5214, *Rev. Stat. Exemption from taxation.*

One of the public policies of the National Bank Act was to secure the public credit and encourage the issue of notes to circulate as currency founded upon United States bonds, and § 3411 will not be construed as intending to exempt those national banks that allowed their circulation to fall below five per cent of their capital from the taxation provided by § 5214 to create a fund to bear the burden common to all national banks for engraving and printing the notes. *Ib.*

3. *Right of United States to recover from bank money obtained on forged pension checks.*

The United States can recover from a bank presenting pension checks to, and receiving the money therefor from, a sub-treasury, where the names of the payees have been forged; and the right to recover is not conditioned upon either demand or the giving of notice of the discovery of facts which by the operation of the legal warranty were presumably within the knowledge of the bank. *United States* v. *Nat. Exchange Bank*, 302.

See STATUTES, A 3.

BENEFITS.

See ASSESSMENT AND TAXATION, 1.

BILL OF REVIEW.

Motions for leave to file petitions for leave to file bills of review in the lower court denied. Gila Bend Reservoir Co. v. *Linn*, 491.

BILL OF SALE.

See EVIDENCE;
GUARANTY, 1.

BONDS.

Official; recovery on.

Judgment of the lower court against a surety on the official bond of an Indian agent affirmed without opinion by a divided court. *United States Fidelity & Guaranty Co.* v. *United States*, 507.

BOUNDARIES.

1. *Water; when river ceases to be boundary.*

Neither continuity of water nor identity of name will make a river a boundary river except where it flows between the States it separates for a part of its course; it ceases to be a boundary river wherever it is wholly within one State. *Leech* v. *Louisiana*, 175.

2. *Water—Channel of river as; effect of diminution in volume of water.*

Although the volume of water and depth of a channel have constantly diminished, if it all results from process of accretion, or, as in this case, possibly from jetties constructed by governmental authority, that channel still remains the boundary line, the precise line of separation being the varying center thereof. *Washington* v. *Oregon*, 205.

3. *Commissions and agreements to adjust.*

The settlement of boundaries is generally attended with difficulties and it is wise for adjacent States to adjust their boundaries by boundary commissions and agreements as has been done with the consent of Congress in several instances. *Ib.*

See PILOTAGE, 2.

BUILDING REGULATIONS.

See CONSTITUTIONAL LAW, 7, 8, 13;
STATUTES, A 7, 8.

CARRIERS.

See COMMON CARRIERS.

CASES APPROVED.

Hoffman House v. *Foote*, 172 N. Y. 348, approved in *Bong* v. *Campbell Art Co.*, 236.

Morrison v. *Smith*, 177 N. Y. 366, approved in *Peck* v. *Tribune Company*, 185.

Wandt v. *Hearst's Chicago American*, 129 Wis. 419, approved in *Peck* v. *Tribune Co.*, 185.

White v. *Continental National Bank*, 64 N. Y. 316, approved in *United States* v. *Nat. Exchange Bank*, 302.

CASES DISTINGUISHED.

Bate Refrigerating Co. v. *Sulzberger*, 157 U. S. 1, distinguished in *Merchants' Nat. Bank* v. *United States*, 33.

Hamilton v. *Rathbone*, 175 U. S. 418, distinguished in *Merchants' Nat. Bank* v. *United States*, 33.

Munn v. *Illinois*, 94 U. S. 113, distinguished in *Weems Steamboat Co.* v. *People's Steamboat Co.*, 345.

Pirie v. *Trust Co.*, 182 U. S. 438, distinguished in *Wild* v. *Provident Trust Co.*, 292.

Risdon Locomotive Works v. *Medart*, 158 U. S. 68, distinguished in *Expanded Metal Co.* v. *Bradford*, 366.

Roller v. *Holly*, 176 U. S. 398, distinguished in *Goodrich* v. *Ferris*, 71.

Wong Wing v. *United States*, 163 U. S. 228, distinguished in *Oceanic Navigation Co.* v. *Stranahan*, 320.

CASES EXPLAINED.

Transportation Co. v. *Parkersburg*, 107 U. S. 691, explained in *Weems Steamboat Co.* v. *People's Steamboat Co.*, 345.

CASES FOLLOWED.

Atlantic Coast Line v. *Wharton*, 207 U. S. 328, followed in *Adams Express Co.* v. *Kentucky*, 218.

Bellingham Bay Co. v. *New Whatcom*, 172 U. S. 314, followed in *Goodrich* v. *Ferris*, 71.

Buttfield v. *Stranahan*, 192 U. S. 470, followed in *Oceanic Navigation Co.* v. *Stranahan*, 320.

Chicago & Alton Railroad v. *Wiggins Ferry Co.*, 119 U. S. 615, followed in *Smithsonian Institution* v. *St. John*, 19.

Chicago, Burlington & Quincy Ry. Co. v. *Williams*, 205 U. S. 444, followed in *Same* v. *Same*, 492.

Choctaw & Oklahoma R. R. v. *McDade*, 191 U. S. 64, followed in *Kreigh* v. *Westinghouse & Co.*, 249.

Cochrane v. *Deener*, 94 U. S. 780, followed in *Expanded Metal Co.* v. *Bradford*, 366.

Coder v. *Arts*, 213 U. S. 223, followed in *Logan* v. *Farmers' Deposit Nat. Bank*, 500.

Copper Queen Mining Co. v. *Arizona Board*, 206 U. S. 474, followed in *English* v. *Arizona*, 359.

Cross v. *Harrison*, 16 How. 164, followed in *Santiago* v. *Nogueras*, 260.

Delaware, The, 161 U. S. 459, followed in *Oceanic Navigation Co.* v. *Stranahan*, 320.

Deserant v. *Cerillos Coal R. R. Co.*, 178 U. S. 409, followed in *Kreigh* v. *Westinghouse & Co.*, 249.

Ex parte Railway Co., 103 U. S. 794, followed in *Laborde* v. *Ubarri*, 173.

Farrell v. *O'Brien*, 199 U. S. 100, followed in *Goodrich* v. *Ferris*, 71.

Field v. *Barber Asphalt Co.*, 194 U. S. 618, followed in *District of Columbia* v. *Brooke*, 138.

Fort Leavenworth R. R. Co. v. *Lowe*, 114 U. S. 525, followed in *Western Union Telegraph Co.* v. *Chiles*, 274.

Fox v. *Haarstick*, 156 U. S. 674, followed in *English* v. *Arizona*, 359.
Friend v. *Wise*, 111 U. S. 797, followed in *Tupiño* v. *Campania de Tabacos*, 268.
Gardner v. *Michigan Cent. R. R.*, 150 U. S. 349, followed in *Kreigh* v. *Westinghouse & Co.*, 249.
Harding v. *Illinois*, 196 U. S. 78, followed in *Chesapeake & Ohio Ry. Co.* v. *McDonald*, 191.
Hepner v. *United States*, 213 U. S. 103, followed in *Oceanic Navigation Co.* v. *Stranahan*, 320.
Lander v. *Mercantile National Bank*, 186 U. S. 458, followed in *English* v. *Arizona*, 359.
Laurel Oil Co. v. *Morrison*, 212 U. S. 291, followed in *Sass & Crawford* v. *Thomas*, 489.
Leather Manufacturers' Bank v. *Merchants' National Bank*, 128 U. S. 26, followed in *United States* v. *Nat. Exchange Bank*, 302.
Leeds & Catlin v. *Victor Talking Machine Co.*, 213 U. S. 301, followed in *Expanded Metal Co.* v. *Bradford*, 366.
Leisy v. *Hardin*, 135 U. S. 100, followed in *Adams Express Co.* v. *Kentucky*, 218.
Leitensdorfer v. *Webb*, 20 How. 176, followed in *Santiago* v. *Nogueras*, 260.
Loom Co. v. *Higgins*, 105 U. S. 580, followed in *Expanded Metal Co.* v. *Bradford*, 366.
Louisville & Nashville Ry. Co. v. *West Coast Naval Stores Co.*, 198 U. S. 483, followed in *Weems Steamboat Co.* v. *People's Co.*, 345.
McCray v. *United States*, 195 U. S. 27, followed in *Oceanic Navigation Co.* v. *Stranahan*, 320.
Northern Pacific Railway v. *Duluth*, 208 U. S. 583, followed in *St. Paul, Minn. & Man. Ry. Co.* v. *Minnesota*, 497.
Northern Pacific R. R. Co. v. *Smith*, 171 U. S. 260, followed in *Donohue* v. *El Paso & Southwestern R. R.*, 499.
Oceanic Navigation Co. v. *Stranahan*, 214 U. S. 320, followed in *International Co.* v. *Stranahan*, 344.
Re Moore, 209 U. S. 490, followed in *Kreigh* v. *Westinghouse & Co.*, 249.
Re Pollitz, 206 U. S. 323, followed in *Matter of Riggs*, 9.
Re Winn, 213 U. S. 458, followed in *Matter of Riggs*, 9.
Rhodes v. *Iowa*, 170 U. S. 412, followed in *Adams Express Co.* v. *Kentucky*, 218.
Riverside Oil Co. v. *Hitchcock*, 190 U. S. 316, followed in *Parish* v. *MacVeagh*, 124.
Roberts v. *Northern Pacific R. R. Co.*, 158 U. S. 1, followed in *Donohue* v. *El Paso & Southwestern R. R.*, 499.
Rogers v. *Alabama*, 192 U. S. 226, followed in *Smithsonian Institution* v. *St. John*, 19.

Santa Fe & Pacific R. R. v. *Holmes*, 202 U. S. 438, followed in *Kreigh* v. *Westinghouse & Co.*, 249.
Slide & Spur Mines v. *Seymour*, 153 U. S. 509, followed in *Dupree* v. *Mansur*, 161.
Stanley v. *Supervisors*, 121 U. S. 535, followed in *English* v. *Arizona*, 359.
Tupper v. *Wise*, 110 U. S. 398, followed in *Tupiño* v. *Compania de Tabacos*, 268.
Ubarri v. *Laborde*, 214 U. S. 168, followed in *Laborde* v. *Ubarri*, 173.
United States v. *Ju Toy*, 198 U. S. 253, followed in *Oceanic Navigation Co.* v. *Stranahan*, 320.
United States v. *Rauscher*, 119 U. S. 407, followed in *Collins* v. *O'Neil*, 113.
Vance v. *Vandercook, No.* 1, 170 U. S. 438, followed in *Adams Express Co.* v. *Kentucky*, 218.
Western Loan Co. v. *Butte Co.*, 210 U. S. 368, followed in *Kreigh* v. *Westinghouse & Co.*, 249.
Western Turf Association v. *Greenberg*, 204 U. S. 359, followed in *Adams Express Co.* v. *Kentucky*, 218.
Williamson v. *United States*, 207 U. S. 425, followed in *Bong* v. *Campbell Art Co.*, 236.
Wight v. *Davidson*, 181 U. S. 371, followed in *English* v. *Arizona*, 359.
Yaple v. *Dahl-Millikan Grocery Co.*, 193 U. S. 526, followed in *Wild* v. *Provident Trust Co.*, 292.
York Manuf. Co. v. *Cassell*, 201 U. S. 344, followed in *Bryant* v. *Swofford Bros.*, 279.

CEDED TERRITORY

See TERRITORIES, 1, 2.

CERTIFICATE.

See JURISDICTION, A 17.

CERTIORARI.

The writs of certiorari in these cases bring conflicting decisions of the Circuit Courts of Appeals to this court for review. *Expanded Metal Co.* v. *Bradford*, 366.

CHECKS.

See COMMERCIAL PAPER, 2.

CIRCUIT COURTS.

See JURISDICTION, A 5; B.

CIRCUIT COURT OF APPEALS.
See JURISDICTION, A 16.

CITIZENSHIP.
See COPYRIGHT, 1, 3.

CLAIMS.
See BANKRUPTCY, 1.

CLAIMS AGAINST UNITED STATES.
See MANDAMUS, 4, 5, 7.

CLASSIFICATION.
See CONSTITUTIONAL LAW, 10, 11;
STATUTES, A 8.

COLLATERAL ATTACK.
See PORTO RICO, 4.

COLLECTOR OF PORT.
See PAYMENT.

COMBINATION OF ELEMENTS.
See PATENTS, 2, 3.

COMMERCE.
Interstate; when transportation completed; when state laws attach under Wilson Act.
Transportation of an article in interstate commerce is not completed until the article is delivered to the consignee; and the Wilson Act of August 8, 1890, c. 728, 26 Stat. 313, does not cause state laws to attach to an interstate shipment until the completion of the transit by delivery to the consignee. (*Rhodes* v. *Iowa*, 170 U. S. 412.) *Adams Express Co.* v. *Kentucky*, 218.
See CONSTITUTIONAL LAW, 1, 2, 3.

COMMERCIAL PAPER.
1. *Rule that one having knowledge of genuine signature cannot recover for money obtained on forged signature not applicable to United States in respect of pension checks.*
The United States is not chargeable with the knowledge of the signatures of the vast numbers of persons entitled to receive pensions,

and the exceptional rule as to certain classes of commercial paper that the person having knowledge of the genuine signature of the payee whose signature is forged is negligent in paying on such an indorsement and therefore cannot recover, does not apply to the United States in regard to pension checks. *Leather Manufacturers' Bank* v. *Merchants' National Bank*, 128 U. S. 26, approving *White* v. *Continental National Bank*, 64 N. Y. 316, followed. *United States* v. *Nat. Exchange Bank*, 302.

2. *Character of government pension checks.*

Quære and not decided whether government pension checks are official warrants or are checks and, as such, subject to the general rules of commercial paper as between private parties. *Ib.*

COMMON CARRIERS.

Compensation to which entitled—Extra services.

A carrier which is at service and expense in stopping goods in transit for inspection and reloading for the benefit of the shipper is entitled to compensation in addition to the actual expense incurred. *Southern Ry. Co.* v. *St. Louis Hay Co.*, 297.

COMPENSATION OF PUBLIC OFFICERS.

See PUBLIC OFFICERS, 1.

CONDEMNATION OF LAND.

See JURISDICTION, A 15.

CONDITIONAL SALES.

See BANKRUPTCY, 2, 3;
VENDOR AND VENDEE, 1, 2.

CONGRESS, POWERS OF.

1. *Alien immigration.*

Congress has power to deal with the admission of aliens and to confide the enforcement of laws in regard thereto to administrative officers. (*United States* v. *Ju Toy*, 198 U. S. 253.) *Oceanic Steam Navigation Co.* v. *Stranahan*, 320.

2. *Imposition of penalties and delegation of enforcement thereof to executive officers.*

It is within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penal-

ties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power. *Ib.*

3. *Power to enact discriminatory legislation as to the District of Columbia.*
If the power of Congress to enact discriminatory legislation as to the District of Columbia is limited either expressly or by implication, the prohibition cannot be stricter or more extensive than the due process and equal protection clauses of the Fourteenth Amendment are upon the States. *District of Columbia* v. *Brooke*, 138.

4. *Police power in District of Columbia; quære as to.*
Quære, and not decided, whether there is any prohibition on Congress from enacting discriminatory legislation, and whether, in the absence of any express prohibition to that effect any prohibition can be implied, especially in regard to the exercise of police power in the District of Columbia. See *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, as to power of Congress to enact discriminatory legislation under the commerce clause of the Constitution. *Ib.*

See CONSTITUTIONAL LAW, 6; COURTS, 7, 8; DRAINAGE, 1; IMMIGRATION; PENALTIES AND FORFEITURES; PILOTAGE, 1; POLICE POWER, 2; PORTO RICO, 1; UNITED STATES, 2.

CONGRESS, ACTS OF.

See ACTS OF CONGRESS.

CONQUERED TERRITORY.

See PORTO RICO, 1, 2; TERRITORIES, 1, 2.

CONSTITUTIONAL LAW.

1. *Commerce clause; conflict of state law denying interstate transportation of liquor.*
However obnoxious and hurtful, in the judgment of many, liquor may be, it is a recognized article of commerce, *Leisy* v. *Hardin*, 135 U. S. 100; and a state law denying the right to send it from one State to another is in conflict with the commerce clause of the Constitution of the United States. (*Vance* v. *Vandercook Co., No.* 1, 170 U. S. 438.) *Adams Express Co.* v. *Kentucky*, 218.

2. *Commerce clause; repugnancy of exercise of state authority directly regulating interstate commerce.*
Congress has by § 5258, Rev. Stat., authorized every railroad com-

pany in the United States to carry all passengers and freight over its road from one State to another State and receive compensation therefor; and any exercise of state authority directly regulating interstate commerce is repugnant to the commerce clause of the Constitution. (*Atlantic Coast Line* v. *Wharton*, 207 U. S. 328.) *Ib.*

3. *Commerce clause; repugnancy of* § 1307 *of Statutes of Kentucky of* 1903 *relative to sale, etc., of liquors.*

Section 1307 of the Statutes of Kentucky of 1903 making it an offense to furnish, sell or give liquor to any person who is an inebriate, as applied to a common carrier bringing the liquor to such a person from another State, is an attempted regulation of interstate commerce, and, as such, is in conflict with the commerce clause of the Constitution of the United States and void. *Ib.*

See CONGRESS, POWERS OF, 4.

4. *Contract impairment—Effect of resolution of municipal council relative to removal and replacement of street railway tracks.*

A resolution of a municipal council, directing a street railway company to remove and replace tracks and wires, and, in case of failure to comply, instructing the City Solicitor to take such action as he deems advisable to enforce the resolution, amounts only to direction to bring a suit; and, even if contract rights should be violated if the resolution were enforced, the resolution does not of itself amount to an ordinance or law impairing the obligation of contracts and the Circuit Court has no jurisdiction of a suit to enjoin its enforcement. *Des Moines* v. *City Railway Co.*, 179.

See Infra, 17.

5. *Due process of law—Right to hearing of persons on whom penalty imposed by executive officer under authority of Congress.*

The greater includes the less and where Congress has power to sanction a prohibition by penalties enforcible by executive officers without judicial trial on the ascertainment in a prescribed manner of certain facts, the person upon whom the penalty is imposed is not entitled to any hearing in the sense of raising an issue and tendering evidence as to the facts so ascertained, and is not, therefore, denied due process because the time which the executive officer allows him after notice of the ascertainment and imposition to produce evidence as to certain facts on which the fine might be remitted is too short. *Oceanic Navigation Co.* v. *Stranahan*, 320.

6. *Due process of law—Imposition of penalty by executive officer.*

The imposition of a penalty by an executive officer when authorized by Congress in a matter wholly within its competency, such as alien immigration, is not unconstitutional under the Fifth Amendment as taking property without due process of law. *Ib.*

7. *Due process of law; compensation for interference with property under statute limiting height of buildings.*

Where there is justification for the enactment of a police statute limiting the height of buildings in a particular district, an owner of property in that district is not entitled to compensation for the reasonable interference with his property by the statute. *Welch* v. *Swasey*, 91.

8. *Due process of law; deprivation of property without; limitation of height of buildings.*

A statute limiting the height of buildings cannot be justified under the police power unless it has some fair tendency to accomplish, or aid in the accomplishment of, some purpose for which that power can be used; if the means employed, pursuant to the statute, have no real substantial relation to such purpose, or if the statute is arbitrary, unreasonable and beyond the necessities of the case, it is invalid as taking property without due process of law. *Ib.*

9. *Due process of law. Sufficiency of notice of probate proceeding. Validity of* §§ 1633, 1634, *Civil Code of California.*

Whether or not a State can arbitrarily determine by statute the length of notice to be given of steps in the administration of estates in the custody of its courts, ten days' notice for the settlement of the final accounts of an executor and action on final distribution is not so unreasonable as to be wanting in due process of law under the Fourteenth Amendment; and so *held* that the contention that §§ 1633 and 1634 of the Civil Code of California prescribing such length of notice are unconstitutional as depriving a distributee of his property without due process of law is without merit. *Roller* v. *Holly*, 176 U. S. 398, distinguished. *Goodrich* v. *Ferris*, 71.

See Infra, 12, 13;
CONGRESS, POWERS OF, 3;
DRAINAGE, 2.

10. *Equal protection of the laws. Classification of resident and non-resident owners of property within police power.*

While the enforcement of a statute enacted under the police power by

criminal proceedings against resident owners, and by civil proceedings against non-resident owners, is a discrimination, if, as in this case, it is justified by the circumstances it does not render the statute unconstitutional, nor is it so rendered by the fact that the remedy as to one class may be more efficient than the remedy as to the other. *District of Columbia* v. *Brooke*, 138.

11. *Equal protection of the laws. Power of States to make classifications in enforcement of police power.*

The Fourteenth Amendment does not deprive the States of the power of classification or require the classification to be logically or scientifically accurate; and sufficient practical reasons exist for a classification of resident and non-resident property owners in the enforcement of police regulations, provided that the act is impartial as between the classes. (*Field* v. *Barber Asphalt Co.*, 194 U. S. 618.) *Ib.*

12. *Equal protection and due process of law—Validity of act of May* 19, 1896, *providing for drainage in District of Columbia.*

The act of May 19, 1896, c. 206, 29 Stat. 125, providing for the drainage of the District of Columbia, is not unconstitutional as depriving non-resident owners of their property without due process of law, or denying them the equal protection of the law on account of the different methods provided for enforcing the law against resident and non-resident owners. *Ib.*

13. *Equal protection and due process of law. Validity of Massachusetts laws limiting height of buildings.*

Chapters 333 of the acts of 1904 and 383 of the acts of 1905 of Massachusetts, limiting the heights of buildings in Boston and prescribing different heights in different sections of the city are, in view of the decision of the highest court of Massachusetts holding that the discrimination is based upon reasonable grounds, a proper exercise of the police power of the State, and are not unconstitutional under the equal protection and due process clauses of the Fourteenth Amendment. *Welch* v. *Swasey*, 91.

See CONGRESS, POWERS OF, 3;
STATUTES, A 8.

14. *Full faith and credit. Effect of erroneous construction of constitution of another State, to deny.*

The mere construction, even if erroneous, by a state court of the statute or, as in this case, of a provision of the constitution of another State does not deny to it the full faith and credit demanded by the Federal Constitution. *Smithsonian Institution* v. *St. John*, 19.

15. *Same.*

The decision of the Court of Appeals of New York that a statute of Ohio authorizing the formation of corporations general in terms, but applicable to a special situation, did not contravene the prohibition of the constitution of Ohio against the general assembly passing any special act conferring corporate powers, and that a corporation organized under such a statute could take as legatee, *held*, not to question the validity of the constitutional provision and, even if erroneous, such decision did not repudiate the obligations of the full faith and credit clause of the Federal Constitution and is not reviewable by this court under § 709, Rev. Stat. *Ib.*

16. *Full faith and credit. Force and effect to be given constitution of another State.*

It is as obligatory upon the courts of a State to give the same full force and effect to the constitution of another State as it must give to its judicial proceedings. (*Chicago & Alton Railroad* v. *Wiggins Ferry Co.*, 119 U. S. 615.) *Ib.*

Jurisdiction of Federal Government. See UNITED STATES, 1.

17. *Property rights; uncompensated obedience to municipal ordinance passed in exercise of police power not violative of.*

The exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and uncompensated obedience to an ordinance passed in its exercise is not violative of property rights protected by the Federal Constitution; *held*, that an ordinance of a municipality of that State, valid under the law of that State as construed by its highest court, compelling a railroad to repair a viaduct constructed, after the opening of the railroad, by the city in pursuance of a contract relieving the railroad, for a substantial consideration, from making any repairs thereon for a term of years was not void under the contract, or the due process, clause of the Constitution. (*Northern Pacific Railway* v. *Duluth*, 208 U. S. 583.) *St. Paul, Minn. & Man. Ry. Co.* v. *Minnesota*, 497.

CONSTRUCTION.
See CONTRACTS;
STATUTES, A;
WILLS.

CONTAGIOUS DISEASES.
See IMMIGRATION;
PENALTIES AND FORFEITURES.

CONTEMPT OF COURT.

1. *Evidence held to establish contempt of this court.*

The court, having already held, 203 U. S. 563, that the information sufficiently set forth a contempt of the court, to punish which the court has jurisdiction, now finds on the testimony taken under its direction that certain of the defendants named were guilty of the contempt as charged and directs that attachments issue against them, and that the defendants not found guilty be discharged. *United States* v. *Shipp*, 386.

2. *Participation in defiance of mandate of this court constituting contempt.*

Where a riot and the lawless acts of those engaged therein are the direct result of opposition to the administration of the law by this court, those who defy its mandate and participate in, or who knowingly fail to take the proper means within their official power and duty to prevent, acts of violence having for their object to, and which do, defeat the action of this court are guilty of, and must be punished for, contempt. *Ib.*

3. *Negligence of one charged with custody and safe-keeping of Federal prisoner pending appeal to this court as contempt thereof.*

One, who after conviction by the state court has applied to the Federal court for his release on *habeas corpus* on the ground that he was denied due process of law is remanded by the Federal court to the custody of the sheriff to be detained for a specified time in which to enable him to prosecute an appeal to this court, is held under § 766, Rev. Stat., as a Federal prisoner and the sheriff is accountable to the Federal courts; and to the extent of his power and the means under his control, he must exercise due diligence and reasonable efforts to protect the prisoner from mob violence, and if, after this court has granted an appeal, he negligently fails in his duty in this behalf, he is guilty of contempt. *Ib.*

4. *Knowledge of order of court sufficient to render one defying same guilty of contempt.*

Knowledge of an allowance by this court of an appeal and a stay of proceedings renders those who defy the mandate of the court and so conduct themselves as willfully to defeat the administration of the law liable for contempt. *Ib.*

5. *Those charged with custody of Federal prisoner pending appeal to this court held guilty of contempt in failing to protect prisoner from mob violence.*

This court having allowed an appeal from an order of a Circuit Court discharging a writ of *habeas corpus* and remanding the prisoner

to the custody of the sheriff to be held for a specified period for prosecution of the appeal, the sheriff and his deputies and the jailer, who had knowledge of such allowance of appeal and also of an intense feeling in the neighborhood against the prisoner which on previous occasions had threatened his safety, were bound to use all means within their power to protect him, and failure on their part to take any precautions whatever to prevent the seizure and killing of the prisoner at the hand of a mob attacking the jail while in a defenseless condition was, under the circumstances of this case, willful negligence, and disregard of duty to, and contempt of, this court; and so held as to the sheriff of Hamilton County, Tennessee, and his deputy and the jailer, in connection with the lynching on March 19, 1906, of Ed Johnson by a mob after this court had allowed his appeal from an order refusing relief on *habeas corpus*. *Ib.*

6. *Members of mob lynching Federal prisoner pending appeal to this court, guilty of contempt.*

Those of a mob who attack a state jail and lynch a person held therein as a Federal prisoner under an order of this court of which they have had notice are guilty of contempt of this court. *Ib.*

See MANDAMUS, 6.

CONTRACTS.

1. *Construction; reference to similar prior contract between parties.*

Where a contract requires construction as to the mode of its performance, a similar contract in writing between the same parties which had been fully performed prior to the execution of the contract to be construed, serves, within proper limitations, to throw light upon the construction of the later contract and may be referred to for that purpose. *Ceballos & Co.* v. *United States*, 47.

2. *Same.*

A contract having been made by the United States with Ceballos & Co. for the repatriation of the Spanish prisoners in Cuba after the Spanish war, similar in terms to another contract subsequently made with the same parties for the repatriation of the Spanish prisoners in Manila, providing certain accommodations for officers and steerage accommodations for men and other persons designated by the Secretary of War, the fact that in the performance of the Cuban contract the wives and children of the officers were given similar cabin accommodations to those of their respective husbands and fathers, and the United States had paid therefor the higher rate, *held* to be material in construing the Philippine

contract and also *held* that Ceballos & Co. were entitled to payment for the transportation of the wives and children of officers at cabin rates. *Ib.*

3. *Construction of contracts carrying out treaty obligations to be liberal.*

The same contract construed as entitling Ceballos & Co. to half rates of cabin transportation for children under ten, and steerage rates for the "other persons designated by the Secretary of War," that expression not embracing wives and children of officers, but embracing all designated persons other than officers and their wives and children. A contract carrying out treaty obligations should be liberally construed so as to effectuate the purposes intended by the treaty. *Ib.*

4. *Construction of contract for repatriation of Spanish prisoners of war from Philippine Islands.*

In the light of all the surrounding circumstances it will not be assumed that the United States in carrying out its stipulations for the capitulation of Manila would commit an act of inhumanity such as separating the surrendered officers from their wives and children by furnishing the former with cabin, and the latter with steerage, accommodations on the voyage to Spain under the repatriation provision of the treaty of peace. *Ib.*

See BANKRUPTCY, 3; EVIDENCE; CONSTITUTIONAL LAW, 4; LOCAL LAW (PORTO RICO, 2); VENDOR AND VENDEE, 1, 2.

CONVEYANCES.

See EVIDENCE.

COPYRIGHT.

1. *Who entitled under* § 4952, *Rev. Stat., as amended by act of March* 3, 1891. *Citizenship of assignee affecting right.*

Under § 4952, Rev. Stat., as amended by the act of March 3, 1891, c. 565, 26 Stat. 1106, the assignee of an author of a painting is not entitled to copyright unless the author is a citizen of a country to the citizens of which reciprocal copyright privileges have actually been extended by proclamation of the President in conformity with § 13 of the act of March 3, 1891. The fact that the assignee is a citizen of such a country does not entitle him to copyright. *Bong* v. *Campbell Art Co.*, 236.

2. *Who entitled—Assignee defined.*

An assignee within the meaning of the copyright statute is one who receives a transfer not necessarily of the painting but of the right

to multiply copies thereof, and such right depends not only upon the statute but is derived also from the painter, who must have the right to copyright in order to assign it. *Ib.*

3. *Who entitled—Effect of membership in Montevideo Union of country of person claiming.*

A citizen of a country not in copyright relations with the United States under § 13 of the act of 1891 is not entitled to avail of the copyright because his country is a member of the Montevideo Union. *Ib.*

4. *Who entitled—Effect of provision in* § 13, *act of March* 3, 1891, *on right of foreign citizen.*

The provision in § 13 of the act of 1891, providing that the President on determining certain conditions extend the privileges of copyright to citizens of countries which are parties to a copyright union to which the United States may become a party is not directory and confers no rights independent of the President's proclamation. *Ib.*

5. *Reciprocity of rights—Extension of right by executive proclamation.*

Where a statute contemplates reciprocity of rights the President is the best fitted officer to determine whether the conditions on which reciprocity depends exist; and this court approves the construction given by the State Department and the Librarian of Congress to the copyright statutes as denying copyright protection to Peru, no proclamation extending copyright to the citizens of that country having ever been made by the President. *Ib.*

COPYRIGHT RULES.

See p. 533.

COURTS.

1. *As refuge from ill-advised, unjust or oppressive laws.*

A wide range of discretion is necessary to make legislation practical and the courts cannot be made a refuge from ill-advised, unjust or oppressive laws. *District of Columbia* v. *Brooke*, 138.

2. *Enforcement in Federal courts of statute of limitations of State.*

Where it is established law of a State, as it is of Texas, that when a debt is barred by limitations an action to foreclose a lien or mortgage given as security for it is barred also, the law must be enforced in the courts of the United States, whether sitting in law or in equity. *Dupree* v. *Mansur*, 161.

3. *Federal courts in applying statute of limitations governed by decisions of State where land lies.*

Whether or not the statute of limitation bars a suit to foreclose is a question of substantive law, created by the State and not by the United States, and not one of procedure or jurisdiction; and the Federal court should be governed by the decisions of the State where the land lies. (*Slide & Spur Mines* v. *Seymour*, 153 U. S. 509.) *Ib.*

4. *Federal; duty as to application of state statute of limitations.*

The Federal courts cannot declare it wrong or inequitable for a debtor to rely upon a state statute of limitations, as that would be to declare wrong or discreditable what the legislature of the State declares to be right. *Ib.*

5. *Conclusiveness of decision of Land Department.*

Where a decision of the Land Department rests on the priority of equitable rights of a contestant it is conclusive upon the courts so far as it involves questions of fact; and on a mixed question of law and fact it is conclusive unless the court can so separate the question that the mistake of law is clearly apparent. *Whitcomb* v. *White*, 15.

6. *Same.*

Where the controversy in the Land Department involves the question of whether the first occupant occupied the land for homestead or town-site entry, and there is evidence to support the Secretary's finding, that finding is conclusive on the courts even though the evidence be conflicting. *Ib.*

7. *Duty and power in determining validity of legislation.*

The constitutional right of Congress to enact legislation in regard to a matter wholly within its jurisdiction is the sole measure by which the validity of such legislation is to be determined by the courts, and the courts cannot proceed on the supposition that harm will follow if the legislature be permitted full sway and, in order to correct the legislature, exceed their own authority, and assume that wrong may be done in order to prevent wrong being accomplished. (*McCray* v. *United States*, 195 U. S. 27.) *Oceanic Navigation Co.* v. *Stranahan*, 320.

8. *Determination of power of Congress to enact legislation.*

The courts cannot make mere form and not substance the test of the constitutional power of Congress to enact a statute in regard to a matter over which Congress has absolute control. *Ib.*

9. *Presumption of fact not indulged.*

Whether or not an heir in Porto Rico waives benefit of inventory is a pure question of fact; and, if the complaint is silent, the court will not presume that there was such a waiver. *Ubarri* v. *Laborde*, 168.

See CONGRESS, POWERS OF, 2; CONTEMPT OF COURT; EXTRADITION, 3; MANDAMUS, 6; PORTO RICO, 2, 3, 4; TERRITORIES, 2.

COURT OF CLAIMS.

See MANDAMUS, 7.

COURT AND JURY.

See NEGLIGENCE.

CRIMINAL LAW.

See EXTRADITION; PENALTIES AND FORFEITURES.

DECEDENTS' ESTATES.

See ACTIONS; CONSTITUTIONAL LAW, 9; COURTS, 9; LOCAL LAW (PORTO RICO, 1, 3, 4).

DELEGATION OF POWER.

See CONGRESS, POWERS OF, 1, 2; FEDERAL QUESTION; PENALTIES AND FORFEITURES.

DEPARTMENTAL REGULATIONS.

See PUBLIC OFFICERS, 2.

DESCRIPTION OF PROPERTY.

See JURISDICTION, A 12.

DISCRIMINATORY LEGISLATION.

See CONGRESS, POWERS OF, 3, 4.

DISEASE.

See IMMIGRATION; PENALTIES AND FORFEITURES.

DISTRICT OF COLUMBIA.

See CONGRESS, POWERS OF, 3, 4;
CONSTITUTIONAL LAW, 12;
DRAINAGE, 1.

DRAINAGE.

1. *Power of Congress to create system for District of Columbia. Necessity for system not a question for property owner.*

A property owner cannot urge against a statutory drainage system the non-existence of the necessity for drainage, or the fact that he had adopted a system of his own which is either sufficient or better than that required by the law. Such a contention would deny to Congress the right to create any drainage system for the District of Columbia. *District of Columbia* v. *Brooke*, 138.

2. *Compulsory drainage of unoccupied dwelling not a deprivation of property without due process of law.*

The mere existence of dwelling houses, whether occupied or not, indicates the necessity for drainage; and the owner is not deprived of his property without due process of law by a compulsory drainage act because the house happens to be unoccupied at the time. *Ib.*

See CONSTITUTIONAL LAW, 12.

DUE PROCESS OF LAW.

See CONGRESS, POWERS OF, 3;
CONSTITUTIONAL LAW, 5–9, 12, 13, 17;
DRAINAGE, 2.

DURESS.

See PAYMENT.

EJECTMENT.

Estoppel to maintain action against railroad.

Judgment of the Supreme Court of Arizona holding that ejectment should not be maintained against a railroad company where the owner had remained inactive and permitted the construction of the track affirmed without opinion on authority of *Roberts* v. *Northern Pacific Railroad Company*, 158 U. S. 1, and *Northern Pacific Railroad Company* v. *Smith*, 171 U. S. 260. *Donohue* v. *El Paso & Southwestern R. R.*, 499.

EMPLOYER AND EMPLOYÉ.

See MASTER AND SERVANT.

ENTRY AND OUSTER.

See JURISDICTION, A 2.

EQUAL PROTECTION OF THE LAWS.

See CONGRESS, POWERS OF, 3;
CONSTITUTIONAL LAW 10–13;
STATUTES, A 8.

ESTATES OF DECEDENTS.

See ACTIONS; CONSTITUTIONAL LAW, 9; COURTS, 9; LOCAL LAW (PORTO RICO).

ESTOPPEL.

See ASSESSMENT AND TAXATION, 3; BANKRUPTCY, 3; EJECTMENT; REMOVAL OF CAUSES, 1, 3.

EVIDENCE.

Admissibility of extrinsic evidence to show that conveyance absolute in form is intended as security.

The face of an instrument is not always conclusive of its purpose; and, in equity, extrinsic evidence is admissible to show that a conveyance, absolute in form, is intended as security; and in this case testimony addressed to the consideration of the bill of sale, and showing that although on its face the vendee agreed to give up its debt the real consideration was to help the vendor and give the vendee additional security, would be admissible under our own, as well as the Spanish, law; and *quære* whether the Spanish law does not permit oral testimony, as to all the terms of a contract upon an equal footing with the written instrument itself, to an extent beyond that which our own law permits. *Cabrera* v. *American Colonial Bank*, 224.

See LOCAL LAW (PORTO RICO, 2);
PRACTICE AND PROCEDURE, 1.

EXECUTIVE OFFICERS.

See CONGRESS, POWERS OF, 1, 2; CONSTITUTIONAL LAW, 5, 6; MANDAMUS, 4, 5; PENALTIES AND FORFEITURES; PUBLIC OFFICERS, 2.

EXECUTORS AND ADMINISTRATORS.

See CONSTITUTIONAL LAW, 9.

EXEMPTIONS.

See BANKS AND BANKING, 2;
STATUTES, A 3.

EXTRADITION.

1. *Indictment or affidavit as prerequisite; application of* § 5278, *Rev. Stat.*

Unless the State demanding the return of an alleged fugitive from justice furnishes a copy of an indictment against the accused or an affidavit before a magistrate as provided by § 5278, Rev. Stat., the executive of the State upon whom the demand is made, may decline to honor the requisition; and, in the absence of such indictment or affidavit, no authority is conferred upon him by § 5278, Rev. Stat., to issue his warrant of arrest for a crime committed in another State. *Compton* v. *Alabama*, 1.

2. *Affidavit to support; sufficiency under* § 5278, *Rev. Stat.*

An affidavit before a notary public is sufficient under § 5278, Rev. Stat., upon which to base a demand for return of a fugitive from justice if such officer is, as he is regarded in Georgia, a magistrate under the law of the State. *Ib.*

3. *Interference by judiciary—When habeas corpus not available to one held for.*

Where the papers upon which the requisition for the return of an alleged fugitive from justice is based are regarded as sufficient by the executive authorities of both the States making, and honoring, the demand, the judiciary should not interfere on *habeas corpus* and discharge the prisoner upon technical grounds unless it is clear that the action plainly contravenes the law. *Ib.*

4. *Immunity from trial for offense other than that for which extradited.*

The rule that a person extradited under treaty provisions cannot be tried for an offense other than that for which he was extradited until after he has had opportunity to leave the country to which he was surrendered does not apply to an offense committed after he arrives in the latter country. (*United States* v. *Rauscher*, 119 U. S. 407.) *Collins* v. *O'Neil*, 113.

5. *Discretion of country to which surrender made in matter of trial of person extradited.*

Whether a person extradited and who thereafter commits a crime in the country to which he is surrendered shall be first tried for the earlier or later crime is a matter wholly within the jurisdiction of the country to which he is surrendered and is of no interest to the surrendering country. *Ib.*

6. *Asylum; right of fugitive from justice to.*

A fugitive from justice has no inherent right of asylum; his rights in that respect depend wholly upon the treaty between the countries demanding and surrendering him. *Ib.*

7. *Treaty of* 1842 *and convention of* 1889 *with Great Britain construed—Trial of party extradited, for crime committed after extradition.*

Under the treaty of 1842 and convention of 1889 with Great Britain a surrendered person can be tried for an offense committed in this country after his arrival; and the trial for such offense does not have to await the conclusion of the trial of the offense for which he was surrendered; and so *held* that one who, on the trial of the offense for which he was surrendered and which resulted in a disagreement, committed perjury could be indicted and tried for that offense without being allowed an opportunity to leave this country and without waiting for the final conclusion of the trial for the crime for which he was surrendered. *Ib.*

FACTS.

See ASSESSMENT AND TAXATION, 1;
COURTS, 5, 6, 9;
PRACTICE AND PROCEDURE.

FEDERAL COURTS.

See COURTS, 2, 3, 4;
JURISDICTION.

FEDERAL QUESTION.

What constitutes. Question of illegality of state statute.

Whether a state statute is illegal because it delegates legislative power to a commission does not raise a Federal question. *Welch* v. *Swasey*, 91.

See JURISDICTION, A.

FIFTH AMENDMENT.

See CONSTITUTIONAL LAW, 6.

FORGED INSTRUMENTS.

See BANKS AND BANKING, 3;
COMMERCIAL PAPER, 1.

FOURTEENTH AMENDMENT.

See CONGRESS, POWERS OF, 3;
CONSTITUTIONAL LAW, 9, 11, 13.

FRAUD.

Evidence to establish.

Judgment reversed on the facts, it being based on allegations of fraud and corruption which this court holds were not sustained by the evidence. *Ubarri* v. *Laborde*, 168.

FUGITIVE FROM JUSTICE.

See EXTRADITION.

FULL FAITH AND CREDIT.

See CONSTITUTIONAL LAW, 14, 15, 16.

GOVERNMENT.

See PORTO RICO, 1, 2;
TERRITORIES, 1, 2.

GOVERNMENT EMPLOYÉS.

See PUBLIC OFFICERS, 1.

GREAT BRITAIN.

See EXTRADITION, 7.

GUARANTY.

1. *Effect of giving of additional security by principal debtor to release one guaranteeing the loan.*

One guaranteeing a loan by mortgage is not released from the guaranty because the loan is subsequently further secured by a bill of sale of other property, absolute on its face but in fact given as additional security, by the principal debtor. *Cabrera* v. *American Colonial Bank*, 224.

2. *Liability; extent of.*

The liability of one who binds himself with others for the whole debt extends to the whole and not to a part of the debt. *Ib.*

HABEAS CORPUS.

See ABATEMENT;
EXTRADITION, 3.

HEIRS.

See LOCAL LAW (PORTO RICO).

IMMIGRATION.

Alien Immigration Act of March 3, 1903, § 9; validity of.

The prohibition of § 9 of the Alien Immigration Act of March 3, 1903,

c. 1012, 32 Stat. 1213, against bringing into the United States alien immigrants afflicted with loathsome and contagious diseases is within the absolute power of Congress; and that provision of the act is not unconstitutional because it provides that the Secretary of Commerce and Labor may, without judicial trial, impose upon, and exact penalties from, the transportation company for violations of the provisions. *Oceanic Navigation Co.* v. *Stranahan*, 320.

See CONGRESS, POWERS OF, 1;
PENALTIES AND FORFEITURES.

IMPAIRMENT OF CONTRACT OBLIGATION.

See CONSTITUTIONAL LAW.

INTERSTATE COMMERCE.

See COMMERCE;
CONSTITUTIONAL LAW, 1, 2, 3;
JURISDICTION, A 10.

INTERSTATE RENDITION.

See EXTRADITION.

INTOXICATING LIQUORS.

See COMMERCE;
CONSTITUTIONAL LAW, 1, 3.

INVENTION.

See PATENTS.

INVOLUNTARY PAYMENT.

See PAYMENT.

JUDGMENTS AND DECREES.

See JURISDICTION, A 1, 2;
PORTO RICO, 2.

JUDICIAL SALES.

See JURISDICTION, A 12.

JURISDICTION.

A. OF THIS COURT.

1. *Amount in controversy—Joinder of distinct judgments to create jurisdictional amount.*

Distinct judgments in favor of or against distinct parties, though in

the same record, cannot be joined to give this court jurisdiction. *Tupiño* v. *Compania de Tabacos*, 268.

2. *Same.*

While in case of joint entry and ouster, where the answer of all defendants takes issue without setting up separate claims to distinct parcels, and the judgment for recovery of possession is against all defendants jointly, the measure of appellate jurisdiction is the value of the whole land, *Friend* v. *Wise*, 111 U. S. 707, where there is no allegation of joint ownership or joint possession, and the controversy with each defendant relates to a separate and distinct parcel, and judgment is rendered separately, the measure as to each defendant is the value of his separate parcel. *Tupper* v. *Wise*, 110 U. S. 398. Nor does this court have jurisdiction in such a case if the judgment were jointly against the defendants for damages where the total amount awarded is less than the jurisdictional amount. *Ib.*

3. *Under § 709, Rev. Stat. Sufficiency of raising Federal question.*

The Federal question must be properly and seasonably set up in the state court in order to give this court jurisdiction to review under § 709, Rev. Stat. *Chesapeake & Ohio Ry. Co.* v. *McDonald*, 191.

4. *Same.*

Where the state statute provides that an appeal from an order refusing to remove a cause to the Federal court must be taken within two years, and no appeal is taken, and the highest court of the State decides that an appeal from the judgment in the case taken more than two years after entry of the order refusing to remove does not bring up that order for review, the Federal question has not been properly preserved, and this court has no jurisdiction. *Ib.*

5. *Of direct appeal from Circuit Court—Sufficiency of involution of constitutional question.*

The mere fact that a constitutional question is alleged does not suffice to give this court jurisdiction of a direct appeal from the Circuit Court if such question is unsubstantial and so clearly devoid of merit as to be clearly frivolous. (*Farrell* v. *O'Brien*, 199 U. S. 100.) *Goodrich* v. *Ferris*, 71.

6. *Federal question; sufficiency of involution.*

Where plaintiff in error, defendant below, in a suit for penalty under a state law asks and the court refuses an instruction that if the jury find that the default occurred within a navy yard, over

which the United States had exclusive jurisdiction, the recovery could not be had under the state law, this court has jurisdiction to review the judgment. *Western Union Telegraph Co.* v. *Chiles*, 274.

7. *Federal question wanting.*

Writ of error to review judgment of the state court dismissed without opinion for want of jurisdiction, there being no Federal question, or if any, it was raised too late. *Kansas City Southern Ry. Co.* v. *Henrie*, 491.

8. *Federal question; sufficiency of.*

Writ of error to review judgment of the highest court of the state, dismissed without opinion, for want of jurisdiction, notwithstanding the contention of plaintiff in error that where a state court in construing a contract departs from its established and applicable mode of procedure theretofore applied under similar circumstances due process and equal protection of the law are denied. *Fidelity & Casualty Co.* v. *Southern Railway News Co.*, 498.

9. *Federal question; sufficiency of.*

Writ of error to review the judgment of the state court in a suit for damages for injuries caused by negligence of plaintiff in error dismissed without opinion for want of jurisdiction, notwithstanding contention of plaintiff in error that its claim that the act of April 24, 1905, ch. 163, of Texas legislature was unconstitutional as depriving it of the fellow-servant defense had been duly set up at the proper time in the state court. *Missouri, Kansas & Texas Ry. Co.* v. *Kennedy*, 502.

10. *Sufficiency of involution of Federal question. Denial by state court that statute conflicts with commerce clause of Constitution.*

Where the state court denied the contention of plaintiff in error, defendant below, that a state statute as applied to transportation of an article from one State to another was in conflict with the commerce clause of the Constitution, a Federal question is involved and this court has jurisdiction. (*Western Turf Association* v. *Greenberg*, 204 U. S. 359.) *Adams Express Co.* v. *Kentucky*, 218.

11. *Sufficiency of Federal question for purpose of.*

Where the disposition of a Federal question is not necessary to the determination of the cause and the judgment is based on a distinct non-Federal ground broad enough to sustain it the writ of error cannot be maintained. *Rogers* v. *Jones*, 196.

12. *When judgment of state court rests on non-Federal grounds sufficient to sustain it.*

Where an act of Congress providing for sale of real estate by a marshal does not define a good and valid description, the question of sufficiency of description is one of general law; and so held in regard to § 4 of the act of February 16, 1839, c. 27, 5 Stat. 317, referring to time and place for making judicial sales in Mississippi; and further held that even if the time and place of sale were wrong under the statute, this court had no jurisdiction as the judgment rested on plaintiff's failure to deraign a title and other non-Federal questions sufficient to sustain it. *Ib.*

13. *Quære as to sufficiency of raising of Federal question for purpose of.*

Quære: Where a petition to the highest court of the State for rehearing asserts that a Federal question had been set up in the brief and arguments is simply denied with the statement that no Federal question had been raised in that court, whether this court has jurisdiction to review the judgment on writ of error. *Smithsonian Institution* v. *St. John*, 19.

14. *Declination of jurisdiction.*

This court cannot decline jurisdiction when it is plain that the fair result of a decision of the state court is to deny a constitutional right. (*Rogers* v. *Alabama*, 192 U. S. 226.) *Ib.*

15. *To review judgment in condemnation proceeding.*

Writ of error to review judgment of the state court in a condemnation proceeding dismissed without opinion for want of jurisdiction. *Thomas* v. *South Side Elevated Ry. Co.*, 496; *Yadkin River Power Co.* v. *Whitney*, 503.

16. *Of appeal in bankruptcy matter.*

An appeal from the Circuit Court of Appeals in a bankruptcy matter dismissed without opinion on authority of *Coder* v. *Arts*, 213 U. S. 223. *Logan* v. *Farmers' Deposit Nat. Bank*, 500.

17. *Certificate from Circuit Court of Appeals; sufficiency of.*

Certificate dismissed on the authority of *Chicago, Burlington & Quincy Railway Company* v. *Williams*, 205 U. S. 444. *Chicago, Burlington & Quincy Ry. Co.* v. *Williams*, 492.

See APPEAL AND ERROR;
CONSTITUTIONAL LAW, 15.

B. OF CIRCUIT COURT.

Amount in controversy.

The Circuit Court has not jurisdiction of a suit against a number of

delinquent taxpayers for assessment work where the assessment due from each taxpayer is less than two thousand dollars. *Granite Bituminous Paving Co.* v. *Landis*, 504.

See CONSTITUTIONAL LAW, 4.

C. GENERALLY.

See ATTACHMENT; PILOTAGE;
EXTRADITION, 5; PORTO RICO, 2, 3, 4;
MANDAMUS, 6; REMOVAL OF CAUSES, 1, 2;
UNITED STATES, 1, 2.

LAND DEPARTMENT.

See COURTS, 5, 6.

LAW GOVERNING.

See COURTS, 2, 3;
NAVIGABLE WATERS, 2;
VENDOR AND VENDEE, 2.

LEGISLATION.

See CONGRESS, POWERS OF.
COURTS, 1, 7;
TERRITORIES, 1.

LEX LOCI.

See COURTS, 3;
NAVIGABLE WATERS, 2;
VENDOR AND VENDEE, 2.

LIBEL.

1. *Publication of portrait as.*

The publication of a portrait with a statement thereunder imports that the original of the portrait makes the statement even if another name be attached to the statement. *Wandt* v. *Hearst's Chicago American*, 129 Wisconsin, 419; *Morrison* v. *Smith*, 177 N. Y. 366, approved on this point. *Peck* v. *Tribune Company*, 185.

2. *Publication of portrait as.*

A woman, whose portrait is published in connection with an endorsement of a brand of whiskey may be seriously hurt in her standing with a considerable portion of her neighbors and she is entitled to prove her case and go to the jury. *Ib.*

3. *Mistake or ignorance as excuse for.*

Publication of the portrait of one person with statements thereunder as of another, by mistake, and without knowledge of whom the portrait really is, is not an excuse. A libel is harmful on its face, and one publishing manifestly hurtful statements concerning an individual does so at his peril; and, if there is no justification other than that it was news or advertising, he is liable if the statements are false or are true only of some one else. See *Morasse* v. *Brochu*, 151 Massachusetts, 567. *Ib.*

4. *Degree of harm resulting from false statement to render it libellous.*

An unprivileged falsehood need not entail universal hatred to constitute a cause of action; to be libellous a statement need not be that the person libelled has done or said something that every one, or even a majority of persons in the community, may regard as discreditable; it is sufficient if the statement hurts the party alluded to in the estimation of an important and respectable part of the community. *Ib.*

LICENSE.

See NAVIGABLE WATERS, 6.

LIMITATION OF ACTIONS.

See COURTS, 2, 3, 4.

LIQUORS.

See COMMERCE;
CONSTITUTIONAL LAW, 1, 3.

LOANS.

See GUARANTY.

LOCAL LAW.

Arkansas. Conditional sales (see Vendor and Vendee, 2). *Bryant* v. *Swofford Bros.*, 279.

California. Civil Code, §§ 1633, 1634. Notice in administration proceedings (see Constitutional Law, 9). *Goodrich* v. *Ferris*, 71.

Georgia. Notary public as magistrate (see Extradition, 2). *Compton* v. *Alabama*, 1.

Kentucky. Stats. 1903, § 1307. Intoxicating liquors (see Constitutional Law, 3). *Adams Express Co.* v. *Kentucky*, 218.

Massachusetts. Acts of 1904, ch. 333, and acts of 1905, ch. 383. Height of buildings (see Constitutional Law, 13). *Welch* v. *Swasey*, 91.

Porto Rico. 1. *Mortgage of an interest in a succession.* In Porto Rico one can mortgage an interest in a succession after it has accrued notwithstanding it has not been actually assigned or delivered to the mortgagor; this is not prohibited by article 108 of the mortgage law, nor are articles 110, 111 of that law applicable thereto. *Cabrera* v. *American Colonial Bank*, 224.

2. *Contracts; admissibility of evidence to vary.* The provisions of the Spanish Civil Code, which was in force in Porto Rico until 1902, to the effect that the obligations of a contract must be complied with according to their terms and that evidence cannot be introduced to vary them are practically the same as the principles of the common law and are subject to similar well-recognized exceptions. *Ib.*

3. *Estates of decedents—Effect of waiver of benefit of inventory—Liability of succession.* The effect under the law of Porto Rico of an heir waiving the benefit of inventory is to make him personally liable for the debts of the succession without limit, as under the early law of Rome, of England and of France; but, after the inheritance is divided, the liability of the succession is at an end and gives place to personal liability of each heir for the whole debt to the extent of the assets received by him, if accepted with benefit of inventory, or otherwise in full. *Ubarri* v. *Laborde*, 168.

4. *Same.* *Ubarri* v. *Laborde*, *ante*, p. 168, followed to effect that after a succession in Porto Rico has been divided the liability of the heirs is personal; and, even if the suit can be maintained against the succession, private property of the heirs cannot be attached to answer for the judgment. *Laborde* v. *Ubarri*, 173.

Texas. Act of April 24, 1905, ch. 163 (see Jurisdiction, A 9). *Missouri, Kansas & Texas Ry. Co.* v. *Kennedy*, 502.
Limitation of actions (see Courts, 2, 3). *Dupree* v. *Mansur*, 161.

LOUISIANA.

See PILOTAGE.

LYNCHING.

See CONTEMPT OF COURT, 5, 6.

MAGISTRATES.

See EXTRADITION, 2.

MANDAMUS.

1. *Not substitute for writ of error.*

Mandamus is not a proper substitute for a writ of error. *Matter of Riggs*, 9.

2. *Not available to review adjudication in bankruptcy.*

Where the bankruptcy court in adjudicating a corporation a bankrupt is called upon to decide, and does decide, a question of fact, or of mixed law and fact, that adjudication cannot be reviewed by proceedings in mandamus. (*Re Pollitz*, 206 U. S. 323; *Re Winn*, 213 U. S. 458.) *Matter of Riggs*, 9.

3. *Same.*

Mandamus to the bankruptcy court to dismiss proceedings in bankruptcy against a corporation because the petition failed to show that the principal business of the bankrupt was trading, printing, publishing, mining, manufacturing or a mercantile pursuit, refused. *Ib.*

4. *To contral action of executive officer. When performance of duty administrative and when involving exercise of discretion.*

If the reference by Congress to the Secretary of the Treasury to ascertain the amount due to a claimant and pay the same requires the exercise of discretion the courts cannot control his decision, *Riverside Oil Company* v. *Hitchcock*, 190 U. S. 316; but where the statute simply requires him to ascertain the amount, according to certain prescribed rules, the duty is administrative; and, the amount being ascertained according to those rules, the courts can by mandamus compel the Secretary to issue his warrant therefor. *Parish* v. *MacVeagh*, 124.

5. *Same.*

The history of the litigation and legislation in regard to the claim of Parish against the United States for damages on contract for ice made in 1863 for use of armies in the field reviewed and *held* that under the act of February 17, 1903, c. 559, 32 Stat. 1612, directing the Secretary of the Treasury "to determine and ascertain the full amount which should have been paid to Parish if the contract had been carried out in full without charge or default by either party" and to issue his warrant therefor, no judicial duty devolved upon the Secretary, nor has the Secretary power to determine what was right or proper but only the administrative duty of ascertaining the amount and paying the same; and, the amount having

been ascertained, the claimant is entitled to a writ of mandamus directing the Secretary to issue his warrant therefor. *Ib.*

6. *To compel court to take jurisdiction.*

Petition for leave to file petition for mandamus to compel the Circuit Court of Appeals to take jurisdiction of a writ of error to the Circuit Court to review an order fining petitioner for contempt denied without opinion. *Ex parte Heller*, 501.

7. *To compel action by Court of Claims, denied.*

Leave to file petition for mandamus to the Chief Justice and the associate justices of the Court of Claims to make a report to the President of the Senate on petitioner's claim denied. *Matter of Pearson*, 505.

8. *To compel remanding of case to state court.*

Leave to file petition for mandamus to remand a case to the state court denied. *Matter of Tobin*, 506.

MARSHAL'S SALE.

See JURISDICTION, A 12.

MASTER AND SERVANT.

1. *Duty of master as to safety of place. Right of servant to assume exercise of care in furnishing appliances.*

It is the duty of the master to use reasonable diligence in providing a safe place for his employés to work in and to carry on his business; and the employé may, in the absence of notice to the contrary, assume that the master will use reasonable care in furnishing appliances for carrying on the business. (*Choctaw & Oklahoma R. R.* v. *McDade*, 191 U. S. 64.) *Kreigh* v. *Westinghouse & Co.*, 249.

2. *Master's duty a continuing one.*

The duty of the master to provide safe place and appliances for his employés is a continuing one and must be exercised whenever circumstances demand it, *Saute Fe & Pacific R. R.* v. *Holmes*, 202 U. S. 438; and this applies where the workmen are engaged in work more or less dangerous and it is only a matter of using due skill and care to make the place and appliances safe. (*Choctaw & Oklahoma R. R.* v. *McDade*, 191 U. S. 64.) *Ib.*

3. *Master's liability not affected by concurring negligence of others.*

Where the negligence of the master in failing to provide and maintain

a safe place contributes to the injury of the employé, the master is liable notwithstanding the concurring negligence of those performing the work. (*Deserant* v. *Cerillos Coal R. R. Co.*, 178 U. S. 409.) *Ib.*

MILITARY GOVERNMENT.

See PORTO RICO, 1, 2;
TERRITORIES, 1, 2.

MISSISSIPPI.

See PILOTAGE.

MISSISSIPPI RIVER.

See PILOTAGE.

MISTAKE.

See LIBEL, 3.

MOB VIOLENCE.

See CONTEMPT OF COURT.

MORTGAGES.

See COURTS, 2, 3;
GUARANTY, 1;
LOCAL LAW (PORTO RICO, 1).

MUNICIPAL CORPORATIONS.

See CONSTITUTIONAL LAW, 4.

NATIONAL BANKS.

See BANKS AND BANKING, 1, 2;
STATUTES, A 3.

NAVIGABLE WATERS.

1. *Wharf as private property.*

A wharf on a navigable stream is private property and subject to the absolute control of the owner as other property is. *Weems Steamboat Co.* v. *People's Co.*, 345.

2. *Riparian owners; rights of; law governing.*

The rights of a riparian owner on a navigable stream are governed by the law of the State in which the stream is situated, but subject to the paramount public right of navigation. *Ib.*

3. *Wharves; right of riparian owners to construct and maintain.*
One of the rights of a riparian proprietor is to build private wharves out so as to reach the navigable waters of the stream, and this right has been affirmed by the courts of Virginia; but a wharf obstructing navigation or private rights of others or encroaching upon any public landing may be abated. *Ib.*

4. *Wharves; property rights in.*
A private wharf on a navigable stream is the exclusive property of the owner of which he can only be deprived in accordance with established law, and, if taken for public use, on compensation being made. *Ib.*

5. *Wharves; right of third person to demand use of.*
A private wharf on a navigable stream is not held by the owner, as a railroad is, subject to the public use, and a third person has no right to demand its use even on tendering compensation therefor and even though there may be no other wharf at the place. *Munn* v. *Illinois*, 94 U. S. 113, distinguished. *Louisville & Nashville Railway Co.* v. *West Coast Naval Stores Co.*, 198 U. S. 483, followed. *Ib.*

6. *Wharves; rights of public; effect of user.*
The public obtains no adverse right against the owner of a private wharf by mere user; in the absence of an intent on the owner's part to dedicate, and an acceptance by the public authority, the use is mere license subject to withdrawal. *Ib.*

7. *Wharves; right of owner to make arbitrary charges for use of.*
The remarks of Mr. Justice Bradley in *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, as to the right of the owner of a private wharf to make arbitrary charges are *obiter* and are not applicable to the present case. *Ib.*

NAVIGATION.

See NAVIGABLE WATERS, 2, 3;
PILOTAGE.

NAVY YARDS.

See JURISDICTION, A 6;
UNITED STATES, 1, 2.

NEGLIGENCE.

1. *When question for jury and when for court.*
Questions of negligence do not become questions of law except where

all reasonable men must draw the same conclusion from the evidence, nor should a case be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts which the evidence tends to establish. (*Gardner* v. *Michigan Cent. R. R.*, 150 U. S. 349.) *Kreigh* v. *Westinghouse & Co.*, 249.

2. *Same.*

In this case *held* that there was sufficient evidence as to the defective condition of a derrick and the method in which it was operated to require the submission, under proper instructions from the court, to the jury. *Ib.*

See COMMERCIAL PAPER, 1;
CONTEMPT OF COURT, 3, 5;
MASTER AND SERVANT, 3.

NEGOTIABLE INSTRUMENTS.

See COMMERCIAL PAPER.

NORFOLK NAVY YARD.

See UNITED STATES, 1, 2.

NOTARIES PUBLIC.

See EXTRADITION, 2.

NOTICE.

Sufficiency—Setting aside notice prescribed by legislature of State.

Even though the power of the State to prescribe length of notice be not absolute, a notice authorized by the legislature will only be set aside as ineffectual on account of shortness of time in a clear case. (*Bellingham Bay Co.* v. *New Whatcom*, 172 U. S. 314.) *Goodrich* v. *Ferris*, 71.

See ACTIONS;
ASSESSMENT AND TAXATION, 2, 3;
BANKS AND BANKING, 3;
COMMERCIAL PAPER, 1;
CONSTITUTIONAL LAW, 5, 9;
CONTEMPT OF COURT, 4, 5;
MASTER AND SERVANT, 1.

OBITER DICTA.

See NAVIGABLE WATERS, 7.

OBJECTIONS.

See PRACTICE AND PROCEDURE, 4, 5.

OFFICIAL WARRANTS.
See COMMERCIAL PAPER, 2.

OPEN ACCOUNTS.
See BANKRUPTCY, 1.

PATENTS.

1. *Patentability; improvement in art of making expanded metal work.*
The patent involved in this case shows a method for expanding metal consisting of two operations, which when combined produce a new and useful result covered by the claim allowed; and this result, when read in connection with the specifications, shows substantial improvement in the art of making expanded metal work. *Expanded Metal Co.* v. *Bradford*, 366.

2. *Patentability; new combination of old elements patentable.*
A new combination of elements, though old in themselves, which produces a new and useful result, entitles the inventor to the protection of a patent. (*Loom Co.* v. *Higgins*, 105 U. S. 580.) *Ib.*

3. *Patentability of method.*
While the mere function or effect of the operation of a machine cannot be the subject-matter of a patent, a method of doing a thing so clearly indicated that those skilled in the art can avail themselves of mechanism to carry it into operation can be the subject-matter of a patent. (*Cochrane* v. *Deener*, 94 U. S. 780.) *Ib.*

4. *Patentability—Process and apparatus.*
A process and an apparatus by which it is performed are distinct things. They may be found in one patent; they may be the subject of different patents. (*Leeds & Catlin* v. *Victor Talking Machine Co.*, 213 U. S. 301.) *Ib.*

5. *Patentability of process—Limitation of process.*
An invention or discovery of a process or method involving mechanical operation and producing a new and useful result, such as expanding metal, may, and in this case does, entitle the inventor to a patent, and such a process is not limited to those showing chemical action or elemental changes. *Risdon Locomotive Works* v. *Medart*, 158 U. S. 68, distinguished. *Ib.*

6. *Patentability of Golding process of expanding metal.*
In this case, *held*, that the Golding patent No. 547,242 for the process of expanding metal was a substantial improvement of the art

involving mechanical operations and producing a new and useful result independently of particular mechanisms for performing such process, and is valid. *Ib.*

PAYMENT.

Involuntary payment.

Money paid to the collector of a port under protest, and on the certainty that if not paid clearance to vessels necessarily sailing on definite schedule would be refused, to the great damage of the owner, is paid involuntarily, and can, if unlawfully exacted, be recovered. *Oceanic Steam Navigation Co.* v. *Stranahan*, 320.

See BANKRUPTCY, 1;
COMMERCIAL PAPER, 1.

PENALTIES AND FORFEITURES.

Power of Congress to provide for imposition of penalty—Enforcement of penalty.

The authority, given by Congress in the Alien Immigration Act to the Secretary of Commerce and Labor to impose an exaction on a transportation company bringing to the United States an alien immigrant afflicted with a loathsome contagious disease when the medical examination establishes that the disease existed, and could have been detected by medical examination at the time of embarkation, does not purport to define and punish any criminal offense, but merely entails the infliction of a penalty enforceable by civil suit; and it is within the power of Congress to provide for such imposition by an executive officer, and the enforcement is not necessarily governed by the rules controlling the prosecution of criminal offenses. *Wong Wing* v. *United States*, 163 U. S. 228, distinguished; *Hepner* v. *United States*, 213 U. S. 103, followed. *Oceanic Steam Navigation Co.* v. *Stranahan*, 320.

See ACCOUNTS AND ACCOUNTING; IMMIGRATION;
CONGRESS, POWERS OF, 2; JURISDICTION, A 6;
CONSTITUTIONAL LAW, 5, 6; UNITED STATES, 2.

PENSION CHECKS.

See BANKS AND BANKING, 3;
COMMERCIAL PAPER.

PILOTAGE.

1. *Jurisdiction of Louisiana over pilotage in Mississippi river.*

The Mississippi river is a boundary between Mississippi and Louisiana from below the port of Natchez as far north as Louisiana ex-

tends; but below Natchez all the river is wholly within Louisiana, and that State, subject only to the paramount power of Congress, has exclusive jurisdiction over pilotage in the river between points south of Natchez. *Leech* v. *Louisiana*, 175.

2. *Application of* § 4236, *Rev. Stat., act of March* 2, 1837, *relative to employment of pilots.*

Section 4236, Rev. Stat., act of March 2, 1837, c. 22, 5 Stat. 153, allowing the master of vessels coming in or going out of ports on boundary rivers to employ any pilot licensed by either State, does not apply to pilotage to ports on a river below the point where it becomes a boundary river; and a pilot licensed only by Mississippi has no right to pilot a vessel from the Gulf of Mexico to New Orleans. *Ib.*

3. *Quære as to rights of pilots under* § 4236, *Rev. Stat.*

Quære whether under § 4236 a pilot licensed only by Mississippi can pilot a vessel from the Gulf to Natchez. *Ib.*

PLEADING.

See COURTS, 9;
JURISDICTION, A 2;
MANDAMUS, 3.

POLICE POWER.

1. *Nature and scope of power.*

The police power is one of the most essential of governmental powers, at times one of the most insistent, and always one of the least limitable. *District of Columbia* v. *Brooke*, 138.

2. *Power of Congress paramount over that of State.*

Generally speaking, the police power belongs to, and is to be exercised by, the State, but it must yield to Congress wherever it conflicts with the powers belonging exclusively to Congress. *Adams Express Co.* v. *Kentucky*, 218.

See CONSTITUTIONAL LAW, 7, 8, 10, 11, 13, 17.

PORTO RICO.

1. *Status between ratification of treaty of peace and establishment of civil government.*

By the ratifications of the treaty of peace of 1898 with Spain, Porto Rico ceased to be subject to that country and became subject to the legislative power of Congress; but, pending the action of Congress, and the necessary delay in establishing civil government, there was no interregnum, and the authority to govern the

territory ceded by the treaty was, by the law applicable to conquest and cession, under the military control of the President as Commander-in-Chief. (*Cross* v. *Harrison*, 16 How. 164.) *Santiago* v. *Nogueras*, 260.

2. *Provisional Court; power of military government to establish.*
The military government in Porto Rico at the time of the ratification of the treaty of peace continued until superseded by the organic act; and it had power to establish the United States Provisional Court, and that court had jurisdiction to render the judgment involved in this case. *Ib.*

3. *Provisional Court; jurisdiction of controversy between subject of Spain and resident of Porto Rico.*
Under the provision of the order establishing the Provisional Court of Porto Rico that it have jurisdiction of controversies between different states and of foreign states, it had jurisdiction of a controversy between a subject of Spain and a resident of Porto Rico. *Ib.*

4. *Provisional court; question of jurisdiction not open in collateral attack.*
Whether the court lost jurisdiction, after having properly obtained it, by disregarding rules of procedure is not open in a collateral attack. *Ib.*

See COURTS, 9.

PORTRAITS.

See LIBEL;
TORTS.

POWERS OF CONGRESS.

See CONGRESS, POWERS OF;
CONSTITUTIONAL LAW, 6;
COURTS, 7, 8;
DRAINAGE, 1;
IMMIGRATION;
PENALTIES AND FORFEITURES;
PILOTAGE, 1;
POLICE POWER, 2;
PORTO RICO, 1;
UNITED STATES, 2.

PRACTICE AND PROCEDURE.

1. *Assumption as to insufficiency of evidence in bankruptcy proceeding not indulged.*
Where the evidence sustaining an application for an adjudication in bankruptcy is not disclosed this court will not assume that it was not sufficient. *Matter of Riggs*, 9.

2. *Following findings of fact concurred in by lower courts.*

Which is the correct English translation of a will written in the Hawaiian language is a pure question of fact, and in this case this court follows its usual course in regard to the findings of fact of both the lower courts and adopts the translation which both found to be correct. *Gray* v. *Noholoa*, 108.

3. *Deference to construction given by Supreme Court of Territory to statute of Territory.*

Where there is doubt as to the construction of a statute of a Territory this court leans towards the construction given by the Supreme Court of the Territory, *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 674, and unless there is manifest error this court will not disturb a decision of that court, *Fox* v. *Haarstick*, 156 U. S. 674, and in this case this court accepts the decision of the Supreme Court of Arizona in construing a revenue statute of that Territory. *English* v. *Arizona*, 359.

4. *Effect of failure to seasonably object to technical defect in return.*

Where no objection was made to a technical defect in the return which could have been rectified by amendment had attention seasonably been called thereto, a party who, as disclosed by the record, was not prejudiced, cannot raise the objection at a later date. *District of Columbia* v. *Brooke*, 138.

5. *Waiver of constitutional objection when question not made in state court by proper procedure.*

A Federal constitutional objection may be waived so far as having the right of review of a judgment in the state court is concerned where the question is not made in the state court by proper procedure. (*Harding* v. *Illinois*, 196 U. S. 78.) *Chesapeake & Ohio Ry. Co.* v. *McDonald*, 191.

6. *Disposition of case on opening of counsel condemned.*

The practice of disposing of cases on the opening of counsel is generally an unsafe method of procedure; the case should be developed by the evidence. *Hoffman House* v. *Foote*, 172 N. Y. 348, approved. *Bong* v. *Campbell Art Co.*, 236.

7. *Disposition of case on disagreement by this court with determination by lower courts as to amount of compensation to which carrier entitled; the testimony not having been preserved in record.*

Where the Interstate Commerce Commission has held, and its order has been affirmed by the Circuit Court and Circuit Court of Appeals, that a carrier cannot charge for a service rendered at the request and for the benefit of the shipper any amount in excess

of the actual expense incurred, and fixed a rate less than this court considers reasonable, this court cannot, where the testimony has not been preserved in the record, fix a fair and reasonable charge, but will reverse the judgments of both courts and remand the case to the former court with instructions to send the matter back to the commission for further investigation and report. *Southern Ry. Co.* v. *St. Louis Hay Co.*, 297.

See STATUTES, A 6, 7, 8.

PREFERENCES.

See BANKRUPTCY, 1.

PRESIDENT.

See PORTO RICO, 1.

PRESUMPTIONS.

See COURTS, 9; PRACTICE AND PROCEDURE, 1; TERRITORIES; WILLS.

PRINCIPAL AND SURETY.

See BONDS.

PROBATE.

See ACTIONS.

PROCESS.

Service; sufficiency of.

The service of the summons in this case by delivering the same at defendant's usual place of abode into the hands of his wife being strictly in accord with the procedure established by the court, the court had jurisdiction to enter judgment by default. *Santiago* v. *Nogueras*, 260.

PROCESS AND APPARATUS.

See PATENTS, 4, 5.

PROHIBITION.

1. *Writ refused.*

Writ of prohibition to prohibit Judges of the District Court from applying any part of proceeds of sale under decrees of admiralty court of same district of vessels belonging to a bankrupt, and surrendered by the receiver for adjudication of the maritime liens, to the payment of the receiver's expenses and commissions

in connection with such vessels, until all maritime liens had been paid in full, refused. *Matter of Hudson Oil & Supply Co.*, 487; *Matter of McWilliams*, 488.

2. *Leave to file petition for, denied.*

Leave to file petition for writ of prohibition to prohibit the United States Circuit Court from retaining jurisdiction of a case, denied. *Matter of Consolidated Rubber Tire Co.*, 490.

PROPERTY RIGHTS.

See CONSTITUTIONAL LAW, 7, 8, 17;
NAVIGABLE WATERS.

PUBLIC IMPROVEMENTS.

See ASSESSMENT AND TAXATION.

PUBLIC OFFICERS.

1. *Extra compensation—Section* 1765, *Rev. Stat., construed.*

Where there is no specific provision in the appropriation for government work and there is no intention of the department in which a government employé is employed to call upon him to fill another separate and distinct office, his designation by the head of his department to do certain work for another department does not entitle him to extra compensation; and, under § 1765, Rev. Stat., he cannot be allowed extra compensation therefor, even though the services be of value to the Government, are rendered out of hours, and are in addition to the full performance of his regular employment. *Woodwell* v. *United States*, 82.

2. *Executive officers; power to make regulations in aid of a law.*

Where the head of a department of the Government is authorized to make regulations in aid of a law, he cannot make regulations which defeat it. (*Williamson* v. *United States*, 207 U. S. 425.) *Bong* v. *Campbell Art Co.*, 236.

See ACCOUNTS AND ACCOUNTING;
BONDS.

PUBLIC USE.

See NAVIGABLE WATERS, 5, 6.

RAILROADS.

See COMMON CARRIERS;
CONSTITUTIONAL LAW, 2, 3, 4;
EJECTMENT.

REMOVAL OF CAUSES.

1. *Right of one removing to Federal court to thereafter deny its jurisdiction.*

The right of a defendant who has petitioned for removal of a case to the Federal court cannot be extended beyond what is necessary to defend the case; he cannot deny the jurisdiction after invoking it for affirmative relief. *Texas & Pacific Railway* v. *Eastin*, 153.

2. *Effect of removal to Federal court on jurisdiction of state court.*

A defendant's right to remove to the Federal court is amply protected. He may file his record in the Circuit Court and thereby completely take jurisdiction from the state court. *Ib.*

3. *Estoppel of defendant to attack in this court action of state court in denying petition for removal.*

Even though a defendant's petition to remove is wrongfully denied by the state court, and in his answer he protests against the right of the state court to retain jurisdiction, if he asserts an affirmative remedy in the state court, as in this case in which he brought in a third party for liability over, he submits his whole case and cannot attack the action of the state court in denying his petition for removal in this court on writ of error. *Ib.*

4. *Waiver of defect where neither party a resident of the Federal district into which case removed.*

Where at the time of removal to the Federal court neither of the parties was a resident nor citizen of the district, that defect, although jurisdictional, being only as to the particular district, can be waived; and is waived, if, as in this case, the parties make up the issues on the merits without objecting to the jurisdiction. (*Re Moore*, 209 U. S. 490; *Western Loan Co.* v. *Butte Co.*, 210 U. S. 368.) *Kreigh* v. *Westinghouse & Co.*, 249.

See JURISDICTION, A 4;
MANDAMUS, 8.

REQUISITIONS.

See EXTRADITION, 1, 3.

RES JUDICATA.

See COURTS, 5, 6.

REVISED STATUTES.

See ACTS OF CONGRESS;
STATUTES, A 2, 3.

RIGHT OF ASYLUM.
See EXTRADITION, 4, 6, 7.

RIOT.
See CONTEMPT OF COURT, 2.

RIPARIAN RIGHTS.
See NAVIGABLE WATERS.

RIVERS.
See BOUNDARIES, 1, 2;
NAVIGABLE WATERS;
PILOTAGE.

RULES RELATING TO COPYRIGHT.
See p. 533.

SAFETY OF APPLIANCES.
See MASTER AND SERVANT.

SALES.
See BANKRUPTCY, 2, 3;
JURISDICTION, A 12;
VENDOR AND VENDEE.

SECRETARY OF COMMERCE AND LABOR.
See IMMIGRATION;
PENALTIES AND FORFEITURES.

SECRETARY OF THE INTERIOR.
See COURTS, 6.

SECRETARY OF THE TREASURY.
See MANDAMUS, 4, 5.

SERVICE OF PROCESS.
See PROCESS.

SHIPPING.
See PILOTAGE.

SPAIN.
See PORTO RICO, 1.

SPECIAL ASSESSMENTS.

See ASSESSMENT AND TAXATION.

STATES.

See BOUNDARIES;
COMMERCE;
CONSTITUTIONAL LAW, 1, 2, 3, 9, 11;
NOTICE;
POLICE POWER, 2;
UNITED STATES, 1, 2.

STATE BANKS.

See BANKS AND BANKING, 1.

STATUTES.

A. CONSTRUCTION OF.

1. *Reference to report of congressional committee.*

In construing a congressional statute this court may consider the report of the committee as a guide to its true interpretation in order to dispel ambiguity, if any exists. (*The Delaware*, 161 U. S. 459; *Buttfield* v. *Stranahan*, 192 U. S. 470.) *Oceanic Steam Navigation Co.* v. *Stranahan*, 320.

2. *Recourse to prior legislation in construction of sections of Revised Statutes.*

Where two sections of the Revised Statutes when taken together are not free from ambiguity and cannot be harmoniously applied, recourse may be had to legislation prior to the Revised Statutes from which the provisions of those sections were drawn in order to arrive at the correct meaning. *Hamilton* v. *Rathbone*, 175 U. S. 418, and *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, distinguished. *Merchants' Nat. Bank* v. *United States*, 33.

3. *Sections* 5214 *and* 3411, *Rev. Stat., not capable of being construed together.*

Sections 5214 and 3411, Rev. Stat., cannot be so construed together, and effect given to both, as to leave a national bank liable to the duty imposed by § 5214 and yet entitle it to the exemption provided by § 3411 under the contingency stated therein. *Ib.*

4. *Effect of long continued construction.*

A uniform construction ever since its enactment for a long period, in this case over thirty-five years, engenders doubt of a new and different construction. *Ib.*

5. *Intent of Congress in statute referring claim to executive officers for ascertainment of amount due.*

The statute involved in this case, referring the ascertainment of the amount due a claimant to the Secretary of the Treasury, construed on the supposition that Congress regarded the controversy as over and that only the amount remained for ascertainment, as any intricate judicial problem would naturally be referred to the judicial tribunals. *Parish* v. *MacVeagh*, 124.

6. *Suppositions and possible questions affecting validity not answered before they arise.*

In determining whether a statute is constitutional suppositions and questions which might possibly arise, but which have not arisen, will be answered when they do arise and affect the operation of the statute. *District of Columbia* v. *Brooke*, 138.

7. *Determination of validity of state statute affecting height of buildings.*

In determining the validity of a state statute affecting height of buildings, local conditions must be considered; and, while the judgment of the highest court may not be conclusive, it is entitled to the greatest respect, and will not be interfered with unless clearly wrong. *Welch* v. *Swasey*, 91.

8. *Same—When determination of state court as to reasonableness of state statute followed.*

Where the highest court of the State has held that there is reasonable ground for classification between the commercial and residential portions of a city as to the height of buildings, based on practical and not æsthetic grounds, and that the police power is not to be exercised for merely æsthetic purposes, this court will not hold that such a statute, upheld by the state court, prescribing different heights in different sections of the city, is unconstitutional as discriminating against, and denying equal protection of the law to, the owners of property in the district where the lower height is prescribed. *Ib.*

See CONSTITUTIONAL LAW, 14;
COPYRIGHT, 5;
PRACTICE AND PROCEDURE, 3.

B. STATUTES OF THE UNITED STATES.

See ACTS OF CONGRESS.

C. STATUTES OF THE STATES AND TERRITORIES.

See LOCAL LAW.

STATUTE OF LIMITATIONS.

See COURTS, 2, 3, 4.

SUCCESSIONS.

See LOCAL LAW (PORTO RICO).

SUMMONS.

See PROCESS.

TAXES AND TAXATION.

See ASSESSMENT AND TAXATION;
BANKS AND BANKING, 1, 2.

TELEGRAMS.

See UNITED STATES, 2.

TERRITORIAL COURTS.

See APPEAL AND ERROR.

TERRITORIES.

1. *Ceded conquered territory; continuation of military authority—Presumption arising from delay in legislation.*

The military authority in control of ceded conquered territory at the time of a treaty of peace continues, if not dissolved by the Commander-in-Chief, until legislatively changed; nor is there any presumption of a contrary intention from the inaction of the legislature. Whatever the cause of delay in legislation it must be presumed that the delay was consistent with the true policy of the Government. (*Cross* v. *Harrison*, 16 How. 164.) *Santiago* v. *Nogueras*, 260.

2. *Ceded conquered territory—Extent of authority of military government.*

The authority of a military government continued after treaty of peace ceding the conquered territory, though not unlimited, is of large extent, and includes the power to establish courts of justice. (*Leitensdorfer* v. *Webb*, 20 How. 176.) *Ib.*

See PORTO RICO.

TITLE.

See BANKRUPTCY, 2;
VENDOR AND VENDEE, 1.

TORTS.

Publication of person's likeness as.

Quære and not decided whether the unauthorized publication of a person's likeness is a tort *per se*. *Peck* v. *Tribune Company*, 185.

TRANSLATIONS.

See PRACTICE AND PROCEDURE, 2.

TREATIES.

Construction to be reasonable and sensible.

Where a provision in a treaty or convention is plain it must receive a reasonable and sensible construction, and not one which it is impossible to conceive that the representatives of civilized countries would enter into. *Collins* v. *O'Neil*, 113.

See CONTRACTS, 3, 4;
EXTRADITION, 4, 6, 7;
PORTO RICO, 1.

TRIAL.

See CONSTITUTIONAL LAW, 5;
EXTRADITION, 4, 5, 7.

TRUSTEES.

See BANKRUPTCY, 2, 3.

UNITED STATES.

1. *Jurisdiction exclusive over Norfolk Navy Yard.*

The Norfolk Navy Yard is one of the places over which, under Art. I, § 8, par. 17, of the Constitution, Congress possesses exclusive power of legislation, and that exclusive power necessarily includes exclusive jurisdiction; and it is of the highest importance that the jurisdiction of the State should be resisted at the border of such places. (*Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525.) *Western Union Telegraph Co.* v. *Chiles*, 274.

2. *Jurisdiction—Power of State to exact penalty for act of omission within place under exclusive jurisdiction of United States.*

The State cannot inflict a penalty for the non-delivery of a telegram within the limits of a place under the exclusive jurisdiction of the United States; and so *held* that under the statute of Virginia in that regard the penalty cannot be collected for the non-delivery of a telegram to an addressee within the limits of the Norfolk Navy Yard. Congress alone can prescribe penalties in such a case. *Ib.*

See BANKS AND BANKING, 3;
COMMERCIAL PAPER, 1.

USER.

See NAVIGABLE WATERS, 6.

VENDOR AND VENDEE.

1. *Property rights in articles sold.*

In this case, *held*, that the sale of a stock of dry goods under a contract by which the articles sold remained the property of the vendor until paid for, with provision for substitution of other goods and that proceeds of goods sold also belonged to the vendor, was a conditional sale. *Bryant* v. *Swofford Bros.*, 279.

2. *Conditional sales; law governing validity.*

The validity of conditional sales depends upon the law of the State where made, and in bankruptcy the construction and validity of such a contract must be determined by the local law of the State, *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344, and the contract in this case as tested by the law of Arkansas is a conditional sale and is valid without record. *Ib.*

See BANKRUPTCY, 2, 3;
EVIDENCE.

VESSELS.

See PAYMENT;
PILOTAGE.

WAIVER.

See COURTS, 9;
LOCAL LAW (PORTO RICO, 3);
PRACTICE AND PROCEDURE, 5;
REMOVAL OF CAUSES, 4.

WATERS.

See BOUNDARIES, 1, 2;
NAVIGABLE WATERS;
PILOTAGE.

WHARVES.

See NAVIGABLE WATERS.

WILLS.

Construction; presumption against partial intestacy.

The will of a childless testatrix, who lived with her husband in the leper colony of Hawaii, leaving all her property to her husband, was rightfully construed as relating to all property whether situated in that colony or outside thereof, it not being presumed that she died intestate as to any of her property or that she would

limit her bounty to her husband by omitting any of her property. *Gray* v. *Noholoa*, 108.

See PRACTICE AND PROCEDURE, 2.

WILSON ACT.

See COMMERCE.

WORDS AND PHRASES.

"Parcel" and "letter"—Quære as to distinction affecting validity of return.

Quære, whether there is any distinction between "a parcel" and "a letter" that renders defective a return showing service of statutory notice by mail. *District of Columbia* v. *Brooke*, 138.

WRIT AND PROCESS.

See APPEAL AND ERROR; PROCESS; MANDAMUS; PROHIBITION.