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UNITED STATES REPORTS

VOLUME 215

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1909

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1910

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,[2] Associate Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.
WILLIAM HENRY MOODY,[3] Associate Justice.
HORACE HARMON LURTON,[4] Associate Justice.

GEORGE WOODWARD WICKERSHAM, Attorney General.
LLOYD WHEATON BOWERS, 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] Mr. Justice Peckham did not take his seat on the bench during October Term, 1909. He died at his home in Altamont near Albany, New York, on Sunday, October 24, 1909. See p. v, *post.*

[3] Mr. Justice Moody was absent from the court on account of illness and did not take his seat upon the bench until January 31, 1910. He did not participate in the decision of any of the cases reported in this volume which were argued or submitted during October Term, 1910.

[4] Mr. Justice Lurton of Tennessee was appointed to succeed Mr. Justice Peckham by President Taft and confirmed by the Senate, December 20, 1909. He took his seat on the bench, January 3, 1910, but took no part in the decision of cases reported in this volume which were argued or submitted prior to that date.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, JANUARY 10, 1910.[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, Horace H. Lurton, 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 214 U. S. iv.

PROCEEDINGS ON THE DEATH OF MR. JUSTICE PECKHAM.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 25, 1909.

Present: THE CHIEF JUSTICE, MR. JUSTICE HARLAN, MR. JUSTICE BREWER, MR. JUSTICE WHITE, MR. JUSTICE MCKENNA, MR. JUSTICE HOLMES and MR. JUSTICE DAY.

THE CHIEF JUSTICE said:

"It is with deep sorrow that I announce the passing of our eminent colleague and dear friend, MR. JUSTICE PECKHAM. He died at his summer home at Altamont yesterday evening, at quarter past 8. The court will transact no business, but will adjourn until next Monday."

Adjourned until Monday next at 12 o'clock.

The funeral of MR. JUSTICE PECKHAM was in Albany, New York, on October 27, 1909, and was attended by the Chief Justice and all the Associate Justices except MR. JUSTICE MOODY, who was detained by illness.

A meeting of the Bar of the Supreme Court of the United States was held in the Court Room on December 18, 1909. On motion of the Solicitor General, Mr. Alton B. Parker presided. Addresses were made by Mr. Alton B. Parker, Mr. Elihu Root, Mr. William A. Maury, Mr. Thomas H. Clark and Mr. Charles E. Patterson.

A committee consisting of Mr. Elihu Root, Chairman, Mr. Philander C. Knox, Mr. Lloyd W. Bowers, Mr. Jacob M. Dickinson, Mr. William A. Maury, Mr. William B. Hornblower, Mr. John G. Johnson, Mr. Nathaniel Wilson, Mr. Simon W. Rosen-

dale, Mr. Bernard Carter, Mr. DeLancey Nicoll, Mr. Frank P. Flint, Mr. Charles E. Patterson, Mr. William F. Mattingly, prepared and presented resolutions which were adopted, and the Attorney General was requested to present them to the court.

MONDAY, JANUARY 10, 1910.

Present: THE CHIEF JUSTICE, MR. JUSTICE HARLAN, MR. JUSTICE BREWER, MR. JUSTICE WHITE, MR. JUSTICE MCKENNA, MR. JUSTICE HOLMES, MR. JUSTICE DAY and MR. JUSTICE LURTON.

Mr. Attorney-General Wickersham addressed the court as follows:

May it please the court, I am requested by the members of the bar of this court to present for entry upon your records the resolutions recently adopted expressing their profound sorrow in the death of MR. JUSTICE PECKHAM and their sincere tribute to his high character and eminent service to the country. These resolutions are as follows:

"*Resolved*, That the bar of the Supreme Court of the United States deeply deplore the death of Rufus W. Peckham, associate justice of the Supreme Court, and desire to place upon record an expression of the respect and esteem in which JUSTICE PECKHAM was held and of regret for the loss which the court, the bar and the country have suffered in his untimely death.

"For twenty-four years he was an able and successful advocate at the bar of his native State of New York. For twelve years, by the election of his people, he was a member of the highest court of original jurisdiction and of the court of last resort of that State. For fourteen years he sat upon the bench of the Supreme Court of the United States. For a full half century he served the cause of justice without fear and without reproach. His learning and strong powers of reasoning

preserved the standards of the law. His knowledge of affairs and the breadth and vigor of his sympathies with the life and men of his time saved his judgments from pedantry and made them effective instruments for the application of the old principles to new conditions. His published opinions constitute a substantial and valuable contribution to the development of American law. The virile and courageous independence of his strong character, its integrity and its purity, created and justified universal confidence in his judicial acts. The influence of his life and the effect of his work have contributed powerfully to promote that respect for law and for the courts of our country which underlies all of our institutions.

"*Resolved,* That the *Attorney-General* be asked to present these resolutions to the court, with the request that they be entered upon the records, and that the chairman of this meeting be directed to send to the family of the late MR. JUSTICE PECKHAM a copy of the resolutions and an expression of our sympathy for them in the loss which they have sustained."

These resolutions of the bar are intended, in some measure, to express not alone the sense of personal bereavement which is so deeply felt by the immediate friends and associates of MR. JUSTICE PECKHAM, but a just and fitting estimate of his life and labors as they are known and esteemed by his countrymen.

The extent of the contribution to the work of this court of a single member is as difficult of exact ascertainment as is his influence upon its judgments. Only as he speaks through the published opinions which he is directed to announce can the bar or the people know the extent or the character of his service. His devotion to the duties of his high place, his persuasive insistence upon the right as it is given him to see it, his painstaking industry, his aid in council, his personal characteristics—all these are attributes which intimate friends may know, and which may be revealed now and again in the convincing earnestness of some striking opinion, but which have their full, free play only among his colleagues on the bench.

Looking back with this light upon the services of Rufus Wheeler Peckham, it is not beyond the truth to say that in the period of his service on the bench no man contributed more than he to the learning and development of the law.

He came of a family of lawyers and judges. His father, his brother, his sons made this profession the work of their lives. Though the span of his own life was little beyond seventy years, more than half of it was devoted to the public administration of the law of his State or his country. Though the period of his service in this court was less than fifteen years, it is perhaps not too much to say that in no other period of our history has the jurisprudence of the country been more profoundly affected by the new conditions and the new problems that have arisen as incident to our national growth and development. It has been largely during these fifteen years that the graver questions involved in the effort of the National Government to cope with the great industrial problems arising out of our unexampled commercial expansion have found their way to this court. It has been wholly within these fifteen years that our relations with foreign possessions and the interpretation of our laws for the government of alien peoples have been here debated and determined.

In this work MR. JUSTICE PECKHAM did his full share. No one can examine, even cursorily, the deliverances of this court during the last decade and a half without being impressed by the tremendous volume of it which came from his hand and brain. In that time he wrote nearly four hundred opinions. They dealt with every aspect of the law. But more striking than the number is the fact that so many of them are to-day, and will ever remain, the leading and familiar cases upon the great questions with which they dealt. No tribute to the life and work of MR. JUSTICE PECKHAM could find a higher sanction than the mere citation of his opinions in such cases as Maxwell *v.* Dow, Hopkins *v.* United States, the Addyston Pipe case, the Trans-Missouri and the Joint Traffic Association cases, Montague *v.* Lowry, Lochner *v.* New York, *Ex parte* Young, which reveal his great learning and industry.

But we can not garner up his work as men would bind the

harvest of a season. It has enriched the whole field of our national jurisprudence, and for all time the yield will be the better for his labor.

If it please the court, I have the honor to move that the resolutions adopted by the bar be entered at large upon the records of this court.

THE CHIEF JUSTICE responded:

The resolutions and the remarks by which they are accompanied will be spread upon our records as deserved tributes to the memory of the brother who has so recently been taken from us. Whatsoever things are true and honest, just and of good report, these are the things which the record of the life of MR. JUSTICE PECKHAM displays. Its most striking characteristic is the singlemindedness of his devotion to judicial duty. It may be said of him as it was of MR. JUSTICE STORY that "in all his commerce with the world and in his intercourse with the circle of his friends the predominance of his judicial character was manifest." He discharged his judicial duties not as upon compulsion, but because he loved them. It ran in his blood, and he profoundly believed that justice was "the great interest of man on earth."

"As a man thinketh, so is he," and as this man was, so was his style, simple, forcible, and direct. He aimed to do substantial justice in an intelligible way, dealing in no strained inferences, nor muddling definite results by qualifying his qualifications.

His opinions from the first in volume 160 of our reports to the last in volume 214 are all lucid expositions of the matter in hand, and many of them of peculiar gravity and importance in the establishment of governing principles. He sought to avoid the curse denounced on the removal of landmarks while meriting the blessing accorded to their wise reënforcement. His death is a serious loss to the cause of jurisprudence, to this court, and to his country. I cannot trust myself to speak of the loss to his brethren of this lovable and beloved comrade. We cannot but be exceeding sorrowful as we recall the touch

of the vanished hand and the sound of the voice that is still. "Let us alone," sang the Lotos-Eaters, "what is it that will last?" We find the answer in the example of this distinguished, faithful, and thorough life which, "though the whole world turn to coal, then chiefly lives."

Mr. Elihu Root presented to the court the resolutions adopted at a meeting of the members of the bar of the State of New York in memory of MR. JUSTICE PECKHAM, and it was ordered that they be placed on file.

They are as follows:

NEW YORK STATE BAR ASSOCIATION.

TO THE NEW YORK STATE BAR ASSOCIATION:

The undersigned, appointed as Committee to present Resolutions to this Association with regard to the late MR. JUSTICE PECKHAM, hereby present the accompanying Resolutions.

Dated December 9, 1909.

WILLIAM B. HORNBLOWER,
Chairman.
JOSEPH H. CHOATE,
ALTON B. PARKER,
LOUIS MARSHALL,
FRANCIS LYNDE STETSON,
JOHN G. MILBURN,
Committee.

Resolutions adopted by the New York State Bar Association at a special meeting held in the city of Albany on the evening of Thursday, December 9, 1909:

Resolved, That the New York State Bar Association desires to express its profound sense of the great loss which the Judiciary, the Bar and the public at large have suffered by the death of MR. JUSTICE RUFUS W. PECKHAM, Associate Justice of the Supreme Court of the United States. The members of the Bar of this, his native State, feel that loss in a peculiar and special degree, and we adopt the following memorial to be spread upon our minutes.

Rufus W. Peckham was born in the city of Albany in 1838. He was the son of one of our most distinguished jurists, who rounded out his career by serving upon the Bench of the highest court of the State, and whose life was cut short, while still in the full vigor of his powers, by a terrible catastrophe at sea. Bearing his father's name and strongly resembling him in his physical, mental and moral characteristics, Rufus W. Peckham had an hereditary claim to the regard and esteem of his fellow-citizens of this State. His is one of the rare instances in which the honors of the father have descended naturally to the son. He and his elder brother, Wheeler H. Peckham, became eminent members of the profession, and achieved for themselves a distinction worthy of that which had been bequeathed to them by their father.

Rufus W. Peckham practised law for many years in the city of Albany with ability and success. He was a man of vigorous and forceful character; frank and outspoken and courageous in every relation of life. In the practice of his profession he won the respect and admiration of his brethren of the Bar, the members of the Bench and the public at large.

He was elected a justice of the Supreme Court of this State more than twenty-five years ago, and until his death he remained continuously in judicial office, so that to very few of the members of this Association was he known otherwise than as a judge, and for most of us it is difficult to think of him except as we remember him in the performance of his judicial functions, or as we met him personally and socially, from time to time, during his judicial career.

Elected to the Supreme Court of this State in 1883; transferred to the Court of Appeals of the State, January 1, 1887, and to the Supreme Court of the United States in January, 1896, and dying in the full vigor of his ripe manhood in 1909, while still serving on the Bench, he has been to the members of the Bar of this State for a quarter of a century our ideal of judicial character and conduct. His intellectual perceptions were keen and penetrating; his power of analysis of intricate questions of fact and law were unexcelled; his terse, forcible and vigorous expressions of his conclusions, as embodied in

the opinions which he from time to time delivered in the various courts of which he was a member, will always remain to illuminate the path of searchers for the doctrines of our jurisprudence, as set forth in judicial decisions. His absolute and unyielding impartiality and integrity were such marked characteristics that it was impossible for any one to so much as suspect that he was conscious of either fear or favoritism, no matter who were engaged in a cause before him, or what might be the interests involved. It was impossible for Rufus W. Peckham to think except in a straight line from premise to conclusion, according to the logic and reason of the case as he saw them. All must agree that the conclusions reached by JUDGE PECKHAM were the honest conclusions of an open-minded judge, and they were expressed in clear and convincing language which bespoke the sincerity and the ability of the man.

Not only was JUDGE PECKHAM our ideal of a judge in ability, character and conduct, but he had the judicial manner upon the Bench; always courteous yet dignified; his occasional colloquies with counsel arguing before the court were always with the purpose of acquiring information or obtaining the views of counsel, and not with the purpose of indulging in controversy. His keen and incisive questions to counsel left no doubt of his desire to arrive at the very truth of the case, and left no sting behind.

And now, what shall we say of JUDGE PECKHAM as a man and as a friend? As we have already said, there are few of us who can remember him in the days before he became a judge in the freedom from restraint and reserve of ordinary professional life. But, to those of us who knew him only as a judge, when he was surrounded to some extent by that undefined, but always-felt distinction between the Bench and the Bar, JUDGE PECKHAM preserved, even after he became a Justice of the Supreme Court of the United States, a geniality and a kindliness which, in social intercourse, made him peculiarly attractive. We would not call him affable, for that implies a certain amount of condescension, and there was nothing of condescension about Rufus Peckham. He never seemed con-

scious of his honors, nor did he feel it necessary to maintain an attitude of judicial reserve, but to his dying day he was the same hearty, outspoken, warm-hearted Rufus Peckham that some of us knew in our earlier days.

It is hard for us to realize that the life and the judicial career of this eminent son of New York State are at an end. His sturdy intellectual honesty, his absolute and exclusive devotion to judicial duty, and his sterling common sense, made him an invaluable member of the great tribunal which he so fitly graced. The influence which he has exerted upon the jurisprudence of this State and of this country cannot be overestimated. As has been frequently remarked, it is one of the advantages which the judicial function possesses over that of the advocates of the Bar, that while the fame of the latter vanishes, with rare exceptions, with the brain and the voice which gave it life, the fame of the former is written imperishably in the volumes of official reports, which will be handed down from generation to generation. The name and the fame of Rufus W. Peckham will last as long as the decisions of the Court of Appeals of this State and of the Supreme Court of the United States are quoted as authority.

This Association extends to the bereaved widow and family our deepest and profound sympathy, and begs to assure them that the members of the Bar of this State are fellow-mourners with them in their great loss.

I hereby certify that the foregoing is a correct copy of the Resolutions adopted upon the report of the Committee, appended hereto, at the special meeting of the New York State Bar Association, called to commemorate the life and services of the late Mr. Justice Peckham, which meeting was held on Thursday, December 9, 1909, in the Assembly Chamber in the Capitol in the city of Albany, N. Y.

[SEAL.] Frederick E. Wadhams,
Secretary.

Dated Albany, N. Y., December 16, 1909.

SUPREME COURT OF THE UNITED STATES.

Amendment to sec. 7 of rule 24.[1]

OCTOBER TERM, 1909.

ORDER.

It is ordered by the court that § 7 of rule 24 be, and the same is hereby, amended so as to read as follows:

"For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio; but when the necessary printed copies of the record, as printed for the use of the lower court, shall be furnished, the fee for supervising shall be five cents per folio.

"For every printed copy of any opinion of the Court or any justice thereof, certified under seal, two dollars."

(Promulgated January 10, 1910.)

[1] For all rules of the Supreme Court of the United States see 210 U. S. 441.

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IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1909.

FALL *v.* EASTIN.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 24. Submitted April 30, 1909.—Decided November 1, 1909.

While a court of equity acting upon the person of the defendant may decree a conveyance of land in another jurisdiction and enforce the execution of the decree by process against the defendant, neither the decree, nor any conveyance under it except by the party in whom title is vested, is of any efficacy beyond the jurisdiction of the court. *Corbett* v. *Nutt*, 10 Wall. 464.

A court not having jurisdiction of the *res* cannot affect it by its decree nor by a deed made by a master in accordance with the decree.

Local legislation of a State as to effect of a decree, or a conveyance made by a master pursuant thereto, on the *res* does not apply to the operation of the decree on property situated in another State.

The full faith and credit clause of the Constitution does not extend the jurisdiction of the courts of one State to property situated in another State, but only makes the judgment conclusive on the merits of the claim or subject-matter of the suit; and the courts of the State in which land is situated do not deny full faith and credit to a decree of courts of another State, or to a master's deed thereunder, by holding that it does not operate directly upon, and transfer the property.

75 Nebraska, 104, affirmed.

THE facts are stated in the opinion.

Mr. Charles J. Greene, Mr. Ralph W. Breckenridge and *Thomas H. Matters,* for plaintiff in error.

There was no appearance or brief for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question in this case is whether a deed to land situate in Nebraska, made by a commissioner under the decree of a court of the State of Washington in an action for divorce, must be recognized in Nebraska under the due faith and credit clause of the Constitution of the United States.

The action was begun in Hamilton County, Nebraska, in 1897, to quiet title to the land and to cancel a certain mortgage thereon, given by E. W. Fall to W. H. Fall, and to cancel a deed executed therefor to defendant in error, Elizabeth Eastin.

Plaintiff alleged the following facts: She and E. W. Fall, who was a defendant in the trial court, were married in Indiana in 1876. Subsequently they went to Nebraska, and while living there, "by their joint efforts, accumulations and earnings, acquired jointly and by the same conveyance" the land in controversy. In 1889 they removed to the State of Washington, and continued to reside there as husband and wife until January, 1895, when they separated. On the twenty-seventh of February, 1895, her husband, she and he then being residents of King County, Washington, brought suit against her for divorce in the Superior Court of that county. He alleged in his complaint that he and plaintiff were *bona fide* residents of King County, and that he was the owner of the land in controversy, it being, as he alleged, "his separate property, purchased by money received from his parents." He prayed for a divorce and "for a just and equitable division of the property."

Plaintiff appeared in the action by answer and cross com-

plaint, in which she denied the allegations of the complaint, and alleged that the property was community property, and "was purchased by and with the money and proceeds of the joint labor" of herself and husband after their marriage. She prayed that a divorce be denied him, and that the property be set apart to her as separate property, subject only to a mortgage of $1,000, which she alleged was given by him and her. In a reply to her answer and cross complaint he denied that she was the "owner as a member of the community in conjunction" with him of the property, and repeated the prayer of his complaint.

Plaintiff also alleges that the Code of Washington contained the following provision:

"SEC. 2007 [now 4637]. In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable having regard to the respective merits of the parties and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody and support and education of the minor children of such marriage."

She further alleges that that provision had been construed by the Supreme Court of the State requiring of the parties to an action for divorce to bring into court all of " 'their property, and a complete showing must be made,' " and that it was decided that § 2007 [now 4637] conferred upon the court " 'the power, in its discretion, to make a division of the separate property of the wife or husband.' "

She further alleges that a decree was entered granting her a divorce and setting apart to her the land in controversy as her own separate property forever, free and unencumbered from any claim of the plaintiff thereto, and that he was ordered and directed by the court to convey all his right, title and interest in and to the land within five days from the date of the decree.

She also alleges the execution of the deed to her by the commissioner appointed by the court, the execution and recording of the mortgage to W. H. Fall and the deed to defendant; that the deed and mortgage were each made without consideration and for the purpose of defrauding her, and that they cast a cloud upon her title derived by her under the decree of divorce and the commissioner's deed. She prays that her title be quieted and that the deed and mortgage be declared null and void.

W. H. Fall disclaimed any interest in the premises, and executed a release of the mortgage made to him by E. W. Fall. Defendant answered, putting in issue the legal sufficiency of the complaint, and, in addition, set forth the fact of the loan of $1,000 to E. W. Fall, the taking of a note therefor signed by him and William H. Fall, the giving of an indemnity mortgage to the latter, and the execution subsequently of a deed by E. W. Fall in satisfaction of the debt. No personal service was had upon E. W. Fall, and he did not appear. A decree was passed in favor of plaintiff, which was affirmed by the Supreme Court. *Fall* v. *Fall*, 75 Nebraska, 104; 106 N. W. Rep. 412. A rehearing was granted and the decree was reversed, Judge Sedgwick, who delivered the first opinion, dissenting.

There is no brief for defendant in this court, but the contentions of the parties and the argument by which they are supported are exhibited in the opinions of the Supreme Court.

The question is in narrow compass. The full faith and credit clause of the Constitution of the United States is invoked by plaintiff to sustain the deed executed under the decree of the court of the State of Washington. The argument in support of this is that the Washington court, having had jurisdiction of the parties and the subject-matter, in determination of the equities between the parties to the lands in controversy, decreed a conveyance to be made to her. This conveyance, it is contended, was decreed upon equities, and was as effectual as though her "husband and she had been strangers and she had bought the land from him and

paid for it and he had then refused to convey it to her." In other words, that the decree of divorce in the State of Washington, which was made in consummation of equities which arose between the parties under the law of Washington, was "evidence of her right to the legal title of at least as much weight and value as a contract in writing, reciting the payment of the consideration for the land, would be."

The defendant, on the other hand, contends, as we gather from his petition for a rehearing in the Supreme Court of the State and from the opinions of the court, that "the Washington court had neither power nor jurisdiction to effect in the least, either legally or equitably," lands situated in Nebraska. And contends further that by the provision of ch. 25, 276 Comp. St. 1901, Neb., a court had no jurisdiction to award the real estate of the husband to the wife in fee as alimony, and a decree in so far as it attempts to do so is void and subject to collateral attack. For this view are cited *Cizek* v. *Cizek*, 69 Nebraska, 797, 800; *Aldrich* v. *Steen*, 100 N. W. Rep. 311, 312.

The contentions of the parties, it will be observed, put in prominence and as controlling different propositions. Plaintiff urges the equities which arose between her and her husband, on account of their relation as husband and wife, in the State of Washington, and under the laws of that State. The defendant urges the policy of the State of Nebraska, and the inability of the court of Washington by its decree alone or the deed executed through the commissioners to convey the land situate in Nebraska. To the defendant's view the Supreme Court of the State finally gave its assent, as we have seen.

In considering these propositions we must start with a concession of jurisdiction in the Washington court over both the parties and the subject-matter. Jurisdiction in that court is the first essential, but the ultimate question is, What is the effect of the decree upon the land and of the deed executed under it? The Supreme Court of the State concedes, as we under-

stand its opinion, the jurisdiction in the Washington court to render the decree. The court said (75 Nebraska, 104, 128):

"We think there can be no doubt that where a court of chancery has by its decree ordered and directed persons properly within its jurisdiction to do or refrain from doing a certain act, it may compel obedience to this decree by appropriate proceedings, and that any action taken by reason of such compulsion is valid and effectual wherever it may be assailed. In the instant case, if Fall had obeyed the order of the Washington court and made a deed of conveyance to his wife of the Nebraska land, even under the threat of contempt proceedings, or after duress by imprisonment, the title thereby conveyed to Mrs. Fall would have been of equal weight and dignity with that which he himself possessed at the time of the execution of the deed."

But Fall, not having executed a deed, the court's conclusion was, to quote its language, that "neither the decree nor the commissioner's deed conferred any right or title upon her." This conclusion was deduced, not only from the absence of power generally of the courts of one State over lands situate in another, but also from the laws of Nebraska providing for the disposition of real estate in divorce proceedings. The court said (75 Nebraska, 133):

"Under the laws of this State the courts have no power or jurisdiction in a divorce proceeding, except as derived from the statute providing for such actions, and in such an action have no power or jurisdiction to divide or apportion the real estate of the parties. *Nygren* v. *Nygren*, 42 Nebraska, 408; *Brotherton* v. *Brotherton*, 15 N. W. Rep. 347; *Cizek* v. *Cizek*, 69 Nebraska, 797; *Aldrich* v. *Steen*, 100 N. W. Rep. 311. In *Cizek* v. *Cizek*, Cizek brought an action for divorce and his wife filed a cross bill and asked for alimony. The court dismissed the husband's bill, found in favor of the wife, and, by stipulation of the parties, set off to the wife the homestead and ordered her to execute to the husband a mortgage thereon, thus endeavoring to make an equitable division of the property.

Afterwards in a contest arising between the parties as to the right of possession of the property, the decree was pleaded as a source of title in the wife, but it was held that that portion of the decree which set off the homestead to the wife was absolutely void and subject to collateral attack, for the reason that no jurisdiction was given to the District Court in a divorce proceeding to award the husband's real estate to the wife in fee as alimony. The courts of this State in divorce proceedings must look for their authority to the statute, and so far as they attempt to act in excess of the powers therein granted their action is void and subject to collateral attack. A judgment or decree of the nature of the Washington decree, so far as affects the real estate, if rendered by the courts of this State would be void.

* * * * * * * *

"The decree is inoperative to affect the title to the Nebraska land and is given no binding force or effect so far as the courts of this State are concerned, by the provisions of the Constitution of the United States with reference to full faith and credit. Since the decree upon which the plaintiff bases her right to recover did not affect the title to the land it remained in E. W. Fall until divested by operation of law or by his voluntary act. He has parted with it to Elizabeth Eastin and whether any consideration was ever paid for it or not is immaterial so far as the plaintiff is concerned, for she is in no position to question the transaction, whatever a creditor of Fall might be able to do."

It is somewhat difficult to state precisely and succinctly wherein plaintiff disagrees with the conclusions of the Supreme Court. Counsel says:

"It is not claimed that the Washington court could create an equity in lands in Nebraska by any finding or decree it might make, and thus bind the courts of a sister State; but it is claimed that where rights and equities already exist, the parties being within the jurisdiction of the court, it can divide them and apportion them by a judgment or decree which

would be conclusive upon the parties in any subsequent proceeding in a court having jurisdiction of the lands, for the purpose of quieting the title in the equitable owner."

If we may regard this as not expressing a complete opposition to the views of the Supreme Court, we must at least treat it as contradicting their fundamental principle, that is, that the decree as such has no extraterritorial operation.

The territorial limitation of the jurisdiction of courts of a State over property in another State has a limited exception in the jurisdiction of a court of equity, but it is an exception well defined. A court of equity having authority to act upon the person may indirectly act upon real estate in another State, through the instrumentality of this authority over the person. Whatever it may do through the party it may do to give effect to its decree respecting property, whether it goes to the entire disposition of it or only to effect it with liens or burdens. Story on Conflict of Laws, § 544. In *French, Trustee,* v. *Hay*, 22 Wall. 250, 252, this court said that a court of equity having jurisdiction *in personam* has power to require a defendant "to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory." The extent of this power this court has also defined. *Watts et al.* v. *Waddle et al.*, 6 Pet. 389, has features like the case at bar. The suit was for the specific performance of a contract for the conveyance of land. It became necessary to pass upon the effect of a decree requiring the conveyance of the lands concerned. The decree appointed a commissioner under a statute of the State to make the conveyance in case the defendants or any of them failed to make the conveyance. This court said: "A decree cannot operate beyond the State in which the jurisdiction is exercised. It is not in the power of one State to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt." In reply to the contention that the deed of the commissioner was a legal conveyance, it was said: "The deed executed by the commissioner in this case

must be considered as forming part of the proceedings in the court of chancery, and no greater effect can be given to it than if the decree itself, by statute, was made to operate as a conveyance in Kentucky as it does in Ohio."

In *Watkins* v. *Holman et al.*, 16 Pet. 25, 57, passing on a decree made by the Supreme Court in Massachusetts by virtue of a statute of that State, it was said:

"No principle is better established than that the disposition of real estate, whether by deed, descent or by any other mode, must be governed by the law of the State where the land is situated."

And further:

"A court of chancery, acting *in personam*, may well decree the conveyance of land in any other State, and may well enforce its decree by process against the defendant. But neither the decree itself nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court."

See, also, *Massie* v. *Watts*, 6 Cranch, 148, and *Miller* v. *Sherry*, 2 Wall. 237, 248, 249.

In *Corbett* v. *Nutt*, 10 Wall. 464, 475, the doctrine was repeated that a court of equity acting upon the person of the defendant may decree a conveyance of land situated in another jurisdiction, and even in a foreign country, and enforce the execution of the decree by process against the defendant, but, it was said: "Neither its decree nor any conveyance under it, except by the party in whom the title is vested, is of any efficacy beyond the jurisdiction of the court." This, the court declared, was familiar law, citing *Watkins* v. *Holman, supra*. See, also, *Brine* v. *Insurance Company*, 96 U. S. 627, 635; *Phelps* v. *McDonald*, 99 U. S. 308.

In *Boone* v. *Chiles*, 10 Pet. 177, 245, it is said that a commissioner is in no sense an agent of the party, but is an officer of the court, and acts strictly under its authority.

Later cases assert the same doctrine. In *Carpenter* v. *Strange*, 141 U. S. 87, 105, a court of New York had declared a

deed for real estate situate in Tennessee null and void. This court said to concede such power would be "to attribute to that decree the force and effect of a judgment *in rem* by a court having no jurisdiction over the *res*." And, explaining the power of a court of equity, said that "by means of its power over the person of a party a court of equity may in a proper case compel him to act in relation to property not within the jurisdiction, its decree does not operate directly upon the property nor affect the title, but it is made effectual through the coercion of the defendant, as, for instance, by directing a 'deed to be executed or canceled by or on behalf of the party. The court has no inherent power by' the mere force of its decree to annul a deed or to establish a title. *Hart* v. *Sansom*, 110 U. S. 151, 155."

Whether the doctrine that a decree of a court rendered in consummation of equities, or the deed of a master under it, will not convey title, and that the deed of a party coerced by the decree will have such effect is illogical or inconsequent, we need not inquire nor consider whether the other view would not more completely fulfill the Constitution of the United States, and that whatever may be done between the parties in one State may be adjudged to be done by the courts of another, and that the decree might be regarded to have the same legal effect as the act of the party which was ordered to be done. The policy of a State would not be violated. Besides, this court found no impediment in the policy of a State in the way of enforcing, under the due faith and credit clause of the Constitution of the United States, a judgment obtained in Missouri, sued upon in Mississippi. The defense was that the cause of action arose in Mississippi and was one that the courts of the State, under its laws, were forbidden to enforce. The defense was adjudged good by the Supreme Court of Mississippi and its judgment was reversed by this court. *Fauntleroy* v. *Lum*, 210 U. S. 230.

In *Hart* v. *Sansom*, *supra*, it was directly recognized that it was within the power of the State in which the land lies to

provide, by statute, that if the defendant is not found within the jurisdiction, or refuses to perform, performance in his behalf may be had by a trustee appointed by the court for that purpose.

In *Dull* v. *Blackman*, 169 U. S. 243, 246, 247, while recognizing that litigation in regard to the title of land belongs to the courts of the State where the land is so located, it was said, "although if all the parties interested in the land were brought personally before a court of another State, its decree would be conclusive upon them, and thus, in effect, determine the title."

But, however plausibly the contrary view may be sustained, we think that the doctrine that the court, not having jurisdiction of the *res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree, is firmly established. The embarrassment which sometimes results from it has been obviated by legislation in many States. In some States the decree is made to operate *per se* as a source of title. This operation is given a decree in Nebraska. In other States power is given to certain officers to carry the decree into effect. Such power is given in Washington to commissioners appointed by the court. It was in pursuance of this power that the deed in the suit at bar was executed. But this legislation does not affect the doctrine which we have expressed, which rests, as we have said, on the well-recognized principle that when the subject-matter of a suit in a court of equity is within another State or country, but the parties within the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately but *indirectly* affected by the relief granted. In such case the decree is not of itself legal title, nor does it transfer the legal title. It must be executed by the party, and obedience is compelled by proceedings in the nature of contempt, attachment or sequestration. On the other hand, where the suit is

strictly local, the subject-matter is specific property, and the relief when granted is such that it *must* act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the State where the subject-matter is situated. 3 Pomeroy's Equity, §§ 1317, 1318, and notes.

This doctrine is entirely consistent with the provision of the Constitution of the United States, which requires a judgment in any State to be given full faith and credit in the courts of every other State. This provision does not extend the jurisdiction of the courts of one State to property situated in another, but only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit. "It does not carry with it into another State the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State it must become a judgment there; and can only be executed in the latter as its laws permit." *M'Elmoyle* v. *Cohen*, 13 Pet. 312.

Plaintiff seems to contend for a greater efficacy for a decree in equity affecting real property than is given to a judgment at law for the recovery of money simply. The case of *Burnley* v. *Stevenson*, 24 Ohio St. 474, 478, in a sense sustains her. The action was brought in one of the courts of Ohio for the recovery of the possession of certain lands. The defendant set up in defense a conveyance for the same lands made by a master commissioner, in accordance with a decree of a court in Kentucky in a suit for specific performance of a contract concerning the lands. The defendant in *Burnley* v. *Stevenson* claimed title under the master's deed. The court declared the principle that a court of equity, having the parties before it, could enforce specific performance of a contract for lands situate in another jurisdiction by compelling the parties to make a conveyance of them, but said that it did not follow that the court could "make its own decree to operate as such conveyance." And it was decided that the decree could not have such effect, and as it could not, it was "clear that a deed exe-

cuted by a master, under the direction of the court," could "have no greater effect." *Watts* v. *Waddle*, *supra*, and *Page* v. *McKee*, 3 Bush, 135, were cited, and the master's deed, the court said, "must, therefore, be regarded as a nullity." But the court decided that the "decree was *in personam* and bound the consciences of those against whom it was rendered." It became, it was in effect said, a record of the equities which preceded it, and of the fact that it had become, and it was the duty of the defendants in the suit to convey the legal title to the plaintiff. This duty, it was further said, could have been enforced "by attachment as for contempt; and the fact that the conveyance was not made in pursuance of the order does not affect the validity of the decree, in so far as it determined the equitable rights of the parties in the land in controversy. In our judgment the parties, and those claiming under them with notice, are still bound thereby."

The court proceeded to say that it might be admitted that the decree would not constitute a good defense at law, but that it was a good defense in equity, as under the code of Ohio equitable as well as legal defenses might be set up in an action for the recovery of land, and from this, and the other propositions that were expressed, concluded that as the decree had the effect in Kentucky of determining the equities of the parties to the land in Ohio, the courts of the latter State "must accord to it the same effect" in obedience to the due faith and credit clause of the Constitution of the United States. "True," the court observed, "the courts of this State cannot enforce the performance of that decree, by compelling the conveyance through its process of attachment; but when pleaded in our courts as a cause of action, or as a ground of defense, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein, unless it be impeached for fraud. See cases *supra;* also *Davis* v. *Headley*, 22 N. J. Eq. 115; *Brown* v. *L. & D. R. R. Co.*, 2 Beasley Eq. (N. J.) 191; *Dobson* v. *Pierce*, 2 Kernan, 156; *United States Bank* v. *Bank of Baltimore*, 7 Gill, 415."

It may be doubted if the cases cited by the learned court sustain its conclusion. But we will not stop to review them or to trace their accordance with or their distinction from the cases which we have cited. The latter certainly accord with the weight of authority. There is, however, much temptation in the facts of this case to follow the ruling of the Supreme Court of Ohio. As we have seen, the husband of the plaintiff brought suit against her in Washington for divorce, and, attempting to avail himself of the laws of Washington, prayed also that the land now in controversy be awarded to him. She appeared in the action, and, submitting to the jurisdiction which he had invoked, made counter-charges and prayers for relief. She established her charges, she was granted a divorce, and the land decreed to her. He, then, to defeat the decree and in fraud of her rights, conveyed the land to the defendant in this suit. This is the finding of the trial court. It is not questioned by the Supreme Court, but as the ruling of the latter court, that the decree in Washington gave no such equities as could be recognized in Nebraska as justifying an action to quiet title does not offend the Constitution of the United States, we are constrained to affirm its judgment.

So ordered.

MR. JUSTICE HARLAN and MR. JUSTICE BREWER dissent.

MR. JUSTICE HOLMES, concurring specially.

I am not prepared to dissent from the judgment of the court, but my reasons are different from those that have been stated.

The real question concerns the effect of the Washington decree. As between the parties to it that decree established in Washington a personal obligation of the husband to convey to his former wife. A personal obligation goes with the person. If the husband had made a contract, valid by the law of Washington, to do the same thing, I think there is no doubt that the contract would have been binding in Nebraska. *Ex parte*

Pollard, 4 Deacon, 27, 40; *Polson* v. *Stewart*, 167 Massachusetts, 211. So I conceive that a Washington decree for the specific performance of such a contract would be entitled to full faith and credit as between the parties in Nebraska. But it does not matter to its constitutional effect what the ground of the decree may be, whether a contract or something else. *Fauntleroy* v. *Lum*, 210 U. S. 230. (In this case it may have been that the wife contributed equally to the accumulation of the property, and so had an equitable claim.) A personal decree is equally within the jurisdiction of a court having the person within its power, whatever its ground and whatever it orders the defendant to do. Therefore I think that this decree was entitled to full faith and credit in Nebraska.

But the Nebraska court carefully avoids saying that the decree would not be binding between the original parties had the husband been before the court. The ground on which it goes is that to allow the judgment to affect the conscience of purchasers would be giving it an effect *in rem*. It treats the case as standing on the same footing as that of an innocent purchaser. Now if the court saw fit to deny the effect of a judgment upon privies in title, or if it considered the defendant an innocent purchaser, I do not see what we have to do with its decision, however wrong. I do not see why it is not within the power of the State to do away with equity or with the equitable doctrine as to purchasers with notice if it sees fit. Still less do I see how a mistake as to notice could give us jurisdiction. If the judgment binds the defendant it is not by its own operation, even with the Constitution behind it, but by the obligation imposed by equity upon a purchaser with notice. The ground of decision below was that there was no such obligation. The decision, even if wrong, did not deny to the Washington decree its full effect. *Bagley* v. *General Fire Extinguisher Co.*, 212 U. S. 477, 480.

REAVIS *v.* FIANZA.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 16. Argued April 26, 27, 1909.—Decided November 1, 1909.

This court has jurisdiction of this case; for, even if the requisite amount is not involved, the meaning and effect of a provision of the Philippine Organic Act of July 1, 1902, c. 1369, 32 Stats. 691, is involved.

The provision of § 45 of the Organic Act of the Philippine Islands relating to title to mines by prescription refers to conditions as they were before the United States came into power and had in view the natives of the islands and intention to do them liberal justice.

Courts are justified in dealing liberally with natives of the Philippines in dealing with evidence of possession. *Cariño* v. *Insular Government*, 212 U. S. 449.

The limitation of size of mining claims in § 22 of the Philippine Organic Act applies only to claims located after the passage of that act.

Under § 28 of the Philippine Organic Act a valid location could not be made if the land was occupied by one who was already in possession before the United States came into power, and the claim of one locating under those conditions does not constitute an adverse claim under § 45 of that act.

A right to an instrument that will confer a title in a thing is a right to the thing itself, and a statutory right to apply for a patent to mining lands is a right that equity will specifically enforce.

Although, if seasonably taken, an objection to the form of remedy might be sustained, after trial on the merits it comes too late.

7 Philippine Rep. 610, affirmed.

THE facts are stated in the opinion.

Mr. Frederic R. Coudert and *Mr. Howard Thayer Kingsbury*, with whom *Mr. Paul Fuller* was on the brief, for appellant:

This court has jurisdiction both as the basis of the amount involved, and because the construction of a statute of the

United States (Act of July 1, 1902, § 45; 32 U. S. Stat. 703) is in question. The facts as well as the law are before the court for review. *De la Rama* v. *De la Rama*, 201 U. S. 309.

The judgment of the Court of First Instance was plainly and manifestly against the weight of evidence. The Philippine Supreme Court should have decided according to the preponderance of the evidence. Act of Feb. 25, 1907, No. 1596, Acts of Phil. Com.

Plaintiffs had no title to the mines at the time of the cession and have acquired none since. Both under Spanish law and ours, mines can be acquired in private ownership only by compliance with governmental regulations. Translation of Mining Law and Regulations, War Dep't, July, 1900; Royal Decree of May 14, 1867; *United States* v. *Castillero*, 2 Black, 1, 166. After the cession the Spanish Mining Laws continued in force until further legislation by Congress. *Strother* v. *Lucas*, 12 Pet. 410, 436. The act of March 2, 1901, 31 Stat. 910, forbade for the time being any government grant of mining rights, and thus suspended recourse to former law. Unless plaintiffs have acquired some rights of property under the act of July 1, 1902, they have none now, and are mere trespassers.

Section 45 of the act of July 1, 1902, 32 Stat. 703, is almost identical with § 2332, Rev. Stat. It confers no title, but merely prescribes what evidence shall entitle a claimant to a patent, upon compliance with requirements of § 37 and determination of any adverse claim under § 39. Plaintiffs at most have only a right to apply for a patent;—a *jus ad rem*, not a *jus in re*. *The Young Mechanic*, 2 Curt. 404; *S. C.*, Fed. Cas. No. 18,180; *The Carlos F. Roses*, 177 U. S. 655, 666; 2 Lindley on Mines, § 688; *In re Smith Brothers*, 7 Copp's L. O. 4; *Buffalo Zinc & Copper Co.* v. *Crump*, 69 S. W. Rep. 572; *Cleary* v. *Skiffich*, 28 Colorado, 362; *McCowan* v. *Maclay*, 16 Montana, 234.

Rights founded on possession must yield to a "location" under the statutes. *Horswell* v. *Ruiz*, 67 Colorado, 111;

Kendall v. *San Juan Mining Co.*, 144 U. S. 658. Reavis's peaceable adverse entry interrupted plaintiffs' possession and prevented them from acquiring title thereunder. *Belk* v. *Meagher*, 104 U. S. 279, 287. Plaintiffs' possession was insufficient under the Philippine statute of limitations. Phil. Code of Proc., § 41; *Hamilton* v. *South Nev. Gold & Silver Min. Co.*, 33 Fed. Rep. 562. A "location" can only be made for a territory not exceeding 1,000 feet by 1,000 feet. 32 Stat. 697, § 22.

This case is to be distinguished from *Cariño* v. *The Insular Government*, 212 U. S. 449. There the boundaries were defined; the possession was definite and exclusive, and the lands were agricultural and hence prescriptible even against the Spanish Crown. Here the plaintiffs ask the court to declare that because a particular family of Iggorrots have habitually roamed over a whole mountain-side and taken out a little loose gold, they have acquired legal title to all the mineral wealth below the surface within whatever boundaries they *now* choose to assert. Such a ruling would prevent the development of the mineral resources of the Philippine Islands. The Iggorrots' conceptions of private property hardly included subterranean rights. The appellant asks the court to appreciate a peculiar colonial problem rather than to weigh conflicting claims as to mining boundaries.

Plaintiffs were not entitled to an injunction. Their rights were doubtful and disputed. *Lawson* v. *U. S. Mining Co.*, 207 U. S. 1; *Gwillim* v. *Donellan*, 115 U. S. 45; *Tacoma Ry. & Power Co.* v. *Pacific Traction Co.*, 155 Fed. Rep. 259. They were out of possession when suit was brought. *Lacassagne* v. *Chapuis*, 144 U. S. 119; *Whithead* v. *Shattuck*, 138 U. S. 146. They should have sued at law to recover possession. *Bago* v. *Garcia*, 5 Phil. Rep. 524; *Bishop of Cebu* v. *Mangaran*, 6 Phil. Rep. 286; *Barlin* v. *Ramirez*, 7 Phil. Rep. 41; *Black* v. *Jackson*, 177 U. S. 349; *Potts* v. *Hollen*, 177 U. S. 365.

The judgment of the trial court should have been reversed for errors in the exclusion of material evidence. There is a

presumption of harm from such exclusion. *Buckstaff* v. *Russell*, 151 U. S. 626, 637; *Crawford* v. *United States*, 212 U. S. 183, 203.

Mr. Henry E. Davis for appellees:

There is no force in the contention that plaintiffs had no title to the mines in controversy at the time of the cession of the Philippine Islands and have not since acquired any. The case comes under the temporary government act, especially § 45 thereof, 32 Stat. 691, 703, which *mutatis mutandis* is, with very slight changes, identical with § 2332, Rev. Stat., taken from the act of May 10, 1872, 17 Stat. 91. The scheme of these acts was clearly to recognize in the inhabitants of territory newly acquired by the United States, rights equivalent to those of location and possession, and of themselves conferring a right to a patent for mining lands, independently of compliance with requirements of laws of the former sovereignty and local laws and customs inherited therefrom, or enacted or adopted in analogy to the institutions thereof.

Rev. Stat., § 2332, provides an additional mode of acquisition of mineral land from the Government, and, where possession has continued for the prescribed period before an adverse right exists, it is equivalent to a location under the laws of Congress. *Anthony* v. *Jillson*, 83 California, 296, 302; *Altoona &c. Co.* v. *Integral &c. Co.*, 114 California, 100, 105; *Min. Co.* v. *Bullion Min. Co.*, 3 Saw. 634, 657, 658; *Harris* v. *Equator &c. Co.*, 8 Fed. Rep. 863; *Belk* v. *Meagher*, 104 U. S. 279, 287; *Lavignino* v. *Uhlig*, 26 Utah, 125.

Upon completion of a location and until patent issues, the Government holds the title in trust for the locator; and a title so acquired will be quieted on a bill in equity even against the holder of a correct paper title. *Noyes* v. *Mantle*, 127 U. S. 348, 351; *Min. Co.* v. *Bullion Min. Co.*, *ubi supra*.

In dealing with the Philippines, the United States meant to treat its inhabitants as it had treated those of our former Mexican territory, and, indeed, to put the former on an even

more favored footing. *Cariño* v. *Insular Government*, 212 U. S. 449.

Accordingly, it is beside the question whether plaintiffs have or have not acquired any title to the mines in controversy since our acquisition of the Philippines, the facts being that it is not contended that plaintiffs ever undertook to acquire formal title to the mines during the Spanish occupation; that, almost immediately upon our occupation, they were prohibited by law from acquiring such title; that they were on their way to the acquisition of such when they encountered interference by the action of the defendant; and that the object of this case was and is to free themselves from such interference.

Plaintiffs have not mistaken their forum, they have a right to the remedy sought in this action.

Section 39 of the act of July 1, 1902, 32 Stats. 701, is *mutatis mutandis*, an exact reproduction of § 2326, Rev. Stat., as amended by act of 1881, with the difference that the question of title is provided to be determined by judgment of the court instead of by verdict of a jury. Plaintiffs, instead of going through the form of applying for a patent upon the ground of compliance with § 45 of the act of July 1, 1902, elected directly to institute proceedings in equity. The propriety of this proceeding might have been raised by demurrer or apt objection in the answer, but defendant, having answered without objection of any kind to the proceeding or the jurisdiction of the court, and having converted his answer into a petition or cross-bill for affirmative defense, closed the door upon any question as to the propriety of the proceeding itself or the jurisdiction to determine the same of the tribunal in which it was instituted. 16 Cyc. Law, 117, 129, 131, and cases cited.

Any objection to the jurisdiction or proceeding comes too late in the appellate tribunal. *Perego* v. *Dodge*, 163 U. S. 160, 164, 166, 168.

The character and extent of plaintiff's possession are unimportant, it being plain that the acts of mining on the part of

the plaintiffs were as continuous as the nature of the business and the customs of the country permitted, and such as to permit them to do acts of mining of which the methods, although crude, were yet such as were practiced and customary among their people, "and produced gold." *Stephenson* v. *Wilson*, 37 Wisconsin, 482; 2 Lind. on Mines, § 688.

The description of the premises in controversy, being by name of a property well known, is sufficient. *Glazier Mining Co.* v. *Willis*, 127 U. S. 471, 480.

And the limitation of § 22 of the act of July 1, 1902, has application only to claims located after the passage of the act.

The alleged exclusion of competent and material evidence cannot be considered, as the same is not to be found in the reasons assigned for the motion for a new trial, nor in the bill of exceptions, so-called, nor in the assignments of error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the appellees to restrain the appellant from setting up title to certain gold mines in the Province of Benguet, or interfering with the same, and to obtain an account of the gold heretofore taken from the mines. The trial court rendered a judgment or decree granting an injunction as prayed. Exceptions were taken on the grounds that the findings of fact were against the weight of evidence and that the judgment was against the law. The Supreme Court reëxamined the evidence and affirmed the decree below. Then the case was brought here by appeal.

The appellees make a preliminary argument against the jurisdiction of this court, while the appellant asks us to reëxamine the evidence and to reverse the decree on the facts as well as the law. We cannot accede to either of these contentions. We are of opinion that this court has jurisdiction. For if the affidavits of value should be held to apply to the whole of Reavis's claims and not to only that part of them that are in controversy here, still a statute of the United States,

namely, a section of the organic act (§ 45, concerning mining titles in the Philippines), is "involved," within the meaning of § 10 of the same act, which determines the jurisdiction of this court. Act of July 1, 1902, c. 1369, 32 Stats. 691. The meaning and effect of that section are in question, and our construction even has some bearing upon our opinion that the findings of the two courts below should not be reopened. For apart from the general rule prevailing in such cases, *De la Rama* v. *De la Rama*, 201 U. S. 303, 309, we shall refer to the law for special reasons why those findings should not be disturbed in a case like this.

The appellees are Iggorrots, and it is found that for fifty years, and probably for many more, Fianza and his ancestors have held possession of these mines. He now claims title under the Philippine Act of July 1, 1902, c. 1369, § 45, 32 Stat. 691. This section reads as follows:

"That where such person or association, they and their grantors have held and worked their claims for a period equal to the time prescribed by the statute of limitations of the Philippine Islands, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this Act, in the absence of any adverse claim; but nothing in this Act shall be deemed to impair any lien which may have attached in any way whatever prior to the issuance of a patent."

It is not disputed that this section applies to possession maintained for a sufficient time before and until the statute went into effect. See *Soper* v. *Lawrence Brothers Co.*, 201 U. S. 359. The period of prescription at that time was ten years. Code of Procedure in Civil Actions, August 7, 1901, No. 190, § 40; 1 Pub. Laws of Phil. Comm. 378, 384. Therefore, as the United States had not had the sovereignty of the Philippines for ten years, the section, notwithstanding its similarity to Rev. Stats., § 2332, must be taken to refer to the conditions as they were before the United States had come into power. Especially must it be supposed to have had in view the natives of

the islands, and to have intended to do liberal justice to them. By § 16 their occupancy of public lands is respected and made to confer rights. In dealing with an Iggorrot of the Province of Benguet it would be absurd to expect technical niceties, and the courts below were quite justified in their liberal mode of dealing with the evidence of possession and the possibly rather gradual settling of the precise boundaries of the appellees' claim. See *Cariño* v. *Insular Government*, 212 U. S. 449. At all events, they found that the appellees and their ancestors had held the claim and worked it to the exclusion of all others down to the bringing of this suit, and that the boundaries were as shown in a plan that was filed and seems to have been put in evidence before the trial came to an end.

It cannot be said that there was no evidence of the facts found, for the plaintiff Fianza testified, in terms, that his grandfather and father had owned the mines in question, and that he and the other appellees owned them in their turn, that they had all worked the mines, that no one else had claimed them, and that the appellant had interfered with his possession, and when he put up a sign had torn it down. No doubt his working of the mines was slight and superficial according to our notions, and the possession may not have been sharply asserted as it would have been with us, whether from Iggorrot habits or from the absence of legal title under Spanish law. But it sufficiently appears that the appellees' family had held the place in Iggorrot fashion, and to deny them possession in favor of Western intruders probably would be to say that the natives had no rights under the section that an American was bound to respect. Whatever vagueness there may have been in the boundaries, it is plain that the appellant attempted to locate a claim within them, and Fianza testified that the plan to which we have referred followed the boundaries that his father showed to him. It is said that the claim is larger than is allowed by § 22. But the limitation of that section applies only to claims "located after the passage of this act."

It is to be assumed then that the appellees and their ances-

tors had held possession and had worked their claims for much more than the period required by § 45, before the moment when the statute went into effect. It is to be assumed that the possession and working continued down to within two months of that moment. But the appellant says that he entered and staked his claims before that time and then was in possession of them. On this ground, as well as others that are disposed of by the findings below, he contends that there was an adverse claim within the meaning of the act. But the ground in question was not unoccupied and therefore he could not make a valid claim under § 28. See also act of March 2, 1901, c. 803, 31 Stats. 895, 910. He refiled a location in October, 1902, but he did not and could not make the required affidavit because of the prior occupation, and at that date Fianza was within the act, unless he already had been deprived of its benefits. Moreover, it is found that Fianza's possession continued down to the bringing of this suit. This is justified by the evidence and is not contradicted by the bill. The bill, to be sure, alleges that Reavis in 1900 illegally entered and deprived the appellees of their mines and that he still continues to maintain his unjust claim. But further on it alleges that in the spring of 1902 Reavis was directed by the Governor of Benguet not to molest the appellees; that he then waited in Manila, and after the promulgation of the law "again entered," set stakes and filed a notice of location. So that the bill does not mean that he was continuously in possession or that he was in possession when the law took effect. We are of opinion that there was no adverse claim that would have prevented the appellees from getting a patent under § 45. See *Belk* v. *Meagher*, 104 U. S. 279, 284. *Altoona Quicksilver Mining Co.* v. *Integral Quicksilver Mining Co.*, 114 California, 100, 105. See also *McCowan* v. *Maclay*, 16 Montana, 234, 239, 240.

It is suggested that the possession of Fianza was not under a claim of title, since he could have no title under Spanish law. But whatever may be the construction of Rev. Stats., § 2332, the corresponding § 45 of the Philippine Act cannot be taken

to adopt from the local law any other requirement as to the possession than the length of time for which it must be maintained. Otherwise, in view of the Spanish and American law before July 1, 1902, no rights could be acquired and the section would be empty words, whereas, as we have said before, another section of the act, § 16, still further shows the intention of Congress to respect native occupation of public lands.

Again it is urged that the section of itself confers no right other than to apply for a patent. But a right to an instrument that will confer a title in a thing is a right to have the thing. That is to say, it is a right of the kind that equity specifically enforces. It may or may not be true that if the objection had been taken at the outset the plaintiffs would have been turned over to another remedy and left to apply for a patent, but after a trial on the merits the objection comes too late. See *Perego* v. *Dodge*, 163 U. S. 160, 164; *Reynes* v. *Dumont*, 130 U. S. 354, 395.

Some objections were taken to the exclusion of evidence. But apart from the fact that they do not appear to have been saved in the exceptions taken to the Supreme Court, and irrespective of its admissibility, the evidence offered could not have affected the result. An inquiry of Fianza, whether he claimed the mines mentioned in the suit or those measured by the surveyor who made the plan to which we have referred, was met by the allowance of an amendment claiming according to the plan. A question to another of the plaintiffs, whether she saw any Iggorrots working for Reavis, would have brought out nothing not admitted by the bill, that Reavis did for a time intrude upon the mines in suit. Upon the whole case we are of opinion that no sufficient ground is shown for reversing the decree, and it is affirmed.

Decree affirmed.

UNITED STATES *v.* MESCALL.

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

No. 278. Argued October 14, 1909.—Decided November 8, 1909.

The rule of *ejusdem generis*, that where the particular words of description are followed by general terms the latter will be regarded as referring to things of a like class with those particularly described, is only a rule of construction to aid in arriving at the real legislative intent and does not override all other rules. When the particular words exhaust the genus the general words must refer to words outside of those particularized.

Under § 9 of the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131, 135, providing punishment for making and aiding in false entries, the words "owner, importer, consignee, agent or other person" include a weigher representing the Government, and his acts come within the letter and purpose of the statute.

SECTION 9, chapter 407, Laws of June 10, 1890, 26 Stat. 130-135, known as the Customs Administrative Act, under which defendant was indicted, reads as follows:

"That if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture

shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates; and such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court."

The indictment in the first count alleges that the steamship Alice arrived at the port of New York on November 2, 1907, from Greece, having on board eighty cases of cheese, consigned to one Stamatopoulos; that the said cheese was unloaded and an invoice and entry thereof filed with the collector of customs of the port of New York by the said Stamatopoulos; that the defendant was at the time an assistant weigher of the United States in the customs service at the port of New York and engaged in the performance of his duties as such assistant weigher; that it was his duty to weigh accurately the said cheese and make return thereof to the collector of customs, and upon the weight so returned the said entry was to be liquidated; that the said defendant "did knowingly, wilfully and unlawfully make and attempt to make an entry of imported merchandise, to wit, the said eighty cases of cheese, by means of a false and fraudulent practice, by means whereof the United States was to be deprived of the lawful duties or a portion thereof accruing upon the said merchandise;" that he did knowingly, wilfully and unlawfully return the net weight of said cheese as 13,358 pounds, whereas the true weight thereof and the weight upon which the entry should have been liquidated and the duties paid was 17,577 pounds. The second and third counts contain the same statement of facts, but it is averred in the one that the defendant was "guilty of a wilful act and omission, by means whereof the United States was to be deprived of the lawful duties," or a portion thereof, and in the other that he unlawfully made and attempted to make the entry "by means of a false written statement." To this indictment a

demurrer was filed and sustained, the court, after discussing several matters, saying:

"But it is apparent from the allegations of the indictment that the defendant is not in fact any of the persons within the contemplation of section 9 with relation to these particular importations, and cannot be considered either an owner, importer, consignee, agent or other person.

"The defendant Mescall was not making or attempting to make an entry of these goods. According to the charge he was, contrary to his duty, rendering assistance to the importer, who was the 'person' making the entry."

The case is here under the act of March 2, 1907, 34 Stat. 1246, which authorizes a writ of error "direct to the Supreme Court of the United States" in a criminal case wherein there has been a decision or judgment sustaining a demurrer to an indictment, when such decision or judgment is based upon the invalidity or construction of a statute upon which the indictment is founded.

Mr. Assistant Attorney General Fowler for the United States:

An entry of goods within the meaning of § 9 of the act of July 24, 1897, embraces the entire transaction from the time the vessel enters port until the importer obtains an entrance of the goods into the body of merchandise in the United States; *United States* v. *Baker*, 24 Fed. Cas. 953; *United States* v. *Cargo of Sugar*, 25 Fed. Cas. 288; *United States* v. *Legge*, 105 Fed. Rep. 930; and every person performing any material act in accomplishing that purpose and violating the statute in any particular is liable to prosecution therefor.

One who is not an importer is not excluded from prosecution because under the rule of *ejusdem generis* the words "other person" exclude those not of the class of importer. 2 Lewis' Suth. Stat. Const., 2d ed., p. 833; 26 Cyc. 610; *State* v. *Corkins*, 123 Missouri, 56, 67; *Bank* v. *Ripley*, 161 Missouri, 126, 131; *Willis* v. *Mabon*, 48 Minnesota, 140, 156; *Winters* v. *Duluth*, 82 Minnesota, 127; *Foster* v. *Blount*, 18 Alabama, 687;

Misch v. *Russell*, 136 Illinois, 22, 25; *Webber* v. *Chicago*, 148 Illinois, 313; *Maxwell* v. *People*, 158 Illinois, 248, 253; *Gillock* v. *People*, 171 Illinois, 307; *Matthews* v. *Kimball*, 70 Arkansas, 451, 463; *State* v. *Woodman*, 26 Montana, 348, 353; *Randolph* v. *State*, 9 Texas, 521; *State* v. *Solomon*, 33 Indiana, 450; *Matter of La Société Française*, 123 California, 525, 530; *State* v. *Holman*, 3 McCord (So. Car.), 306; *State* v. *Williams*, 2 Strob. (So. Car.) 427; *Tisdell* v. *Combe*, 7 A. & E. 788, 792, 796; *Young* v. *Grattridge*, 4 Q. B. Cases, 166; *Reg.* v. *Doubleday*, 3 E. & E. 500.

Mr. George F. Hickey for defendant in error:

Section 9 of the Customs Administrative Act is a penal statute and should be construed strictly. *United States* v. *Seventy-five Bales of Tobacco*, 147 Fed. Rep. 127; *Andrews* v. *United States*, 2 Story, 202; *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Eighty-four Boxes of Sugar*, 7 Pet. 453; Sutherland on Stat. Const., § 353.

In expounding a penal statute the court will not extend it beyond the plain meaning of its words. *United States* v. *Morris*, 14 Pet. 464.

Such a statute should be construed according to the manifest import of the words.

If the statute is ambiguous, the construction adopted should be that most favorable to the accused. *The Schooner Enterprise*, 1 Paine, 32.

Under § 9 indictments may not be brought against others than owners, importers, consignees, agents or other persons of the same class.

The entry contemplated undoubtedly is the entry originally made by the importer, or some one on his behalf, as required by the rules and regulations of the customs service. This was the entry alluded to in the act of June 22, 1874, § 21, 18 Stat. 190, and it was the entry provided for, regulated and defined by §§ 2785–2790, Rev. Stat. *United States* v. *Seidenberg*, 17 Fed. Rep. 227.

No one but the importer or some one representing him, has a right to enter goods at the custom house. *Harris* v. *Dennie*, 3 Pet. 292; *United States* v. *One Silk Rug*, 158 Fed. Rep. 974; *United States* v. *Ninety-nine Diamonds*, 132 Fed. Rep. 579; 139 Fed. Rep. 961.

It seems to us that the principal dispute that can arise in the case at bar is as to the meaning of the words "or other person."

The decision in the case that the words "or other person" mean some one of the same general class as those described by the preceding words, seems to be correct. It is certainly supported by the great weight of authorities. *United States* v. *1,150½ Pounds of Celluloid*, 82 Fed. Rep. 627.

The words "or other person" cannot be construed to mean "or other person whosoever."

For cases in support of this rule of construction, known as Lord Tenderden's Rule, see 21 American & Eng. Ency. of Law, title "Other," 1012; *In re Davidson*, 4 Fed. Rep. 509; *Crystal Spring D. Co.* v. *Cox*, 49 Fed. Rep. 555; *Newport News Co.* v. *United States*, 61 Fed. Rep. 488; *Crowther* v. *Fidelity Ins. Co.*, 85 Fed. Rep. 41; *Alabama* v. *Montague*, 117 U. S. 602; *State* v. *McGarry*, 21 Wisconsin, 502. Sedgwick on Const. of Stat. 361, states the rule as follows:

"Where general words follow particular words, the rule is to construe the former as applicable to the persons or things particularly mentioned."

The rule that general words will be restrained to things of the same kind with those particularized, has been applied in numerous cases. *East Oakland* v. *Skinner*, 94 U. S. 255; *White* v. *Ivey*, 34 Georgia, 186; *McIntyre* v. *Ingraham*, 35 Mississippi, 25; *Bucher* v. *Commonwealth*, 103 Pa. St. 528; *Matter of Hermance*, 71 N. Y. 481; *Renick* v. *Boyd*, 99 Pa. St. 555; *People* v. *N. Y. R. Co.*, 84 N. Y. 565; *Sullivan's Appeal*, 77 Pa. St. 107; *People* v. *Richards*, 108 N. Y. 137; Sutherland on Stat. Const., §§ 268, 277.

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

It appears that the trial court sustained the demurrer on the ground that, as to the offense charged, the statute, properly construed, does not include the defendant. The case is, therefore, one which may be brought to this court. *United States* v. *Keitel*, 211 U. S. 370. But our inquiry is limited to the particular question decided by the court below. *Id.* 398.

Counsel for defendant invokes what is sometimes known as Lord Tenderden's Rule, that where particular words of description are followed by general terms the latter will be regarded as referring to things of a like class with those particularly described—*ejusdem generis*. The particular words of description, it is urged, are "owner, importer, consignee, agent." The general term is "other person," and should be read as referring to some one similar to those named, whereas the defendant was not owner, importer, consignee, or agent or of like class with either. He was not making or attempting to make an entry. He represented the Government, and, contrary to his duties, was rendering assistance to the consignee who was making the entry. But, as said in *National Bank of Commerce* v. *Ripley*, 161 Missouri, 126, 132, in reference to the rule:

"But this is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument. . . . Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the *genus* there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning

outside of the class indicated by the particular words or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose."

See also *Gillcock* v. *The People*, 171 Illinois, 307, and the cases cited in the opinion; *Winters* v. *Duluth*, 82 Minnesota, 127; *Matthews* v. *Kimball*, 70 Arkansas, 451, 462. Now the party who makes an entry, using the term "entry" in its narrower sense, is the owner, importer, consignee or agent, and it must be used in that sense to give any force to the argument of counsel for defendant, but used in that sense the term "other person" becomes surplusage. In § 1 of chap. 76, Laws of 1863, 12 Stat. 738, is found a provision of like character to that in the first part of the section under which this indictment was found, but the language of the description there is "owner, consignee or agent." This was changed by § 12, chap. 391, Laws 1874, 18 Stat. 188, to read "owner, importer, consignee, agent, or other person," and that description has been continued in subsequent legislation. Evidently the addition in 1874 of the phrase "other person" was intended to include persons having a different relation to the importation than the owner, importer, consignee or agent. Congress was broadening the scope of the legislation and meaning to reach other persons having something to do in respect to the entry beyond that which was done by the owner, importer, consignee or agent, or else the term "other person" was a meaningless addition. Now the defendant was a person, other than the owner, importer, consignee or agent, by whose act the United States was deprived of a portion of its lawful duties. His act comes within the letter of the statute as well as within its purpose, and the intent of Congress in the legislation is the ultimate matter to be determined.

The fact that he could not be punished in all respects as fully as the owner, in that he had no goods to be forfeited, is immaterial. *United States* v. *Union Supply Company*, decided this day, *post*, p. 50.

We are of opinion, therefore, that the trial court erred in sustaining the demurrer. The judgment is reversed and the case remanded for further proceedings.

WATERMAN v. THE CANAL-LOUISIANA BANK AND TRUST COMPANY, EXECUTOR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 306. Submitted February 25, 1909.—Decided November 8, 1909.

The equity jurisdiction of the Federal courts is derived from the Federal Constitution and statutes and is like unto that of the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789; it is not subject to limitations or restraints by state legislation giving jurisdiction to state courts over similar matters.

While Federal courts cannot seize and control property which is in the possession of the state courts and have no jurisdiction of a purely probate character, they can, as courts of chancery, exercise jurisdiction, where proper diversity of citizenship exists, in favor of creditors, legatees, and heirs, to establish their claims and have a proper execution of the trust as to them.

Although complainant in this case asks in some of her prayers for relief which is beyond the jurisdiction of the court as being of a purely probate character if the allegations of the bill support them the court may grant other prayers for relief which are within its jurisdiction, and, as a court of equity, shape its decree according to the equity of the case.

Where the bill does not seek to set aside the probate of a will or interfere with the possession of the probate court, the Federal court of equity, in a case where diverse citizenship exists, may determine as between the parties before the court their interests in the estate and such decree will be binding upon, and may be enforced against, the executor.

It will be assumed that the state probate court will respect the decree

of the Federal court having jurisdiction settling the rights of parties in an estate, and the denial of effect of such a decree presents a claim of Federal right which can be protected by this court.

While a Federal court of equity cannot, either under the forty-seventh rule in equity or general principles of equity, proceed to adjudication in the absence of indispensable parties, if it can do justice to the parties before it without injury to absent persons it will do so and shape the decree so as to preserve the rights of those actually before the court, without prejudice to the rights of the absentees.

In this case the absent party was not of the same State as complainant and had no interest in common with complainant and while a proper, was not an indispensable party, as his interests were separate and could be protected by retention of his legacy by the executors subject to adjudication in another suit.

THE facts, which involved the jurisdiction of the Circuit Court, are stated in the opinion.

Mr. E. Howard M'Caleb, and *Mr. E. Howard M'Caleb, Jr.*, for appellant:

As to the jurisdiction of the Federal court:

Any creditor, heir or legatee who is a citizen of another State has the right to institute his suit in the Federal court against executors and administrators and all other parties interested, who are citizens of the same State as decedent, to determine the validity and extent of his rights and claims in the property of the estate; nor is he deprived of his original right to maintain and to try his suit in the Federal court by his failure to present his claim to the state court as provided by the administration statutes of the State. Here are a few of the authorities: *Suydam* v. *Broadnax*, 14 Pet. 67; *Bank* v. *Vaiden*, 18 How. 503; *Borer* v. *Chapman*, 119 U. S. 587, 588, 589; *Payne* v. *Hook*, 7 Wall. 425, 430; *Lawrence* v. *Neilson*, 143 U. S. 215, 224; *Hayes* v. *Pratt*, 147 U. S. 557, 570; *Hess* v. *Reynolds*, 113 U. S. 73; *Hyde* v. *Stone*, 20 How. 170; *Byers* v. *McAuley*, 149 U. S. 608; *Yonley* v. *Lavender*, 21 Wall. 276; *Green* v. *Creighton*, 23 How. 90.

To sustain appellees' contention that the state court, hav-

ing acquired jurisdiction over the succession, is alone competent to entertain and determine every issue which may arise in the progress of the cause, whether it be as to the construction of the will, the rights of heirs and legatees to the estate, and the claims of creditors which may be asserted against it, whether such parties be citizens of other States or not, until the administration is terminated, the funds distributed and the executor discharged, would be to deny the judicial power of the United States conferred by the Constitution as extending over "*controversies* between citizens of different States" and force such citizens into the state courts in order to have their complaints heard. This is answered by *Buck* v. *Colbath*, 3 Wall. 334, 347; *Watson* v. *Jones*, 13 Wall. 679.

Farrell v. *O'Brien*, 199 U. S. 89, is claimed to be decisive against the Federal jurisdiction over this bill, but it can be distinguished as in that case the only question was as to the power of the Circuit Court to annul a will admitted to probate. It was held that, where the laws of a State afforded a remedy by contest in proceedings supplementary to the original probate proceedings, such a contest was not *inter partes*, and hence not within the designation of "a suit at law or in equity." It was further held that, where the construction and effect of the will is wholly subordinate to the sole issue of probate, Federal jurisdiction did not attach under the rule "that no instrument can be effective as a will, no rights in relation to it can arise until preliminary probate has been first made." *Ellis* v. *Davis*, 109 U. S. 485. But here there is no contest over the existence or non-existence of the will, and such a question is, therefore, a moot one. In Louisiana, an action to set aside a will already admitted to probate is strictly and purely an independent action in nullity between parties. Unlike the Washington statutes, involved in *Farrell* v. *O'Brien*, the judgment setting aside the will only binds the parties, inures only to the benefit of the particular contestant, and is *not* operative as to the whole world. *Ellis* v. *Davis*, 109 U. S. 485; *Gaines* v. *Fuentes*, 92 U. S. 10. As to

those not parties, the judgment of probate still stands *prima facie* valid. *Succession of Barker*, 10 La. Ann. 28; *Compton* v. *Prescott*, 12 Rob. (La.) 56; *Ingersoll* v. *Coram*, 211 U. S. 335; *Garzot* v. *DeRubio*, 209 U. S. 283, can also be distinguished.

The modes of the action in nullity may be various, but essentially and in its nature it is one *inter partes*, and if the cause of nullity of a judgment probating a will is not one of form, but one of substance, relating to the merits, then the courts of the United States have jurisdiction where diversity of citizenship exists and state rules on the subject cannot deprive them of it. *Barrow* v. *Hunton*, 99 U. S. 80, 85; *Arrowsmith* v. *Gleason*, 129 U. S. 86, 98; *Johnson* v. *Waters*, 111 U. S. 640, 667. It is, however, out of place to pursue this matter at length, since there is nothing in the case that seeks to set aside the probate of the will. The sole question is: Have the Federal courts jurisdiction to establish a claim or right against and into an estate where the parties are, on one side citizens of one State and on the other citizens of another State? The long line of jurisprudence of this court remains unbroken. The question has been answered in the affirmative.

As to the indispensability of parties:

That the right of action for the establishment of his claim, as well as his interest by an heir is separable from that of his co-heirs is the law of Louisiana. *Tugwell* v. *Tugwell*, 32 La. Ann. 848; *Denbridge* v. *Crawley*, 43 La. Ann. 504; *Glasscock* v. *Clark*, 33 La. Ann. 584; *Burney Heirs* v. *Ludeling*, 41 La. Ann. 627, 632; *Denegre* v. *Denegre*, 33 La. Ann. 689; *Skipwith* v. *Glathary*, 34 La. Ann. 28; Arts. 113 and 120, Code of Practice of Louisiana.

Even if Louisiana jurisprudence cannot be invoked to control the jurisdiction of the Federal court, sitting in equity, nevertheless it should control the question upon which equity jurisdiction as to parties is founded concerning the character of an heir's interest in the estate as *separate* from that of his co-heir. At least, it is persuasive, since it fully accords with

equity jurisdiction as to parties. *Payne* v. *Hook*, 7 Wall. 425, 433; Story's Equity Pleading, 10th ed., §§ 89, 207*a*, 212.

The strict rule as to parties will yield if the court can proceed to decree and do justice to the parties before it without injury to the absentees. Cooper's Eq. Pl. 35; *West* v. *Randall* 2 Massachusetts, 181. In *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235, this court regarded the absent parties as absolutely indispensable to the main cause of action, which is not the case here. See *Payne* v. *Hook*, 7 Wall. 425; *Van Bokellen* v. *Cook*, Fed. Cas. No. 16,831; *Elmendorf* v. *Taylor*, 10 Wheat. 167; *Delaware County* v. *Diebold Safe Co.*, 133 U. S. 473.

Complainant may be required to waive her allegation as to Davis and still the court has jurisdiction. *Northey* v. *Northey*, 2 Arkansas, 77; *S. C.*, 26 Eng. Reprint, 447; *Williams* v. *Williams*, 9 Mod. 299; *S. C.*, 88 Eng. Reprint, 465.

Reservation of Davis' rights need not be made by amendment; the court may modify the decree prayed for to meet it. *Harding* v. *Handy*, 11 Wheat. 103, 132.

Mr. Wm. C. Dufour, Mr. Edgar H. Farrar, Mr. Jas. McConnell, Mr. Chas. E. Fenner, Mr. Geo. C. Walshe, Mr. Geo. H. Terriberry, Mr. H. Garland Dupre, Mr. S. McC. Lawrason, Mr. Walter Guion, Mr. Victor Leovy, Mr. Pierre Crabites and *Mr. H. Generes Dufour* for appellees:

No Federal court has jurisdiction to remove an entire succession administration from a state court, as the bill in this case proposes to do. The state court acted first, and, under the law of Louisiana, has the entire estate in its possession and its administration, and it is entitled to proceed with that administration until it shall be completed. If complainant's contention is correct, a non-resident creditor of an estate in the hands of a receiver appointed by a state court can file a suit in a Federal court against the state court receiver, and request the Federal court, not only to pass upon the litigated claim, but further to fix the costs and expenses of the state

court receivership, to determine who were the creditors of the estate, to settle the amount for distribution and the rank and order in which the creditors should be paid, and to direct the receiver to account to the Federal court and not to the state court.

No precedent for this remarkable action can be found. See *Farrell* v. *O'Brien*, 199 U. S. 89, which distinguishes *Byers* v. *McAuley*, 149 U. S. 608; *Lawrence* v. *Nelson*, 143 U. S. 223; *Hayes* v. *Pratt*, 147 U. S. 570.

Under Arts. 133, 134 of the constitution of Louisiana and § 924 of the Code of Peace of that State, *Denegre* v. *Denegre*, 33 La. Ann. 689; *Succession of Burnside*, 34 La. Ann. 728.

See *Westfeldt* v. *Nor. Car. Mining Co.*, 166 Fed. Rep. 706; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, as to disinclination of this court to permit Federal courts to interfere with proceedings in state courts and to withdraw questions properly and necessarily involved in proceedings in the state courts.

On the indispensability of parties:

Under *Shields* v. *Barrow*, 17 How. 130; *Garzot* v. *DeRubio*, 209 U. S. 283; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 237; 47th Rule in Equity, Arts. 967, 1014, 1017, Code of Practice of Louisiana, Davis is an absolutely indispensable party and the bill cannot be maintained in any court of equity without him.

Mr. Justice Day delivered the opinion of the court.

This case presents a question of jurisdiction concerning the right of the United States Circuit Court to entertain a certain bill in equity. Frances E. Waterman, wife of Charles A. Crane, a resident of Chicago in the State of Illinois, and a citizen of that State, joined by her husband, also a citizen of Illinois, brought the suit in the United States Circuit Court against the Canal-Louisiana Bank and Trust Company, executor of the last will and testament of Caroline Stannard Tilton, deceased, a citizen of the State of Louisiana and an inhabitant of the East-

ern District of Louisiana, and also against the Charity Hospital of New Orleans, St. Ann's Asylum, Protestant Episcopal Orphan Asylum, Home for Incurables, Christian Woman's Exchange, State Insane Asylum of Jackson, Louisiana; City of New Orleans and Louisiana Retreat, conducted by the Society of the Daughters of St. Vincent de Paul, all and each of them being institutions established under the laws of Louisiana and citizens of the State of Louisiana, and inhabitants of the Eastern District of Louisiana; also against Robert Waterman and Frederick Waterman, citizens of the State of Louisiana and inhabitants of the Eastern District thereof. The bill set forth in substance: That Caroline Stannard Tilton, widow of Frederick W. Tilton, late of the city of New Orleans, duly made and published her last will and testament and codicils thereunto annexed, and by said will and codicils said Caroline Stannard Tilton gave and bequeathed to Robert Waterman the sum of $3,000; to the said Robert Waterman and his wife, fifteen premium bonds; to Frederick Waterman $3,000; to Frederick Tilton Davis, $1,000, and the whole series of No. 5,963 premium bonds. That the said Caroline Stannard Tilton departed this life on or about the sixth of July, 1908; that the Canal-Louisiana Bank and Trust Company, executor in said will named, duly proved the same in the court of probate jurisdiction in and for the Parish of Orleans in the State of Louisiana, and undertook the executorship thereof, and possessed itself of the personal estate and effects of the said testatrix to a very considerable amount, and more than sufficient to discharge her just debts, funeral expenses and legacies.

The complainant further avers that she is the sole surviving niece, and that Robert and Frederick Waterman and Frederick Tilton Davis are the sole surviving nephews of said Caroline Stannard Tilton, and that there are no other persons within the nearest degree of kinship of the said testatrix; and that the said Frederick Tilton Davis resides in the State of Alabama, outside of the court's jurisdiction.

She avers that the said Robert Waterman, Frederick Water-

man and Frederick Tilton Davis, legatees in said will, became entitled to have and receive their said respective legacies, and did receive the same, and accordingly, by receiving said bequests have renounced the succession of said Caroline Stannard Tilton, deceased, and by taking said legacies have renounced all their rights as heirs at law, and are estopped and debarred from claiming any portion of the estate undisposed of, because of certain provisions of the will, which are set forth in the bill.

It is further averred by the complainant that by reason of the renunciation and estoppel of said legatees the complainant remains the sole heir at law of Caroline Stannard Tilton, and, as such, is entitled to the shares which would have gone to Frederick and Robert Waterman and Frederick Tilton Davis, of the same degree and collateral line, by right of accretion.

She further avers that said will bequeathed to the Charity Hospital of New Orleans, $2,000; St. Ann's Asylum, $2,000; Protestant Episcopal Orphan Asylum, $2,000; Home for Incurables, $2,000; Home for Insane, $3,000, and to the Christian Woman's Exchange, $1,000; and that after satisfaction of the foregoing special legacies and bequests, and after payment of all costs and expenses of settlement of the estate, if any remained thereof undisposed of, the testatrix willed and directed that such residue should be divided between the beneficiaries of the charitable bequests heretofore made to the various institutions, the divisions to be made *pro rata* in proportion to the amount of special legacies already made to them, respectively. She avers that at the time of making said will, and at the time of the death of said testatrix, there was no such institution or corporation in existence known as Home for Insane, nor was the testatrix capable of incorporating any such institution under her will; and that said special legacy for $3,000, and the *pro rata* share of the residue remained undisposed of because of the facts stated, and thereby the sum of $3,000 and the *pro rata* share of the proportion of the estate undisposed of devolved upon the complainant as sole legal heir and next of kin to said Caroline Stannard Tilton. And it was averred that

the Christian Woman's Exchange was not entitled to share in the residue, because the bequest to it of $1,000 was not a charitable bequest, and the said Christian Woman's Exchange was not one of the institutions mentioned in the will to share in the residue.

Complainant states that the insane asylum situated at Jackson, Louisiana, the Louisiana Retreat, conducted by the Society of the Daughters of Charity of St. Vincent de Paul, and the city of New Orleans claim and assert their right to take and receive the amount of said lapsed and caducous legacies, asserting that the testatrix intended them as beneficiaries of her bounty, and as particular legacies under her will, instead of the Home for Insane. And the plaintiff denies, for reasons stated in the bill, that either of them is entitled to receive such legacies intended for the Home for Insane, and she charges that the amount falling to her as sole legal heir and next of kin, because of her right to the lapsed legacies bequeathed to the non-existing Home for Insane's share in the residue, together with that part and proportion of the estate accessory and appurtenant thereto, exceeds the sum of $90,000, which she is entitled to out of the estate. She charges that the estate, after payment of the special legacies, charges and costs of administration, will amount to more than a residue of $350,000. She charges that the executor refuses to do or make any satisfaction whatever in respect to her just demands, and the complainant avers that she has no sufficient remedy under the rules of common law, and must resort to a court of equity for adequate relief. And the prayer of the bill is:

"Wherefore, your oratrix prays that this court do order, adjudge and decree (1) that the particular legacy contained in the last will and testament of Caroline Stannard Tilton, deceased, to so-called 'Home for Insane,' and also the interest of said legatee in the residue or residuum of said testatrix's estate, be declared caducous, to have lapsed, because of the uncertainty and non-existence of said legatee; (2) that it be further declared and decreed that Robert Waterman and Fred-

erick Waterman have renounced and abandoned all their right, title and interest as heirs of said Caroline Stannard Tilton, deceased, in the said lapsed and caducous legacy made in favor of the so-called 'Home for Insane;' (3) that it be further adjudged and decreed that your oratrix, as the nearest sole heir and next of kin of said Caroline Stannard Tilton, deceased, capable of inheriting, is alone entitled to the amount of the caducous and lapsed special legacy bequeathed to the said so-called 'Home for Insane,' for the sum of three thousand dollars ($3,000.00), and to the proportionate share of said non-existing and uncertain legatee in the residue of the estate of said Caroline Stannard Tilton, and that the Canal-Louisiana Bank & Trust Company, executor of said deceased, Caroline Stannard Tilton, be condemned to pay over and deliver to your oratrix the whole amount of said caducous, special legacy, together with the proportionate share and interest of said so-called 'Home for Insane' in the residue of the estate of said deceased remaining after the payment of the particular legacies and the costs of administration of her estate, and for such further sum as the court may find to be justly due and owing unto your oratrix as legal heir and next of kin of the said Caroline Stannard Tilton; (4) and that it be further ordered and decreed that the Christian Woman's Exchange is not a charitable institution or entitled as such under said will to participate or receive any share or portion of the residue of the estate of said deceased; (5) and that an account be taken of the personal estate and effects of the said testatrix coming to the hands of the said executor, or of any person or persons by its order or for its use, and also of the said testatrix's funeral expenses, debts, legacies and costs of administration, and especially showing the residue remaining in the hands of the said executor after making the aforesaid deduction, and that the same may be applied in due course of administration, and that for these purposes proper directions may be given.

"And your oratrix further prays for all general and equitable relief, as well as all costs."

From an early period in the history of this court cases have arisen requiring a consideration and determination of the jurisdiction of the courts of the United States to entertain suits against administrators and executors for the purpose of establishing claims against estates, and to have a determination of the rights of persons claiming an interest therein. And this court has had occasion to consider how far the jurisdiction in equity of the courts of the United States in such matters may be affected by the statutes of the States providing for courts of probate for the establishment of wills and the settlement of estates. We will not stop to analyze or review in detail all these cases, as they have been the subject of frequent and recent consideration in this court. The general rule to be deduced from them is that, inasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that in so far as controversies between citizens of different States arise which are within the established equity jurisdiction of the Federal courts, which is like unto the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789, the jurisdiction may be exercised, and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters. This court has uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor of creditors, legatees and heirs to establish their claims and have a proper execution of the trust as to them. In various forms these principles have been asserted in the following, among other cases: *Suydam* v. *Broadnax*, 14 Pet. 67; *Hyde et al.* v. *Stone*, 20 How. 170, 175; *Green's Ad.* v. *Creighton et al.*, 23 How. 90; *Payne* v. *Hook*, 7 Wall. 425; *Lawrence* v. *Nelson*, 143 U. S. 215; *Hayes* v. *Pratt*, 147 U. S. 557, 570; *Byers* v. *McAuley*, 149 U. S. 608; *Ingersoll* v. *Coram*, 211 U. S. 335.

The rule stated in many cases in this court affirms the jurisdiction of the Federal courts to give relief of the nature stated,

notwithstanding the statutes of the State undertake to give to state probate courts exclusive jurisdiction over all matters concerning the settlement of accounts of executors and administrators in the distribution of estates. This rule is subject to certain qualifications, which we may now notice. The courts of the United States, while they may exercise the jurisdiction, and may make decrees binding upon the parties, cannot seize and control the property which is in the possession of the state court. In *Byers* v. *McAuley, supra*, the rule was thus tersely stated by Mr. Justice Brewer, delivering the opinion of the court:

"A citizen of another State may establish a debt against the estate. *Yonley* v. *Lavender*, 21 Wall. 276; *Hess* v. *Reynolds*, 113 U. S. 73. But the debt thus established must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent. *Yonley* v. *Lavender, supra*. In like manner a distributee, citizen of another State, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties (*Payne* v. *Hook*, 7 Wall. 425); or against any other parties subject to liability (*Borer* v. *Chapman*, 119 U. S. 587), or in other way which does not disturb the possession of the property by the state court. (See the many cases heretofore cited.)"

In a late case, where the subject was given consideration in this court (*Farrell* v. *O'Brien*, 199 U. S. 89) while the rule of the earlier cases was stated and their binding force admitted, it was laid down that the Circuit Court of the United States could not entertain jurisdiction of a bill to set aside the probate of a will in the State of Washington, because by the statutes of that State the proceeding was one purely *in rem* and not a suit *inter partes*, sustainable in a court of equity. That case recognized what previous cases had held, that in proceedings purely of a probate character there was no jurisdiction in the Federal courts. This was in harmony with the rule

theretofore laid down in *Byers* v. *McAuley, supra,* in which it was held that the Federal court could not exercise original jurisdiction to draw to itself the entire settlement of the estate of the decedent and the accounts of administration, or the power to determine all claims against the estate. But it was there decided that a Circuit Court of the United States could entertain jurisdiction in favor of citizens of other States to determine and award by decrees binding *in personam* their shares in the estates.

In view of the cases cited, and the rules thus established, it is evident that the bill in this case goes too far in asking to have an accounting of the estate, such as can only be had in the probate court having jurisdiction of the matter; for it is the result of the cases that in so far as the probate administration of the estate is concerned in the payment of debts, and the settlement of the accounts by the executor or administrator, the jurisdiction of the probate court may not be interfered with. It is also true, as was held in the court below in the case at bar, that the prior possession of the state probate court cannot be interfered with by the decree of the Federal court. Still, we think there is an aspect of this case within the Federal jurisdiction, and for which relief may be granted to the complainant, if she makes out the allegations of her bill under the other prayers, and the prayer for general relief therein contained. Under such prayer a court of equity will shape its decree according to the equity of the case. *Walden* v. *Bodley,* 14 Pet. 156, 164.

The complainant, a citizen of a different State, brings her bill against the executor and certain legatees named, who are likewise citizens of another State, and are all citizens of Louisiana, where the bill was filed, except one, who was beyond the jurisdiction of the court, and for the reasons stated in her bill she asks to have her interest in the legacy alleged to be lapsed and the residuary portion of the estate established.

This controversy is within the equity jurisdiction of the courts of the United States as heretofore recognized in this

court, and such jurisdiction cannot be limited or in anywise curtailed by state legislation as to its own courts. The complainant, it is to be noted, does not seek to set aside the probate of the will which the bill alleges was duly established and admitted to probate in the proper court of the State.

The United States Circuit Court, by granting this relief, need not interfere with the ordinary settlement of the estate, the payment of the debts and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, and we think has the right to determine as between the parties before the court the interest of the complainant in the alleged lapsed legacy and residuary estate, because of the facts presented in the bill. The decree to be granted cannot interfere with the possession of the estate in the hands of the executor, while being administered in the probate court, but it will be binding upon the executor, and may be enforced against it personally. If the Federal court finds that the complainant is entitled to the alleged lapsed legacy and the residue of the estate, while it cannot interfere with the probate court in determining the amount of the residue arising from the settlement of the estate in the court of probate, the decree can find the amount of the residue, as determined by the administration in the probate court in the hands of the executor, to belong to the complainant, and to be held in trust for her, thus binding the executor personally, as was the case in *Payne* v. *Hook*, 7 Wall. 425, *supra*, and *Ingersoll* v. *Coram*, 211 U. S. 335, *supra*.

It is to be presumed that the probate court will respect any adjudication which might be made in settling the rights of parties in this suit in the Federal court. It has been frequently held in this court that a judgment of a Federal court awarding property or rights, when set up in a state court, if its effect is denied, presents a claim of Federal right which may be protected in this court.

The Circuit Court in this case construed the bill, in view of its broad prayer for relief, as one which undertook to take the

entire settlement of the estate from the hands of the probate court, and denied the jurisdiction of the Circuit Court of the United States in the premises. We are of opinion that, to the extent stated, the bill set up a valid ground for relief, and, while all that it asks cannot be granted, enough was stated in it to make a case within the jurisdiction of the Federal courts within the principles we have stated.

At the last term of the court counsel in this case were invited to file, on or before the first day of the present term of court, briefs upon the question whether Frederick Tilton Davis, averred in the bill to be a resident of the State of Alabama and outside of the jurisdiction of the court, is an indispensable party to the suit, and in his absence a dismissal of the cause required for want of jurisdiction in the court to proceed without him. These briefs have been filed and we come now to consider this branch of the case. In so doing it is essential to remember that the complainant's cause of action is primarily against the executor of the estate for a decree against it concerning the right of the complainant to recover because of the alleged lapse of the legacy to the Home for the Insane, and the consequent increase in the residuary portion of the estate to be distributed to the heirs of Mrs. Tilton because of the allegations contained in the bill. The Watermans and Davis are made parties to the bill, and asked to be excluded from a participation in the recovery because of the alleged renunciation of their rights in the succession to Mrs. Tilton. If it shall be found that they have not thus renounced their interest, and a decree be rendered in complainant's favor, they are entitled to participate in the recovery. They have no interest in common, however, with the complainant, and the shares of the complainant and other heirs are separate and distinct. The question is, therefore, Is Davis an indispensable party to this suit, his absence creating a want of jurisdiction in the Federal court to proceed without him?

Section 737 of the Revised Statutes of the United States provides:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer."

To the same effect is the forty-seventh equity rule. This statute and rule permit the court to proceed with the trial and adjudication of the suit, as between parties who are properly before it, and preserves the rights of parties not voluntarily appearing, providing their rights are not prejudiced by the decree to be rendered in the case. This rule has been said to be declaratory of the already-established equity practice. *Shields* v. *Barrow*, 17 How. 130; 1 Street's Federal Equity Practice, § 533, and cases there cited. This rule does not permit a Federal court to proceed to a decree in that class of cases in which there is an absence of indispensable, as distinguished from proper, or even necessary parties, for neither the absence of formal, or such as are commonly termed necessary parties, will defeat the jurisdiction of the court; provided, in the case of necessary parties, their interests are such and so far separable from those of parties before the court, that the decree can be so shaped that the rights of those actually before the court may be determined without necessarily affecting other persons not within the jurisdiction. After pointing out that there may be formal parties, of whose omission the court takes no account, Mr. Justice Miller, in delivering the opinion in *Barney* v. *Baltimore*, 6 Wall. 280, went on to say:

"There is another class of persons whose relations to the suit are such that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties, if within its jurisdiction, before deciding the case. But if this cannot be done, it will proceed to

administer such relief as may be in its power between the parties before it. And there is a third class whose interests in the subject-matter of the suit and in the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of such absent party. 1 Street's Fed. Equity Practice, § 519.

If the court can do justice to the parties before it without injuring absent persons it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons. *Payne* v. *Hook*, 7 Wall. 425.

Applying these principles to the case at bar we are of opinion that the presence of Frederick T. Davis as a party to the suit is not essential to the jurisdiction of the Federal court to proceed to determine the case as to the parties actually before it. In other words, that while Davis is a necessary party in the sense that he has an interest in the controversy, his interest is not that of an indispensable party without whose presence a court of equity cannot do justice between the parties before it, and whose interest must be so affected by any decree to be rendered as to oust the jurisdiction of the court.

With the parties before it the court may proceed to determine whether, because of the acts alleged in the bill, the heirs-at-law of Mrs. Tilton were entitled to recover because of the lapsed legacy. If it finds the issue in favor of the complainant, it may proceed to determine the proportion in which the com-

plainant and the Watermans are entitled to share, without prejudice to the rights of Davis. It may direct the retention of his share in the hands of the executors, to be adjudicated in some other suit, or may otherwise shape its relief so as to do justice to the parties before the court without affecting his interest.

Upon the whole case we are of opinion that the Federal court has jurisdiction for the purpose of ascertaining the rights of the complainant to recover as against the executor, and the interest of the persons before the court in the fund. While the court could make no decree which would interfere with the possession of the probate court, it had jurisdiction to entertain the bill and to render a judgment binding upon the parties to the extent and in the manner which we have already stated. We are, therefore, of the opinion that the court below erred in holding that there was no jurisdiction to entertain this suit, and the decree is reversed and the cause remanded to the Circuit Court of the United States for the Eastern District of Louisiana for further proceedings in accordance with this opinion.

MR. JUSTICE WHITE dissents.

UNITED STATES *v.* UNION SUPPLY COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 120. Argued October 13, 14, 1909.—Decided November 8, 1909.

Where corporations are as much within the mischief aimed at by a penal statute and as capable of willful breaches of the law as individuals the statute will not, if it can be reasonably interpreted as including corporations, be interpreted as excluding them.

Where a penal statute prescribes two independent penalties, it will be construed as meaning to inflict them so far as possible, and, if one is

impossible, the guilty defendant is not to escape the other which is possible.

Section 6 of the act of May 9, 1902, c. 784, 32 Stat. 193, imposing certain duties on wholesale dealers in oleomargarine and imposing penalties of fine and imprisonment for violations applies to corporations, notwithstanding the penalty of imprisonment cannot be inflicted on a corporation.

THE facts are stated in the opinion.

The Solicitor General for plaintiff in error.

The duty to make the returns in question was undoubtedly imposed upon corporations as well as upon natural persons. 1. Section 6 of the act of 1902 is a reënactment of § 41 of the act "to reduce revenue and equalize duties on imports, etc.," approved October 1, 1890, 26 Stat. 567, which latter act undoubtedly applied to both natural persons and corporations but was defective in not providing any penalty for its violation. 2. To construe § 6 as not imposing a duty on corporate dealers would be inconsistent with the general purposes of the oleomargarine legislation. 3. Section 6 imposes the duty on wholesale dealers, without distinction between different classes of dealers and in this the section is consistent with the other provisions of the act, which all relate to oleomargarine, or dealers in or manufacturers of it and not to particular persons or classes.

Corporations being under the duty to make said returns, they are subject to the criminal punishment which § 6 visits upon violators of that duty, so far as their nature makes possible. 1. The purpose of the statute will be largely defeated unless punishment can be imposed. 2. There is no difficulty in construing the word "person" in the final clause as including a corporation. *United States* v. *Amedy*, 11 Wheat. 392, 412; 1 Clark & M., Priv. Corp., § 252; *State* v. *Security Bank of Clark*, 2 So. Dak. 538; *State* v. *B. & O. R. R. Co.*, 15 W. Va. 362; *United States* v. *B. & O. R. R. Co.*, Fed. Cas. No. 14,509; *United States* v. *John Kelso Co.*, 86 Fed. Rep.

304; *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 135; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 588; Rev. Stat., § 1. 3. The statute should therefore be construed as imposing only a fine in the case of corporate violators. Lewis, Suth. on Constr. Stat., 2d ed., § 372; *Commonwealth* v. *Pulaski County Co. & M. Assn.*, 92 Kentucky, 197; 1 Clark & M., Priv. Corp., § 251, p. 657. 4. Where it is *impossible* to impose both sorts of punishment the imposition of only one would not be an exercise of *discretion* by the court; hence the cases of *Ex parte Karstindick*, 93 U. S. 396; *In re Mills*, 135 U. S. 266; *United States* v. *Pridgeon*, 153 U. S. 48; *In re Johnson*, 46 Fed. Rep. 477; *Harman* v. *United States*, 50 Fed. Rep. 521; *In re Christian*, 82 Fed. Rep. 199; *Woodruff* v. *United States*, 58 Fed. Rep. 766, and *Whitwarth* v. *United States*, 114 Fed. Rep. 502, are not in point. 5. The mention of natural persons in § 5 of the act has no effect upon the construction of § 6.

If the construction placed on § 6 by the trial court be correct, then corporations may violate some fifty or sixty other important criminal statutes similarly worded.

A construction which would limit the application of § 6 to natural persons would render it unconstitutional or would at least make its constitutionality seriously questionable. *Hurtado* v. *California*, 110 U. S. 516, 535; *Caldwell* v. *Texas*, 137 U. S. 692, 697; *Giozza* v. *Tiernan*, 148 U. S. 657, 662; *Downes* v. *Bidwell*, 183 U. S. 244, 291; *Dorr* v. *United States*, 195 U. S. 138, 147, and therefore such a construction is to be avoided. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407.

Mr. Isaac R. Hitt, Jr., for defendant in error.

The act of May 9, 1902, c. 784, 32 Stat. 193, is an original act which also amends the act of August 2, 1886, and is not to be construed as a supplemental act, as the plaintiff in error endeavors to show.

Section 5 of that act applies, in express terms, to corporations, and gives the court discretionary power to punish either

by fine or imprisonment or both. Since a corporation cannot be imprisoned, the court, under § 6, cannot disregard so much of that section as prescribes punishment by imprisonment and punish only by fine. *United States* v. *Braun*, 158 Fed. Rep. 450.

See the decision of Judge Caldwell holding, in a case in which the statute prescribed a penalty of fine and imprisonment, that a sentence of imprisonment only was erroneous. *Woodruff* v. *United States*, 58 Fed. Rep. 766.

If the penalty prescribed for the act be both fine and imprisonment, then, so far as the punishment cannot, from the nature of the offender, be carried out, the statute is, of course, inoperative. *Commonwealth* v. *Association*, 92 Kentucky, 197. See also Clark's Criminal Law, 2d ed., 79. It may be that such a construction discloses a serious defect in the law; but if so, that defect must be cured by congressional and not judicial legislation. *United States* v. *Braun*, 158 Fed. Rep. 456. Also see *Cumberland Canal Corp.* v. *Portland*, 56 Maine, 77; *Androscoggin Water Power Co.* v. *Bethel Steam Mill Co.*, 64 Maine, 441.

It has been held, in substance, that oleomargarine acts are complete in themselves and contain provisions for all the punishment that Congress intended for violations thereof. *United States* v. *Lamson*, 165 Fed. Rep. 80; *Grier* v. *Tucker*, 150 Fed. Rep. 658; *Schafer* v. *Craft*, 144 Fed. Rep. 907; *Craft* v. *Shafer*, 153 Fed. Rep. 175; *S. C.*, 154 Fed. Rep. 1002.

The contention of the Government that a decision adverse to the Government will affect many other now existing laws seems unworthy of the high ideal which this court has ever endeavored to fill. The decisions of this court are always far-reaching and the enactments of Congress are not necessarily settled law until passed upon by this tribunal.

Mr. Justice Holmes delivered the opinion of the court.

This is an indictment of a corporation for wilfully violating

the sixth section of the act of Congress of May 9, 1902, c. 784, § 6, 32 Stat. 193, 197. That section requires "wholesale dealers" in oleomargarine, etc., to keep certain books and to make certain returns. It then goes on as follows: "And any person who wilfully violates any of the provisions of this section shall, for each such offense, be fined not less than fifty dollars and not exceeding five hundred dollars, and imprisoned not less than thirty days nor more than six months." The corporation moved to quash the indictment and the District Court quashed it on the ground that the section is not applicable to corporations. Thereupon the United States brought this writ of error.

The argument for the defendant in error is drawn from an earlier decision by the same court. It is that § 5 applies in express terms to corporations, and gives the court discretionary power to punish by either fine or imprisonment, or both, whereas in § 6 both punishments are imposed in all cases and corporations are not mentioned; that it is impossible to imprison a corporation, and that the statute warrants no sentence that does not comply with its terms. *United States* v. *Braun & Fitts*, 158 Fed. Rep. 456. We are of opinion that this reasoning is unsound. In the first place, taking up the argument, drawn from § 5, that corporations were omitted intentionally from the requirements of § 6, it is to be noticed that the sixth section of the present act copies its requirements from the act of October 1, 1890, c. 1244, § 41, 26 Stat. 567, 621, which did not contain the penal clause. In its earlier form the enactment clearly applied to corporations, and when the same words were repeated in the later act it is not to be supposed that their meaning was changed. The words "wholesale dealers" are as apt to embrace corporations here as they are in § 2, requiring such dealers to pay certain taxes. We have no doubt that they were intended to embrace them. The words "any person" in the penal clause are as broad as "wholesale dealers" in the part prescribing the duties. U. S. Rev. Stat., § 1. It is impossible to believe that corporations were inten-

tionally excluded. They are as much within the mischief aimed at as private persons, and as capable of a "wilful" breach of the law. *New York Central & Hudson River R. R.* v. *United States*, 212 U. S. 481. If the defendant escapes, it does so on the single ground that as it cannot suffer both parts of the punishment it need not suffer one.

It seems to us that a reasonable interpretation of the words used does not lead to such a result. If we compare § 5, the application of one of the penalties rather than of both is made to depend not on the character of the defendant, but on the discretion of the judge; yet there corporations are mentioned in terms. See *Hawke* v. *E. Hulton & Co. Limited*, (1909) 2 K. B. 93, 98. And if we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that if one of them is impossible, it does not mean on that account to let the defendant escape. See *Commonwealth* v. *Pulaski County Agricultural & Mechanical Association*, 92 Kentucky, 197, 201. In *Hawke* v. *E. Hulton & Co.* (1909), 2 K. B. 93, it was held that the words "any person" in one section of a penal act did not embrace a corporation notwithstanding a statute like our Rev. Stat., § 1. But that was not so much on the ground that imprisonment was contemplated as a punishment, as because the person convicted was to be "deemed a rogue and a vagabond." Moreover it was thought that corporations could be reached under another section of the act.

Judgment reversed.

FLEMING *v.* McCURTAIN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

No. 253. Argued October 20, 21, 1909.—Decided November 8, 1909.

The grant in letters patent, issued in pursuance of the treaty of Dancing Rabbit Creek of September 27, 1830, 7 Stat. 333, conveying the tract described to the Choctaw Indians in fee simple to them and their descendants to inure to them while they should exist as a nation and live thereon, was a grant to the Choctaw Nation, to be administered by it as such; it did not create a trust for the individuals then comprising the nation and their respective descendants in whom as tenants in common the legal title would merge with the equitable title on dissolution of the nation.

THE facts are stated in the opinion.

Mr. Frank Hagerman and *Mr. John G. Carlisle,* with whom *Mr. Webster Ballinger* and *Mr. Albert J. Lee* were on the brief for appellants.[1]

Mr. Edward P. Hill, with whom *Mr. David C. McCurtain* was on the brief for Green McCurtain, appellee.[1]

The Solicitor General for Richard A. Ballinger, Secretary of the Interior, appellee.[1]

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity purporting to be brought by and on

[1] These briefs consist of over 350 printed pages and contain résumés and compilations of, and extracts from, the treaties and statutes abolishing Indian tribal government and the distribution of the Indian lands among the members of the five civilized tribes under the plan of the Dawes Commission.

behalf of some thirteen thousand persons "all persons of Choctaw or Chickasaw Indian blood and descent and members of a designated class of persons for whose exclusive use and benefit a special grant was made" of certain property in Oklahoma. The principal defendants are, the Secretary of the Interior; McCurtain, Chief of the Choctaws; Johnston, Governor of the Chickasaws, and all persons whose names appear with theirs on the rolls of "Citizens" of the Choctaw and Chickasaw Nations respectively, and all persons whose names appear upon the "freedmen" rolls of those Nations, as approved by the Secretary of the Interior on or before March 4, 1907, these being the persons to whom the Secretary of the Interior is proceeding to allot the above-mentioned property, being all the property of the tribe. The main object of the bill is to restrain the allotment to the defendants and to undo it so far as it has taken place, to establish the title of the plaintiffs for the purpose of allotment, and to have a new distribution decreed. A firm of lawyers is joined, on the allegation that they have received a portion of the property under a fraudulent arrangement. The bill was demurred to for want of equity and for want of jurisdiction in the court.

The Circuit Court examined the treaty and conveyance under which the plaintiffs claim and held that they did not confer the rights alleged in the bill; that the right to share in the distribution depended on membership in one of the two tribes, except in the case of freedmen, specially provided for; that who were members of the respective tribes, and entitled to enrollment as such, was a matter for Congress to determine; that Congress had adopted certain rolls when finally approved by the Secretary of the Interior; that the Secretary had acted and the plaintiffs had been excluded; that his action was final, and that the court had no jurisdiction in the case. The demurrer to the jurisdiction was sustained, the bill was dismissed, and the plaintiffs appealed to this court.

The plaintiffs found their claim upon the Choctaw treaty of Dancing Rabbit Creek, September 27, 1830, Article 2, 7 Stat.

333, and letters patent of March 23, 1842, coupled with a treaty between the Choctaws and Chickasaws of January 17, 1837, ratified by the Senate March 24, 1837, 11 Stat. 573. By Article 2 of the treaty of 1830 "The United States under a grant specially to be made by the President of the U. S. shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it;" with the boundaries. The letters patent recite this article, and, 'in execution of the agreement,' grant the described tract, to have and to hold the same "as intended to be conveyed by the aforesaid article 'in fee simple to them and their descendants to inure to them while they shall exist as a nation and live on it,' liable to no transfer or alienation except to the United States or with their consent." The treaty with the Choctaws gave the Chickasaws a district within the limits of the Choctaws' country, "to be held on the same terms that the Choctaws now hold it, except the *right* of disposing of it, which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw Nation." The plaintiffs say that the patent conveyed the legal title to the Choctaw Nation in trust for such persons as were members of the tribe at the date of the treaty, or of the Chickasaw tribe at the date of the treaty with them, and their respective descendants, and that upon the dissolution of the nation the legal title merged with the equitable title, and the designated class became the absolute owners of the property as tenants in common.

The plaintiffs, in aid of their view, refer to various indications that the policy of the United States already was looking toward the disintegration of the Indian tribes, point out that the words on which they rely were interlined in the Government draft at the instance of the Indians, and from these and other circumstances argue that their construction is confirmed. They say that the dominant phrase is "in fee simple to them and their descendants," and that the use of the plural 'them'

shows a transition from the Nation as formal grantee to the members as beneficiaries. They say that 'descendants' was used instead of 'heirs' or 'children' to avoid questions of legitimacy, or giving an absolute title to living members and their children, and to establish a principle of devolution suitable to the mode of life and unions in those Indian tribes. They conclude that the words "inure to them while they shall exist as a nation and live on it," only mark the duration of the legal title and do not cut down the equitable right conferred by the earlier words.

As we cannot agree with this construction it will be unnecessary to consider many of the further allegations of the bill. The foundation of the plaintiffs' case is upon the words of the treaty and the patent that we have set forth. Those words seem to us to convey a different meaning on their face, a meaning that would not be changed but rather confirmed if we were to refer at length to the earlier and later dealings with the tribes, which we shall not need to do. We should mention, however, that the United States already had ceded this tract to the Choctaw Nation, with no qualifying words, by the treaty of October 18, 1820, Article 2, 7 Stat. 210. *Choctaw Nation* v. *United States*, 119 U. S. 1, 38. The treaty of 1830 only varied the description a little and provided for a special patent. But it would not better the plaintiffs' case if the treaty of 1830 were the single root of their grant. In a grant to the Choctaw Nation as a nation it was natural, as in other cases, to use some words of perpetuity. Of course the United States could use what words it saw fit to manifest its purpose, but the habit derived from private conveyances would be likely to prevail, and as in such instruments the gift of a fee is expressed by adding to the name of the grantee the words 'and his heirs,' or in case of a corporation, although unnecessary, its 'successors and assigns,' here also some addition was to be expected to the mere name of the grantee. The word Nation is used in the treaty as a collective noun, and as such, according to a common usage, is accompanied by a plural

verb in the very next article. ("The Choctaw Nation of Indians consent and hereby cede.") Therefore the second article says 'to them' rather than 'to it,' just as it says "while they (*i. e.*, the Nation) shall exist as a Nation," and it adds to the untechnical 'in fee simple' untechnical words of limitation of a kind that would indicate the intent to confine the grant to the Nation, which 'successors' would not, and at the same time to imply nothing as to the rules for inheritance of tribal rights, as "heirs" might have seemed to do. We may compare "for the Government of the Choctaw Nation of Red People and their descendants," in Article 4. The word was addressed to the Indian mind.

There is not a suggestion of any trust in the language to either the technical or the unlearned reader, and it is most unlikely that the United States would have attempted to impose one upon the Choctaws in favor of the existing members of the tribe in the very 'Treaty' that dealt with them as a quasi independent nation recognized by Article 5 as having the right to make war, and that by the fourth article bound the United States to secure to that nation "the jurisdiction and government of all the persons and property that may be within their limits west," etc. It is true that in further promising to secure the nation from all laws except those enacted by their own National Councils, the fourth article adds "not inconsistent with the Constitution, Treaties and Laws of the United States;" but this addition is far from suggesting that a constitutional right of property has been conferred upon a designated class, that might be enforced in a Circuit Court of the United States by a bill in equity against what was called a Nation. How far any one was from that understanding or from doubting that all the rights granted by the United States were in the Choctaw Nation is shown by the treaty with the Chickasaws upon which the plaintiffs rely. The nation had no right to make that treaty as it did, if it was subject to the trust supposed. Again, the limitation of time, ' while they shall exist as a nation and live on it,' shows that

the grant has reference to the corporate existence of the nation as such, and very plainly qualifies the absoluteness of the earlier words, "in fee simple." The suggestion that it limits the duration of the legal title only but leaves a trust outstanding is simply arbitrary. If the plural signifies the members of a class constituted *cestuis que trust* the limitation would attach to the trust. But the only answer necessary is that no such separation or intent can be discovered in the words.

What we have said shows another sufficient answer to the plaintiffs' claim. They say and argue, as they must in order to make out their right to a distribution to themselves, that the Choctaws and Chickasaws no longer exist as nations. But if so, the grant also was at an end when the nations ceased to be, and it rested with the bounty of the United States to decide what should be done with the land, except so far as it already had been decided by treaties or statutes upon which the plaintiffs do not and cannot rely. It is said that by Article 18, in case of any well-founded doubt as to the construction of the treaty, it is to be construed most favorably toward the Choctaws. But there is no well-founded doubt, except whether the construction contended for would have been regarded as favorable to the Choctaws, since it would have cut down the autonomy that the treaty so carefully expressed. See further *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 568.

The residue of the bill becomes immaterial upon the failure of the plaintiffs to make out a title under the treaty and patent. It refers to the act of June 28, 1898, c. 517, 30 Stat. 495, and the earlier statutes leading up to it, which established a commission, ordered it to prepare correct rolls of citizenship, and provided by § 21 of the act of 1898 that the rolls so made, when approved by the Secretary of the Interior, should be final, (See also Acts of March 3, 1901, c. 832, 31 Stat. 1058, 1077; April 26, 1906, c. 1876, 34 Stat. 137.) By § 11 a divi-

sion was to be made among the "citizens" of the tribes according to the rolls, and by § 12 the allottees were to have undisturbed possession when the report of the allotments had been made to the Secretary of the Interior and confirmed by him. By § 29 an agreement with the Choctaws and Chickasaws on the matter was ratified, and by act of July 1, 1902, c. 1362, 32 Stat. 641, a further agreement was ratified, which again excluded all except those whose names were on the roll. Art. 35. The bill charges that these agreements, as well as a part of the act of 1898, were void as excluding some of the plaintiffs who were not residents of the nation on June 28, 1898, and as not having been approved by the class, or a majority of the class, alleged to have been designated by the treaty and patent that we have discussed. The bill goes on to allege that rolls were prepared by the Commission, and approved by the Secretary, within the time allowed by the statutes, (Act of April 26, 1906, c. 1876, § 2, 34 Stat. 137), and that the time has expired, but the rolls were not made in conformity to the act of 1898, and are not correct but fraudulent, in various particulars set forth.

But these allegations make out no case for the plaintiffs. It is said that the statutes recognize individual rights as already existing. It is true that by a treaty of June 22, 1855, 11 Stat. 611, the United States guaranteed the lands "to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole" with provisos. But the plaintiffs do not claim under this treaty or mention it in their bill, or a treaty of April 28, 1866, 14 Stat. 769, by Articles 11–36 of which the change from common to individual ownership was agreed, and it was provided that unselected land should "be the common property of the Choctaw and Chickasaw Nations, in their corporate capacities," etc. Art. 33. They might be descendants or the members of the tribe as it was in 1839 or 1842, and yet not members or heirs of members of the tribe

of 1854, therefore it is unnecessary to construe this treaty. Neither do the plaintiffs claim under any title to be derived from the statute providing for distribution according to the rolls of citizenship. They do not allege that they are citizens or attempt to bring themselves within any grant later than the treaty and patent that we have discussed. They disclose that their names are not upon the rolls and that the decision of the Secretary of the Interior has been against them and they show no reason for our not accepting the rolls and decision as final according to the terms of the distributing acts. See *West* v. *Hitchcock*, 205 U. S. 80; *Garfield* v. *Goldsby*, 211 U. S. 249, 259.

Decree affirmed.

MARBLES *v.* CREECY, CHIEF OF POLICE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 23. Submitted November 5, 1909.—Decided November 15, 1909.

The executive of a State upon whom a demand is made for the surrender of a fugitive from justice may act on the papers in the absence of, and without notice to, the accused, and it is for that executive to determine whether he will regard the requisition papers as sufficient proof that the accused has been charged with crime in, and is a fugitive from justice from, the demanding State, or whether he will demand, as he may if he sees fit so to do, further proof in regard to such facts.

A notice in the requisition papers that the demanding State will not be responsible for any expenses attending the arrest and delivery of the fugitive does not affect the legality of the surrender so far as the rights of the accused under the Constitution and laws of the United States are concerned.

The executive of the surrendering State need not be controlled in the discharge of his duty by considerations of race or color, or, in the

absence of proof, by suggestions that the alleged fugitive will not be fairly dealt with by the demanding State.

On *habeas corpus* the court can assume that a requisition made by an executive of a State is solely for the purpose of enforcing its laws and that the person surrendered will be legally tried and adequately protected from illegal violence.

THE facts are stated in the opinion.

Mr. George D. Reynolds for appellant:

The provisions of § 5278, Rev. Stat., will be strictly construed and all the requirements of the statute must be respected. *Ex parte Hart*, 63 Fed. Rep. 259; *Ex parte Morgan*, 20 Fed. Rep. 298; *Kentucky* v. *Dennison*, 24 How. 66.

The following facts should have been clearly stated in the warrant issued by the Governor of surrendering State to show that it is issued in a case authorized by law and the power to issue the warrant depends upon the following facts:

1. That the person is charged in some State or Territory of the United States with treason, felony or other crime.

2. That he had fled from justice and was found to be a fugitive from justice.

3. That he was found in the State.

4. That the executive authority of the State from which he fled had demanded his delivery to be removed to the State having jurisdiction of the crime.

If the warrant omits to state that the person has fled from justice or that he is found in the asylum it is defective. *Matter of Romaine*, 23 California, 585, 592.

The executive of the asylum State is not required by the act of Congress to cause the arrest of appellant and his delivery to the agent appointed to receive him without proof of the fact that he was a fugitive from justice. *Ex parte Reggel*, 114 U. S. 642.

A warrant for arrest and return must recite and set forth the evidence necessary to authorize the state executive to issue it and unless it does it is illegal and void and the warrant is-

sued by the Governor of surrendering State should have stated that as such governor he had found appellant to have been a fugitive from justice. *In re Doo Woon*, 18 Fed. Rep. 898; *Kentucky* v. *Dennison*, 24 How. 66; *Ex parte Smith*, 3 McLean, 121.

Where the warrant alone is before the court and is insufficient on its face the prisoner must necessarily be discharged. *Standahl* v. *Richardson*, 34 Minnesota, 115; *Ex parte Powell*, 20 Florida, 806.

The warrant must recite that the person charged is a fugitive from justice and it is not enough that it state that the demanding executive has represented him to be such. *In re Jackson*, 2 Flippin, 183.

In a petition for a writ of *habeas corpus* verified by the oath of the petitioner as required by § 754, Rev. Stat., facts duly alleged may be taken to be true unless denied by the return or controlled by other evidence, and in this case the return of the jailor did not deny that the prisoner was not present in the demanding State at the time when the crime was alleged to have been committed. *Whitten* v. *Tomlinson*, 160 U. S. 231.

There was no appearance or brief for appellee.

Mr. Justice Harlan delivered the opinion of the court.

The appellant Marbles was indicted in the Circuit Court of Warren County, Mississippi, for the crime of having, in violation of the laws of Mississippi, made a deadly assault with the willful and felonious intent to kill and murder the person assaulted. Miss. Code, § 1043. The deputy sheriff of the county furnished a certified copy of the indictment to the Governor of Mississippi, as well as his affidavit that Marbles was a fugitive from the justice of that State and had taken refuge in Missouri, and applied for a requisition upon the Governor of Missouri for the arrest of the alleged criminal and his delivery to the agent of Mississippi, to be conveyed to the

latter State and there dealt with according to law. Thereupon the Governor of Mississippi issued his requisition, in the ordinary form, except that there was in it this unusual, not to say, extraordinary, provision: "This State will not be responsible for any expense attending the execution of this requisition for the arrest and delivery of fugitives from justice."

The Governor of Missouri honored the requisition made upon him and issued his warrant for the arrest of Marbles and his delivery to the designated agent of Mississippi. That warrant recited the fact that the accused was proceeded against as a fugitive from justice, and that the Governor of Mississippi had, as required by the statute of the United States, produced to the Governor of Missouri a copy of the indictment certified to be authentic, and charging the fugitive with having committed the crime of assault to kill. Rev. Stat., § 5278.

Marbles was arrested under this warrant, and, being in custody, sued out a writ of *habeas corpus* from one of the judges of the Circuit Court of the United States for his discharge upon the ground that he was deprived of his liberty in violation of the Constitution of the United States. The application for the writ was heard in that court. The reasons assigned in support of the contention just stated were: That the Governor of Missouri had no jurisdiction to issue a warrant for his arrest, in that it was not shown before that officer that the accused was a fugitive from the justice of Mississippi, or had fled from that State, nor was there any evidence before the Governor of Missouri that the petitioner was personally or had been continuously present in Mississippi when the crime in question was alleged to have been committed; that it appeared on the face of the indictment accompanying the requisition that no crime under the laws of Mississippi was legally charged or had been committed by the accused; that it did not appear before the Governor of Missouri, when the requisition was presented to him, that the petitioner was, in fact, a fugitive from the justice of Mississippi; that said req-

uisition was not certified to as required by the laws of the United States; that there was not produced to that executive a copy of any indictment or affidavit certified as authentic by the Governor of Mississippi; and that the petitioner was not present before the Governor of Missouri at the hearing before him of the warrant of extradition, nor was he given an opportunity to meet the witnesses face to face.

No reason whatever was shown on the hearing of the application for *habeas corpus* for the discharge of the accused from custody—nothing that showed any failure to conform to the requirements of the Constitution or laws of the United States. The material allegations of fact set forth in the application for the writ are wholly unsupported by anything in the record; indeed, some of them are affirmatively disproved by the record. No proof at all appears to have been made by the accused of any essential fact, and the decision of the court must have been based altogether upon the same official documents that were presented to the Governor of Missouri supported by the legal inferences to be drawn from their contents. It was made to appear by those documents that the accused was charged by indictment with a specified crime against the laws of Mississippi (Miss. Code, § 1043) and had become a fugitive from the justice of that State. That was legally sufficient, without more, to authorize a requisition, and when the Governor of Missouri was furnished, as he was, with a copy of the indictment against Marbles, certified by the Governor of Mississippi to be authentic, it then became the duty of the Governor of Missouri, under the Constitution and laws of the United States, to cause the arrest of the alleged fugitive. So reads the statute enacted in execution of the constitutional provision relating to fugitives from justice. Rev. Stat., § 5278. It is true that it does not appear from the record before us that there was any evidence before the Governor of Missouri other than the requisition of the Governor of Mississippi and a copy of the indictment against the alleged fugitive, certified to be authentic. It is also true that, so far

as the Constitution and laws of the United States are concerned, the Governor of Missouri could not legally have issued his warrant of arrest unless the accused was charged with what was made by Mississippi a crime against its laws and was a fugitive from justice. But those facts were determinable in any way deemed satisfactory by that executive, and he was not bound to demand—although he may have required if the circumstances made it proper to do so—proof apart from proper requisition papers that the accused was so charged and was a fugitive from justice. He was, no doubt, at liberty to hear independent evidence showing that the act with which the accused was charged by indictment was not made criminal by the laws of Mississippi and that he was not a fugitive from justice. No such proof appears to have been offered to the Governor or to the court below. But the official documents, reasonably interpreted, made a *prima facie* case against the accused as an alleged fugitive from justice and authorized that executive to issue his warrant of arrest as requested by the Governor of Mississippi. The contention that the Governor of Missouri could not act at all on the requisition papers in the absence of the accused and without previous notice to him is unsupported by reason or authority, and need only be stated to be rejected as unsound.

The principles here announced are firmly established by the decisions of this court. *McNichols* v. *Pease*, 207 U. S. 100; *Ex parte Reggel*, 114 U. S. 642, 652, 653; *Roberts* v. *Reilly*, 116 U. S. 80, 95; *Hyatt* v. *Corkran*, 188 U. S. 691, 719; *Munsey* v. *Clough*, 196 U. S. 364, 372; *Pettibone* v. *Nichols*, 203 U. S. 192; *Appleyard* v. *Massachusetts*, 203 U. S. 222.

Other questions may be noticed. One is, in effect, that the requisition of the Governor of Mississippi was invalid because of the clause or provision therein that that State would not be responsible for any expense attending the arrest and delivery of the alleged fugitive. We will not indulge in conjecture as to the object of inserting that clause in the requisition; particularly, as the State of Mississippi is not represented in

this court by counsel. It is sufficient now to say that the warning given to the Governor of Missouri that Mississippi would not be responsible for any expense attending the arrest and delivery of the alleged fugitive was a matter for the consideration of the Governor of the former State when he received the official demand for the arrest and delivery of the appellant as a fugitive from justice and a copy of the indictment against Marbles, certified as authentic. It was not a matter that could legally affect the inquiry before the Circuit Court on *habeas corpus*, whether the requisition of the demanding State and the action thereon by the Governor of Missouri were in substantial conformity with the Constitution and the laws of the United States, and, therefore, not in any legal sense hostile to the liberty of the accused.

The other question to be noticed is that raised by the following averments in the application for the writ of *habeas corpus:* "Your petitioner further states that he is a negro, and that the race feeling and race prejudice is so bitter in the State of Mississippi against negroes that he is in danger, if removed to that State, of assassination and of being killed, and that he cannot have a fair and impartial trial in any of the courts of that State, and that to deliver him over to the authorities of that State is to deprive him, as a citizen of the United States and a citizen and resident of the State of Mississippi, of the equal protection of the laws." It is clear that the executive authority of a State in which an alleged fugitive may be found, and for whose arrest a demand is made in conformity with the Constitution and laws of the United States, need not be controlled in the discharge of his duty by considerations of race or color, nor by a mere suggestion—certainly not one unsupported by proof, as was the case here—that the alleged fugitive will not be fairly and justly dealt with in the State to which it is sought to remove him nor be adequately protected, while in the custody of such State, against the action of lawless and bad men. The court that heard the application for discharge on writ of *habeas corpus* was entitled to

assume, as no doubt the Governor of Missouri assumed, that the State demanding the arrest and delivery of the accused had no other object in view than to enforce its laws, and that it would, by its constituted tribunals, officers and representatives, see to it not only that he was legally tried, without any reference to his race, but would be adequately protected while in the State's custody against the illegal action of those who might interfere to prevent the regular and orderly administration of justice.

We perceive no error of law in the record and the judgment of the Circuit Court must be affirmed.

It is so ordered.

McGILVRA AND BRESSLER,[1] *v.* ROSS, STATE LAND COMMISSIONER OF THE STATE OF WASHINGTON.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 328. Argued October 19, 20, 1909.—Decided November 15, 1909.

While the construction of the act of Congress under which a patent issued and what rights passed under the patent present Federal questions which give the Circuit Court jurisdiction of the case as one arising under the laws of the United States, if prior decisions have so defined such rights that they are removed from controversy, jurisdiction does not exist in the absence of diverse citizenship.

The decision in *Shively* v. *Bowlby*, 152 U. S. 1, which determined the relative rights of a patentee of the United States and one holding under a conveyance from the State of land below high watermark applies equally to lands bordering on navigable waters, whether tidal or inland, and the test of navigability is one of fact.

Each State has full jurisdiction over the lands within its borders including the beds of streams and other waters, *Kansas* v. *Colorado*, 206 U. S. 46, 93, subject to the rights granted by the Constitution to the United States.

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[1] In the Circuit Court separate cases were instituted by McGilvra and Bressler, respectively.

Where the Circuit Court is without jurisdiction because the Federal questions presented by the bill are no longer open to discussion it should dismiss the bill and not decide it on the merits in order that the plaintiff's rights, if any, may be litigated in the state courts.

164 Fed. Rep. 604, affirmed as to lack of jurisdiction and case remanded for dismissal.

THESE cases were consolidated in the Circuit Court. The appellants were complainants in the suits respectively, and asserted title by virtue of patents from the United States to lands bordering on and touching Lakes Washington and Union in the State of Washington to the lands below the high-water mark of said lakes respectively, against a title claimed by the State. The appellee, James P. Agnew, is the auditor of the county of King, and the other appellees constitute the board of land commissioners of the State.

The fundamental question presented is whether rights below high-water mark passed to the patentees as appurtenant to the uplands conveyed to them or whether they vested in the State upon its admission into the Union and are subject to the control of the State.

The patent in the *McGilvra case* was issued in 1866, under the act of Congress of April 24, 1820, entitled "An act making further provisions for the sale of public lands;" that in the *Bressler case* was issued under the provisions of the act of Congress of September 27, 1850, entitled "An act to create the office of surveyor of the public lands in Oregon, and to provide for the survey and to make donations to the settlers of the said public land." It is alleged that the lakes are respectively non-tidal bodies of water, situated wholly within the county of King, Lake Washington being about twenty miles in length, with an average breadth of three miles, and Lake Union being about three miles in length, with an average breadth of one mile; and that neither lake has an outlet, navigable for boats, scows or lighters, and at all times has been confined to the conveyance of passengers or freight to and from different points upon said lake; and that neither lake is now or ever has been

susceptible of navigation, so far as the carrying of passengers or freight is concerned, to points upon the lake from different counties of the State, to and from other States, or to and from foreign nations, and that the same can never be used unless it be by a very extensive system of canals or dredging of the outlet thereof.

It is alleged that the height of the waters of Lake Washington is dependent upon the amount of rainfall, and that the rise and fall of the water "covers and uncovers many hundreds of thousands of square feet of land" in the patented tracts, exceeding the value of $40,000. As to Lake Union, it is alleged that, by a dam constructed about fifty years ago, its waters were raised and are maintained about seven feet higher than their natural level. And further, that a ditch has been excavated, crossing a narrow neck of land which separates Lake Union from Lake Washington, through which the waters of the latter flow into Lake Union and keep its waters at practically the same level.

It is further alleged that by virtue of the patents and the acts of Congress under which they were issued there became vested in the patentees and their successors the ownership of those portions of the lakes immediately in front of the tracts patented "out into" the "deep waters" of the lakes, subject only to the supervision in their use of the same to the extent that they be so used by the proprietor thereof; that said proprietor should not and did not interfere with the rights of other riparian owners, and the rights of the public in navigating the waters of said lake. And that they became and are vested from the dates of the several patents with the exclusive right and privilege to make such fills in shallow water, and to erect such piers, docks and warehouses as might be convenient and necessary to aid and facilitate the navigation upon the waters of the lakes, and that said rights were so vested, "limited only by the rights of supervision in the Government; that said rights be exercised in such a manner that there should be no interference with the rights of other riparian owners, or with

the rights of the public to freely navigate upon the navigable waters of said lake," and that these rights were conveyed by the patents many years before the admission of Washington into the Union.

It is alleged that the State was admitted into the Union, November 11, 1889, and that Article XVII of the constitution of the State reads as follows:

"The State of Washington asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the State."

That by virtue of this provision the State claims the ownership in fee of all the waters and lands under the waters of the lakes up to and including the line of ordinary high water, and by reason of such claim of ownership the legislature passed Senate Bill No. 101, which was approved by the governor February 4, 1907, and took effect immediately upon its passage. The act was entitled "An act to provide for the establishment of harbor lines, survey, platting and appraisal of shore lands of the first class of Lakes Washington and Union, in King County, Washington, the sale and disposition of said shore lands, the creation of the Alaska-Yukon-Pacific Exposition Fund, and declaring an emergency."

It is also alleged that it is provided in said act that "the board of state land commissioners of the State of Washington, acting as a board of harbor line commission or other proper official capacity as now authorized by law, shall, as soon as possible after the passage of this act, and not later than July 1, 1907, establish harbor lines in Lakes Washington and Union, situated in King County, Washington, in front of the city of Seattle, . . . ; and to survey, plat, examine and appraise such shore lands of the first class within or in front of the

limits of the said city of Seattle . . . After the establishment of said harbor lines and the survey, platting, examination and appraisal, as aforesaid, a copy of the plat and record thereof, as required by existing law, shall be deposited with the county auditor of King County, Washington, and another copy shall be delivered to the commissioner of public lands of this State, and the same shall be filed and safely kept as required by law."

It is further alleged that the board has proceeded to survey the lands belonging to the appellants respectively, and has included therein those portions which lie between the line of ordinary high water and the line of low water out into the lakes to a point where the depth is thirty feet, and that the plat thereof covers the property of the appellees.

It is alleged that John J. McGilvra, the original patentee in the *McGilvra case*, "did erect and construct out into the waters of Lake Washington a wharf in front of a portion" of the patented lands, which was erected and maintained at great expense to facilitate the commerce of the lake, and which was for many years the only wharf within the limits of Seattle. It is alleged that the wharf is still owned by the appellants in the case, and still used for the purpose above mentioned, and is, with the privilege connected therewith and appurtenant thereto, of greater value than $10,000.

It is also alleged in the *Bressler case* that the owners of the lands alleged therein to have been patented constructed a dock or wharf into the waters of Lake Union, for a landing place for passengers and freight, and it was and is used for that purpose, and that the appellant Bressler has, since his ownership of the property, further improved the same, by covering nearly all of it with buildings, which have long been occupied by his tenants for the purpose of trade and manufacture, and the value of the wharf and buildings exceeds $12,000, and the value of the property $75,000.

It is alleged, in both cases, that by the constitutional provision above mentioned the State "seeks to confiscate without

compensation, and if declared valid and of effect will confiscate without compensation the rights of" appellants in and to all the rights hereinbefore set forth as vested for a period of twenty-four years before the admission of the State, and will divest appellants of their said property rights without compensation and without due process of law, all of which, it "is alleged, is contrary to the protection guaranteed to the citizens of the United States by the Fourteenth Amendment of the Constitution of the United States."

And as to the acts and threatened acts of the appellees above described and other acts which they threaten in pursuance of the statute of February 4, 1907, it is alleged that they will cast a cloud upon the respective rights, titles and properties of the appellants in the respective cases, to their damage respectively in the sums of $5,000, $25,000 and $100,000, and that they will take and convert into money the properties of the respective appellants without compensation and without due process of law, and that appellants have no plain, speedy or adequate remedy at law.

Injunctions were prayed, provisional and perpetual, also general relief.

Demurrers were filed to the bills on the ground that they exhibited no equities in the respective complaints and on the ground that the court was "without jurisdiction of the parties or the subject matter."

Alfred J. Pritchard and others were allowed to intervene in the *McGilvra case* and Frank T. Hunter and others were allowed to intervene in the *Bressler case* as parties complainant.

The Circuit Court did not pass on the question of jurisdiction, saying, on page 401: "As the bills fully disclose the extent of the complainants' claims to relief, it results that the demurrers must be sustained and the suits dismissed for want of equity." 161 Fed. Rep. 398. A decree was entered accordingly. The Circuit Court of Appeals, however, discussed the question of jurisdiction, and said, on page 608:

"The Circuit Court was, therefore, without jurisdiction in

these cases and the bills of complaint were properly dismissed. The views here expressed would require this court to affirm the decrees of the Circuit Court dismissing the bills of complaint if the cases were considered on their merits.

"The decree of the Circuit Court is affirmed." 164 Fed. Rep. 604.

Mr. Charles K. Jenner and *Mr. O. C. McGilvra* for appellant.

Mr. Walter P. Bell, Attorney General for the State of Washington, and *Mr. John W. Roberts* for appellee.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The appellants are citizens of the State of Washington, and rely, therefore, upon the existence of Federal questions to sustain the jurisdiction of the Circuit Court. These questions are asserted to be (and we give the language of counsel): "(1) the validity and effect of the several patents of the United States in respect to the claim of ownership thereunder, as set forth in the bill of complaint; (2) the invocation of the protection of the Fourteenth Amendment of the Federal Constitution by these plaintiffs against the threatened taking of their property" by "the several acts of the legislature of the State of Washington and the procedure directed thereunder."

It is manifest that the first is the primary question. If the appellants did not derive the rights contended for by the patents, they have no rights to be impaired, even assuming, as we have assumed in this discussion, that the action of the State has proceeded far enough to be a trespass upon or an impairment of them. But whether such rights passed involves the construction of the acts of Congress under which the patents issued and necessarily of the effect of the patents, and presents a Federal question, if prior decisions have not de-

fined such rights and removed them from controversy. This is contended by appellees, and *Shively* v. *Bowlby*, 152 U. S. 1, is cited. And, as we have seen, the Circuit Court of Appeals took this view. Appellants attack it and contend that the facts of *Shively* v. *Bowlby* are so far different from those in the case at bar as to make that case inconclusive of the questions presented in the latter. A determination of the scope of *Shively* v. *Bowlby* becomes necessary. The controversy in that case was between a title by United States patent under the Oregon Donation Land Law, so called, being the act of Congress, September 27, 1850 (and the same law under which the title in the *Bressler case* is derived), to lands bounded by the Columbia River, and a title derived under the act of the State of Oregon, entitled "An act to provide for the sale of tide and overflowed lands on the seashore and coast" to lands below high-water mark on that river. The issue, therefore, was accurately presented between a title under a patent of the United States and one conveyed by a State in the exercise of its dominion over lands below high-water mark. The issue in the case at bar is exactly the same. But a distinction is pointed out, and on that distinction appellants' contentions and arguments are based. The *Shively case* was concerned with shore lands within the ebb and flow of the tide. In the case at bar the lands border on navigable waters, but not on tidal waters. The *Shively case*, it is therefore contended, as we have said, is not applicable, for, it is said, that whenever the "court in deciding said cause used the term 'navigable waters' in discussing the case then before it said term meant tidal waters, for the question of rights upon tidal waters was the only question therein presented."

The argument to sustain the contention is not confined to an analysis of the case, but goes beyond, and by the citation of many cases seeks to determine the riparian rights of appellants by the common law test of navigability, to wit, the ebb and flow of the tide. The contention is that when the patents were issued to the respective appellants "the common law of Eng-

land in relation to riparian ownership was in full force in the Territory of Washington, and, in the absence of statutes passed by the United States, changing, modifying or varying the common law in regard to grants of land," such grants carried, unless there was an express reservation, as "appurtenances thereunto belonging" such riparian ownership, and from this it is contended that appellants "received with their several patents a grant in fee to the waters" of Lakes Union and Washington, respectively, "in front of the several tracts of land to the middle of said lakes." We will not review the reasoning by which this contention is attempted to be supported. It is enough to say that the test of navigability of waters insisted on has had no place in American jurisprudence since the decision in the case of *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, and is therefore no test of riparian ownership. This is the effect of *Shively* v. *Bowlby*, 152 U. S., *supra*. The whole doctrine is there displayed, and the court declared (152 U. S., p. 11), that on account of the "diversity of view as to the scope and effect of the previous decisions of this court upon the subject of public and private rights in lands below high-water mark of navigable waters," it appeared "to be a fit occasion for a full review of those decisions and a consideration of other authorities upon the subject." And the term "navigable waters," as there used, meant waters which were navigable in fact. The definition was not inadvertent or unnecessary. It was that to which the reasoning conducted and which became the test of the dominion of the national and state governments over shore lands and the rights which they had or could convey. Hence this conclusion by the court (p. 57): "The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution." It was observed that the United States, while it held the country as a Territory, having all the powers of national and of municipal government, might have granted for appropriate purposes rights and titles below high-

water mark. See *United States* v. *Winans*, 198 U. S. 371; *Prosser* v. *Northern Pacific R. R.*, 152 U. S. 59. But, it was said, that they had never done so by general laws, but had considered it "as most in accordance with the interest of the people and with the object for which the Territories were acquired of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States respectively, when organized and admitted into the Union." This policy, it was remarked, as "to navigable waters and the soils under them, whether within or *above* the ebb and flow of the tide," has been "constantly acted upon." And hence it was further said: "Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future State when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States." The conclusion necessarily follows, as expressed by the court, that the State may dispose of its lands under navigable waters "free from any easement of the upland proprietor."

Joy v. *St. Louis*, 201 U. S. 332, is to the same effect. See also *Scranton* v. *Wheeler*, 179 U. S. 141, 190; *United States* v. *Mission Rock Co.*, 189 U. S. 391; *Kansas* v. *Colorado*, 206 U. S. 46–93. In the latter case it was said, as a deduction from many previous cases, including *Shively* v. *Bowlby*, "that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters." *Barney* v. *Keokuk*, 94 U. S. 324, 338, was quoted from as follows: "And since this court, in the case of *The Genesee Chief*, 12 How. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters and amenable to the admiralty jurisdiction, there seems

to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

It follows from these views that the Circuit Court of Appeals rightly decided that the questions presented by the bill are no longer open to discussion, and that the Circuit Court was without jurisdiction. But the Circuit Court of Appeals, overlooking the fact that the decree was not of dismissal simply, but on the merits, affirmed it. To correct this inadvertence the decree of the Circuit Court of Appeals must be reversed and the cause remanded to the Circuit Court with directions to set aside the decree on the merits and sustain the demurrer for want of jurisdiction, and on that ground dismiss the suits. This will enable appellants to litigate in the state courts whatever riparian rights they may have under the laws of the State and the constitutional provisions hereinbefore set out.

So ordered.

MR. JUSTICE HOLMES concurs in the result.

SYLVESTER *v.* THE STATE OF WASHINGTON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 40. Argued November 4, 5, 1909.—Decided November 15, 1909.

Where in the state court plaintiff in error set up the invalidity of a deed under the provisions of an act of Congress and judgment could not be rendered against him without sustaining the deed this court has jurisdiction under § 709, Rev. Stat. *Anderson* v. *Carkins*, 135 U. S. 483; *Nutt* v. *Knut*, 200 U. S. 12.

Where Congress appropriates for a Territory to erect buildings the implication is that the Territory must control the land on which the buildings are to be erected, and where land is cheap the implied authority will not be limited to merely leasing the land. *Quære* whether an organized Territory has not power to purchase land for a seat of government.

Under the Oregon Donation Act of September 27, 1850, c. 76, 9 Stat. 496, as amended July 17, 1854, c. 84, § 2, 10 Stat. 305, no condition except residence for four years was necessary to validate a sale by a settler before a patent.

On a writ of error where the rights of the parties depend upon the validity of a deed under an act of Congress this court is confined to the question of validity under the statute and the effect of the deed, if valid, upon the later rights and acquisitions of the grantor is a matter of local law; and, in this case, the court will not disturb the assumption of the state court that a settler giving a valid deed before patent perfected the title and obtained the patent on behalf of his grantee or else that the patent enured to the benefit of the grantee.

46 Washington, 585, affirmed.

THE facts are stated in the opinion.

Mr. George Marvin Savage for plaintiff in error:

The instrument under which defendant claims title was void because the purported grantors had nothing but a "squatter's right." Under the Oregon Donation Law neither legal nor equitable title vests in the settler before his full compliance with all the requirements of said act. *Hall* v. *Russell*, 101 U. S. 509; *Vance* v. *Burbank*, 101 U. S. 514; *Ore. & Cal. R. R. Co.* v. *United States*, 190 U. S. 195; *United States* v. *Ore. & Cal. R. Co.*, 133 Fed. Rep. 954; *Cutting* v. *Cutting*, 6 Fed. Rep. 262; *Henry* v. *Land Co.*, 83 Fed. Rep. 748; *Hershberger* v. *Blewett*, 55 Fed. Rep. 177; *Traver* v. *Tribou*, 15 Fed. Rep. 31.

The Oregon state courts now hold to the doctrine of full compliance being necessary, having overruled their former decisions in the recent case of *Quinn* v. *Ladd*, 37 Oregon, 261 (59 Pac. Rep. 459); *Bullene* v. *Garrison*, 1 Wash. Ter. 590; *Maynard* v. *Hill*, 1 Wash. Ter. 327; *McSorley* v. *Hill*, 27 Pac.

Rep. 554; *S. C.*, 2 Wash. Ter. 638; *Maynard* v. *Valentine*, 2 Wash. Ter. 18. The decisions of the Land Department also support contentions. *Allen Claim*, 7 L. D. 547; *Vetch* v. *Park*, 14 L. D. 490; *Varner Claim*, 22 L. D. 569; *Stone* v. *Connell Heirs*, 23 L. D. 166.

Under the act of July 26, 1894, mere residence for the required period is not sufficient. The settler must perfect his inchoate rights by conforming to all the requirements of the act. Congress, recognizing this, and desiring to protect dilatory settlers, on July 26, 1894, passed an act extending the time within which final proof could be made under the Oregon Donation Act, 28 Stat. 122, which has been construed to be intended for the relief of those who had resided continuously upon and cultivated the lands specified in the original donation notifications, but had through mistake or negligence omitted to make and file their final proofs and fully establish their rights to such donations. *Oregon & C. R. R. Co.* v. *United States*, 190 U. S. 195.

See circular of the Department of the Interior, April 8, 1895, 20 L. D. 290.

The rule that all the requirements of the granting provisions of the act must be complied with by the settler before title vests is not confined to the Oregon Donation Act. It is the uniform ruling of the courts upon the land laws. *McCune* v. *Essig*, 118 Fed. Rep. 280; aff'd 199 U. S. 388.

A homesteader has not legal title before final proof. *United States* v. *Turner*, 54 Fed. Rep. 228.

Decisions of United States courts control. Decisions of state courts are not binding in cases involving the validity of conveyances of the public lands of the United States, as the questions when title passed, and whether it passed, and to whom, depend on the laws of the United States. *McCune* v. *Essig*, 199 U. S. 390; *Anderson* v. *Carkins*, 135 U. S. 486; *Wilcox* v. *Jackson*, 13 Pet. 517; *Proebstel* v. *Hogue*, 15 Fed. Rep. 583; *Cunningham* v. *Krutz*, 83 Pac. Rep. 109; *S. C.*, 41 Wash. 190.

The Territory was guilty of laches. Sylvester and wife continued to reside on his claim, after making the first deed, until after the patent; residence and cultivation were only necessary upon some part of the claim. *United States* v. *Tichenor*, 12 Fed. Rep. 426.

The Territory, with full knowledge, permitted him to prove up and establish his legal title to his full claim, and must be held to have waived any right beyond a mere possessory right, subordinate to his high title. *Hall* v. *Russell*, 101 U. S. 512.

The state court based its decision upon the cases of *Barney* v. *Dolph*, 97 U. S. 652; *Brazee* v. *Schofield*, 124 U. S. 495, and *Roeder* v. *Foux*, all of which can be distinguished from this case.

The deed was void because the grantee named therein was not authorized by law to take title to the land.

The Territory of Washington, having no attributes to sovereignty, had no power to acquire land. Its organic act gave no power to acquire title to land. It was not authorized or directed by act of Congress to purchase, or take title. The land was public land of the United States. The appropriation for public buildings did not give the Territory power to purchase land. *Koch* v. *Vanderhoff*, 9 Atl. Rep. 772; 19 Op. Atty. Genl. 34, 79; § 3736, Rev. Stat.; *United States* v. *Tichenor*, 12 Fed. Rep. 421.

Mr. W. P. Bell, Attorney General of the State of Washington, with whom *Mr. W. V. Tanner*, *Mr. W. F. Magill* and *Mr. George A. Lee* were on the brief, for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought by the heirs of one Edmund Sylvester to recover a parcel of land patented to him by the United States, under the Oregon Donation Act of September 27, 1850, c. 76, 9 Stat. 496, and the amendments to the same. The State took up the defense and alleged that Sylves-

ter settled on the land on February 1, 1850, resided there continuously for more than four years, and then with his wife, the plaintiff Clara Sylvester, by deed of bargain and sale without covenants, conveyed the land to the Territory of Washington on January 18, 1855. This conveyance was made in accordance with a Territorial Act of January 9, 1855, to provide for the seat of government. The State alleged that it and the Territory, its predecessor, have been in open and adverse possession ever since, and relied upon the statute of limitations as well as upon the deed. To this defense there is a very verbose reply to the following effect.

The grantor offered the land to the Territory as a gift so long as it should be used as a site for the seat of government and the territorial capitol building erected and maintained thereon. The offer was accepted and an act was passed establishing the seat of government there, provided the owners or claimants gave a release of the land. January 9, 1855. Thereupon Sylvester made the above mentioned deed, which the plaintiffs prefer to call a release—or a quitclaim, as it was called in another territorial act of a few days later, January 28, 1855, accepting the deed. At the time of Sylvester's conveyance he was a claimant, but had not complied with the requirements of the Donation Act in other respects than the occupation for more than four years. On this ground it is alleged that his deed was void. On July 1, 1858, he made final proof; there was no adverse claim, and on May 3, 1860, a patent was issued to him. He died in 1887, and after the State of Washington had been admitted to the Union, at its request, the plaintiffs executed another deed of the premises—but this deed purported to be made "upon the express condition that the tract shall be and remain the site of the capitol of Washington, and that in the event of the location of the capitol elsewhere than upon his tract, these presents shall be null and void." As a further ground of recovery, it is alleged that the State has ceased to use the tract for the seat of government. Finally, it is alleged that under the act of Congress of March 2, 1853, c. 90, 10 Stat.

172, organizing Washington Territory, the Territory was not authorized or permitted to acquire title to the land in suit. It is added that the statute of limitations did not run, because the plaintiffs could not sue the Territory or State until authorized to do so by the act of 1895, c. 95, p. 188, for the first time.

There was a trial and judgment for the State, which judgment was affirmed by the state Supreme Court. 46 Washington, 585. The facts found were substantially those set forth in the pleadings, except that it was held to be proved that Sylvester filed his notification of settlement with the Surveyor-General of Oregon in February, 1854, before the date of his deed to the Territory, although, as has been shown, his final proof and his receipt of a patent were after that date. The plaintiffs specially set up the invalidity of his deed under the Oregon Donation Act, and the incapacity of the Territory to accept it under the act by which it was organized and claimed title on these grounds. We may assume that the present writ of error is within the jurisdiction of this court. *Anderson* v. *Carkins*, 135 U. S. 483; *Nutt* v. *Knut*, 200 U. S. 12. But on the merits we are of opinion that the plaintiffs have no case.

We see no ground whatever for the doubt suggested as to the power of the Territory to accept the deed. If that power was not incident to the organization, it was implied by § 13 of the Organic Act, as Congress granted five thousand dollars ' for the erection of suitable buildings at the seat of government.' For that purpose it was necessary that the Territory should control the land, and especially in a region where land was so cheap as it was in those days the implied authority cannot be confined to the taking of a lease.

On the other point it was said that the settler acquired no rights until he not only had cultivated the land for four years, but had otherwise conformed to the provisions of the Oregon Donation Act. Section 4. Whereas, at least, he had not made final proof. *Oregon & California R. R.* v. *United States*, No. 3, 190 U. S. 186, 195. But the question in this case is not whether Sylvester had acquired rights that the Government could not

impair, or in fact preserved as against another claimant, as in *East Central Eureka Mining Co.* v. *Central Eureka Mining Co.*, 204 U. S. 266, 270, 271, but it is between his representatives and his grantee. That Sylvester had some rights cannot be disputed, and is recognized by § 8 of the act ("all the rights of the deceased"). He was in possession and had taken lawful steps toward getting the title. Those rights he could convey unless prohibited by law. But by the amending act of July 17, 1854, c. 84, § 2, 10 Stat. 305, the proviso in § 4 of the Donation Act making contracts for the sale of the lands before patent void was repealed, "*Provided*, That no sale shall be deemed valid, unless the vendor shall have resided four years upon the land." As this proviso attached no condition except residence for four years it would be more than a harsh construction to hold that the validity of the deed still depended upon the fulfillment of the other requirements for a perfect right. We are of opinion that the deed was valid, and thus the question is narrowed to the effect of the conveyance upon the title subsequently given to Sylvester by the patent of the United States. See *Brazee* v. *Schofield*, 124 U. S. 495.

But the questions that come before this court are confined to the rights of the parties under the statutes of the United States, and when it is decided that Sylvester's deed was valid under these statutes, its effect upon his later acts and acquisitions would seem to be a matter of local law. If the state court assumed, as it seems to have assumed, that Sylvester's subsequent making of final proof was to be taken to have been done on behalf of his grantee, and thus to have perfected its equitable right to the land, it is enough to say that we see no ground for disturbing the assumption. See *Nixon* v. *Carco*, 28 Mississippi, 414. If the state Supreme Court concurred with the trial court in holding an equitable title a sufficient answer to the plaintiff's claim, that is a matter with which we have nothing to do. Whether the decision went on this ground or assumed that the legal title also enured to the benefit of the State does not appear. If the latter ground were adopted we

presume that it could not be because of the form of the deed in the absence of words expressing or implying warranty, but would be peculiar to this class of cases. We suppose that, in the absence of a statute specially dealing with the matter, either the title would be taken to relate back, or it would be held that a permitted conveyance, before the Government has given a legal title to any one, made by a person in process of acquiring a title in the statutory method, would be taken to have contemplated that the grantor should have the benefit of what was done afterwards to perfect it. Those propositions we are not called upon to discuss. See *Landes* v. *Brant*, 10 How. 348; *United States* v. *Clark*, 200 U. S. 601, 607; Rev. Stat., § 2448.

Other matters were argued, as, for instance, whether parol evidence should have been received to show that the first deed was intended to be conditional, although absolute in form; the effect of the second deed and the condition that it expressed, the statute of limitations and so forth. But the only questions open, on the most liberal interpretation, are those that we have answered, and it follows without more that the judgment must be affirmed.

Affirmed.

EL PASO & NORTHEASTERN RAILWAY COMPANY *v.* GUTIERREZ, ADMINISTRATRIX.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 505. Submitted October 11, 1909.—Decided November 15, 1909.

Where the effect of the judgment of the state court is to deny the defense that a statute of a Territory is a bar to the action, a claim of Federal right is denied and this court has jurisdiction under § 709, Rev. Stats., to review the judgment. *Atchison, Topeka & Santa Fe Ry.* v. *Sowers*, 213 U. S. 55.

The power of Congress to regulate commerce in the District of Columbia and Territories is plenary and does not depend on the commerce

clause, and a statute regulating such commerce necessarily supersedes a territorial statute on the same subject.

An act of Congress may be unconstitutional as measured by the commerce clause, and constitutional as measured by the power to govern the District of Columbia and the Territories, and the test of separability is whether Congress would have enacted the legislation exclusively for the District and the Territories.

The rule that the court must sustain an act of Congress as constitutional unless there is no doubt as to its unconstitutionality also requires the court to sustain the act in so far as it is possible to sustain it.

This court did not in its decision of the *Employers' Liability Cases*, 207 U. S. 463, hold the act of June 11, 1906, c. 3073, 34 Stat. 232, unconstitutional so far as it related to the District of Columbia and the Territories, and expressly refused to interpret the act as applying only to such employés of carriers in the District and Territories as were engaged in interstate commerce.

The evident intent of Congress in enacting the Employers' Liability Act of June 11, 1906, was to enact the curative provisions of the law as applicable to the District of Columbia and the Territories under its plenary power irrespective of the interstate commerce feature of the act, and although unconstitutional as to the latter as held in 207 U. S. 463, it is constitutional and paramount as to commerce wholly in the District and Territories.

The Employers' Liability Act of June 11, 1906, being a constitutional regulation of commerce in the District of Columbia and the Territories necessarily supersedes prior territorial legislation on the same subject and non-compliance by the plaintiff employé with a provision of a territorial statute (in this case of New Mexico) cannot be pleaded by the defendant employer as a bar to an action for personal injuries.

117 S. W. 426, affirmed, and *Hyde* v. *Southern Ry. Co.*, 31 App. D. C. approved.

THE facts, which involve the constitutionality of the Employers' Liability Law of June 11, 1906, c. 3073, 34 Stat. 232, as applied to the Territories of the United States, are stated in the opinion.

Mr. W. C. Keegin, Mr. W. A. Hawkins and *Mr. John Franklin* for plaintiff in error:

This court has jurisdiction to review the judgment of the

state court of Texas; the plaintiff in error as defendant below asserted the unconstitutionality of the Employers' Liability Act and that this case was controlled by the statute of New Mexico. The denial of this claim was the denial of a Federal right. *St. Louis &c. Ry. Co.* v. *Taylor*, 210 U. S. 281, 293; *Ill. Cent. R. R. Co.* v. *McKendree*, 203 U. S. 514. The statute of New Mexico has been upheld in this court. *A., T. & Santa Fe Ry.* v. *Sowers*, 213 U. S. 55. The Employers' Liability Act is void *in toto*. The decision of this court in 207 U. S. 463, forecloses that question. The statute is not separable as nothing shows that Congress would have enacted it exclusively as to the Territories. *Sprague* v. *Thompson*, 118 U. S. 90.

Mr. F. G. Morris for defendant in error:

This court does not have jurisdiction of the appeal. The New Mexico statute did not create a right of action but only improved conditions. *Klinger* v. *Missouri*, 13 Wall. 257; *Eustis* v. *Bolles*, 150 U. S. 361; *Beaupré* v. *Noyes*, 138 U. S. 397.

The decision that the act of Congress and not the territorial statute controlled the case does not deny full faith and credit to the territorial statute. *United States* v. *Lynch*, 137 U. S. 280; *Balto. & Pot. R. R. Co.* v. *Hopkins*, 130 U. S. 210; *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491; *Smithsonian Institution* v. *St. John*, 214 U. S. 19.

No Federal right exists under a territorial statute in a state court which will support a writ of error from this court other than that provided for by the statute requiring it to be given full faith and credit. *A., T. & Santa Fe Ry.* v. *Sowers*, 213 U. S. 55.

The Employers' Liability Act is within the power of Congress to enact so far as applicable to the District of Columbia and the Territories, and that question is not affected by the decision of this court in 207 U. S. 463, which related only to the act as applicable to the States. The provisions as to the

District of Columbia and the Territories are separable from those as to the States and would have been independently enacted by Congress. *Hyde* v. *Southern Ry. Co.*, 31 App. D. C. 466; *Vial* v. *Penniman*, 103 U. S. 714; *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611; *Florida Cent. R. R. Co.* v. *Schutte*, 103 U. S. 118.

Mr. Justice Day delivered the opinion of the court.

In this case an action was commenced by Enedina Gutierrez, as administratrix of the estate of Antonio Gutierrez, in the District Court of El Paso County, Texas, against the El Paso and Northeastern Railway Company, to recover damages because of the death of the plaintiff's intestate by wrongful act while engaged in the service of the railway company, a common carrier in the Territory of New Mexico, on June 22, 1906. By way of special plea and answer the railway company set up a statute of the Territory of New Mexico, wherein it is provided that no actions for injuries inflicting death caused by any person or corporation in the Territory shall be maintained, unless the person claiming damages shall, within ninety days after the infliction of the injury complained of and thirty days before commencing suit, serve upon the defendant an affidavit covering certain particulars as to the injuries complained of, and containing the names and addresses of all witnesses of the happening of the alleged acts of negligence. Suit must be brought within one year, and in the District Court of the Territory in and for the county in which the injuries were received, or where the injured person resides; or, in a claim against a corporation, in the county of the Territory where the corporation has its principal place of business. This act is set out in full in the marginal note to the case of *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 213 U. S. 55.

The special answer sets forth that the accident happened in the Territory of New Mexico, while the statute was in full force, and that its terms and provisions were not complied with.

To the special answer the plaintiff below interposed a demurrer, and further, by way of supplemental petition, set forth that the injuries complained of happened after the passage of the so-called Employers' Liability Act, June 11, 1906, c. 3073, 34 Stat. 232. This act, the plaintiff alleged, controlled the liability of the defendant in the case. The District Court sustained the demurrer of the plaintiff to that part of the defendant's answer which set up the territorial act of New Mexico, to which ruling the railway company duly excepted. The case then went to trial to a jury upon issues made concerning the liability of the railway company under the Federal Employers' Liability Act of June 11, 1906. 34 Stat. 232. The result was a verdict and judgment in favor of the plaintiff against the railway company. The case was then taken to the Court of Civil Appeals of Texas, and that court held that it would not be governed by the territorial statutes, and that the Employers' Liability Act of June 11, 1906, was unconstitutional, upon the authority of *Employers' Liability Cases*, 207 U. S. 463, and certain cases in the Texas Court of Appeals. Upon rehearing a majority of the court held that the provisions of the New Mexico act as to the presentation of notice of claim for damages was a condition precedent to a cause of action, and that the trial court therefore erred in sustaining plaintiff's exception to that part of the defendant's answer which pleaded the territorial act and plaintiff's failure to present her claim in accordance with it. 111 S. W. Rep. 159. Thereupon the defendant took the case to the Supreme Court of Texas by writ of error, and that court held that the case was controlled by the act of Congress known as the Employers' Liability Act, 34 Stat. 232, and that the same was constitutional, and therefore held that the judgment of the Court of Civil Appeals should be reversed, and the original judgment of the District Court affirmed. 117 S. W. Rep. 426. From the judgment of the Supreme Court of the State a writ of error was prosecuted to this court.

Among other errors assigned is the failure of the Supreme

Court of Texas to give effect to the defense setting up the statute of New Mexico as a full defense to the action. While the Supreme Court of Texas in its opinion conceded that if the territorial act of New Mexico alone controlled the action the plaintiff must fail for non-compliance with its requirements, it reversed the judgment of the Court of Civil Appeals, and affirmed the judgment of the District Court, because in its opinion the liability was controlled by the Employers' Liability Act. The effect of this judgment of the Supreme Court of Texas was to deny the defense set up under the territorial act as a complete bar to the action. The District Court sustained the demurrer to the plea setting up this act, and thereby denied the rights specially set up under that statute, the Supreme Court of Texas overruled the Court of Civil Appeals and affirmed the judgment of the District Court. It thereby necessarily adjudicated the defense claimed under the territorial act against the railway company. If this defense sets up a Federal right within the meaning of § 709 of the Revised Statutes of the United States, then we have jurisdiction of the case. *Wabash R. R. Co.* v. *Adelbert College of Western Reserve University*, 208 U. S. 38, 44.

That the claim of immunity under the territorial act, because of the failure of the plaintiff in error to comply with its provisions as to the affidavit within ninety days, etc., presented a Federal question within the meaning of § 709 of the Revised Statutes, was decided in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 213 U. S. 55, in which case it was held that where suit was brought in a state court a claim of defense under the provisions of the New Mexico statute was a claim of Federal right, which, when adversely adjudicated, gave jurisdiction to this court to review the judgment.

Coming to consider the merits: This court, in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 213 U. S., *supra*, held that in order to give due faith and credit to the territorial statute, under § 906 of the Revised Statutes of the United

States, the plaintiff suing in a State must show compliance with the preliminaries of notice and demand as required by the territorial law. As the answer in the present case set up non-compliance with these requisites, and the state court sustained a demurrer thereto, the judgment must be reversed, unless the state court was right in denying the benefit of the territorial act thus set up, because the Federal Employers' Liability Act superseded the New Mexico law, and is constitutional so far as the Territories are concerned.

In view of the plenary power of Congress under the Constitution over the Territories of the United States, subject only to certain limitations and prohibitions not necessary to notice now, there can be no doubt that an act of Congress undertaking to regulate commerce in the District of Columbia and the Territories of the United States would necessarily supersede the territorial law regulating the same subject.

Is the Federal Employers' Liability Act of June 11, 1906, unconstitutional so far as it relates to common carriers engaged in trade or commerce in the Territories of the United States? It has been suggested that this question is foreclosed by a decision of this court in the *Employers' Liability Cases*, 207 U. S. 463. In that case this court held that, conceding the power of Congress to regulate the relations of employer and employé engaged in interstate commerce, the act of June 11, 1906, c. 3073, 34 Stat. 232, was unconstitutional in this, that in its provisions regulating interstate commerce Congress exceeded its constitutional authority in undertaking to make employers responsible, not only to employés when engaged in interstate commerce, but to any of its employés, whether engaged in interstate commerce or in commerce wholly within a State. That the unconstitutionality of the act, so far as it relates to the District of Columbia and the Territories, was not determined is evident from a consideration of the opinion of the court in the case. In answering the suggestion that the words "any employé" in the statute should be so read as to mean only employés en-

gaged in interstate commerce, Mr. Justice White, delivering the opinion of the court, said:

"But this would require us to write into the statute words of limitation and restriction not found in it. But if we could bring ourselves to modify the statute by writing in the words suggested the result would be to restrict the operation of the act as to the District of Columbia and the Territories. We say this because immediately preceding the provision of the act concerning carriers engaged in commerce between the States and Territories is a clause making it applicable to 'every common carrier engaged in trade or commerce in the District of Columbia or in any Territory of the United States.' It follows, therefore, that common carriers in such Territories, even although not engaged in interstate commerce, are by the act made liable to 'any' of their employés, as therein defined. The legislative power of Congress over the District of Columbia and the Territories being plenary and not depending upon the interstate commerce clause, it results that the provision as to the District of Columbia and the Territories, if standing alone, could not be questioned. Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested; that is, by causing the act to read 'any employé when engaged in interstate commerce,' we would restrict the act as to the District of Columbia and the Territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy." 207 U. S. 500.

A perusal of this portion of the opinion makes it evident that it was not intended to hold the act unconstitutional in so far as it related to the District of Columbia and the Territories, for it is there suggested that to interpolate in the act the qualifying words contended for would destroy the act in respect to the District of Columbia and the Territories by

limiting its operation in a field where Congress had plenary power, and did not depend for its authority upon the interstate commerce clause of the Constitution. The act in question is set forth in full in a note to *Employers' Liability Cases*, 207 U. S. 463, 490. We are concerned in the present case with its first section only. This section reads:

"That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employés, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents or employés, or by reason of any defect or any insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works."

A perusal of the section makes it evident that Congress is here dealing, first, with trade or commerce in the District of Columbia and the Territories; and, second, with interstate commerce, commerce with foreign nations, and between the Territories and the States. As we have already indicated, its power to deal with trade or commerce in the District of Columbia and the Territories does not depend upon the authority of the interstate commerce clause of the Constitution. Upon the other hand, the regulation sought to be enacted as to commerce between the States and with foreign nations depends upon the authority of Congress granted to it by the Constitution to regulate commerce among the States and with foreign nations. As to the latter class, Congress was dealing with a liability ordinarily governed by state statutes, or controlled by the common law as administered in the

several States. The Federal power of regulation within the States is limited to the right of Congress to control transactions of interstate commerce; it has no authority to regulate commerce wholly of a domestic character. It was because Congress had exceeded its authority in attempting to regulate the second class of commerce named in the statute that this court was constrained to hold the act unconstitutional. The act undertook to fix the liability as to "any employé," whether engaged in interstate commerce or not, and, in the terms of the act, had so interwoven and blended the regulation of liability within the authority of Congress with that which was not that the whole act was held invalid in this respect.

It is hardly necessary to repeat what this court has often affirmed, that an act of Congress is not to be declared invalid except for reasons so clear and satisfactory as to leave no doubt of its unconstitutionality. Futhermore, it is the duty of the court, where it can do so without doing violence to the terms of an act, to construe it so as to maintain its constitutionality; and, whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid. It was held in the *Employers' Liability Cases* that in order to sustain the act it would be necessary to write into its provisions words which it did not contain.

Coming to consider the statute in the light of the accepted rules of construction, we are of opinion that the provisions with reference to interstate commerce, which were declared unconstitutional for the reasons stated, are entirely separable from and in nowise dependent upon the provisions of the act regulating commerce within the District of Columbia and the Territories. Certainly these provisions could stand in separate acts, and the right to regulate one class of liability in nowise depends upon the other. Congress might have regulated the subject by laws applying alone to the Territories,

and left to the various States the regulation of the subject-matter within their borders, as had been the practice for many years.

It remains to inquire whether it is plain that Congress would have enacted the legislation had the act been limited to the regulation of the liability to employés engaged in commerce within the District of Columbia and the Territories. If we are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall. *Illinois Central R. R. Co.* v. *McKendree*, 203 U. S. 514; *Employers' Liability Cases*, 207 U. S. *supra*.

When we consider the purpose of Congress to regulate the liability of employer to employé, and its evident intention to change certain rules of the common law which theretofore prevailed as to the responsibility for negligence in the conduct of the business of transportation, we think that it is apparent that had Congress not undertaken to deal with this relation in the States where it had been regulated by local law, it would have dealt with the subject and enacted the curative provisions of the law applicable to the District of Columbia and the Territories over which its plenary power gave it the undoubted right to pass a controlling law, and to make uniform regulations governing the subject.

Bearing in mind the reluctance with which this court interferes with the action of a coördinate branch of the Government, and its duty, no less than its disposition, to sustain the enactments of the national legislature, except in clear cases of invalidity, we reach the conclusion that in the aspect of the act now under consideration the Congress proceeded within its constitutional power, and with the intention to regulate the matter in the District and Territories, irrespective of the interstate commerce feature of the act.

While not binding as authority in this court, we may note that the act, so far as it relates to the District of Columbia,

was sustained in a well-considered opinion by the Court of Appeals of the District of Columbia. *Hyde* v. *Southern Ry. Co.*, 31 App. D. C. 466.

The judgment of the Supreme Court of Texas is

Affirmed.

INTERSTATE COMMERCE COMMISSION *v.* STICKNEY AND OTHERS, RECEIVERS OF THE CHICAGO GREAT WESTERN RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 251. Argued October 12, 1909.—Decided November 29, 1909.

A carrier may charge and receive compensation for services that it may render, or procure to be rendered, off its own line, or outside of the mere transportation thereover.

Where the terminal charge is reasonable it cannot be condemned, or the carrier charging it required to change it because prior charges of connecting carriers make the total rate unreasonable.

In determining whether the charge of a terminal company is or is not reasonable the fact that connecting carriers own the stock of the terminal company is immaterial, nor does that fact make the lines of the terminal company part of the lines or property of such connecting carriers.

The inquiry authorized by § 15 of the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, relates to all charges made by the carrier; and, on such an inquiry, the carrier is entitled to have a finding that a particular charge is unreasonable before he is required to change it.

Where the charge of a terminal company is in itself reasonable the wrong of a shipper by excessive aggregate charges should be corrected by proceedings against the connecting carrier guilty of the wrong.

The convenience of the commission or the court is not the measure of justice, and will not justify striking down a terminal charge when the real overcharge is the fault of a prior carrier.

164 Fed. Rep. 638, affirmed.

On December 10, 1907, the Interstate Commerce Commission entered an order requiring certain railroads running into Chicago to cease and desist from making a terminal charge of two dollars per car for the transportation of live stock beyond the tracks of said railroads in Chicago, and for delivery thereof at the Union Stock Yards, and requiring them to establish and put in force for said services a charge of one dollar per car. Compliance with this order was postponed by the commission until May 15, 1908. On May 7, 1908, the appellees filed this bill in the Circuit Court of the United States for the District of Minnesota, to restrain the enforcement of said order, averring that the actual cost to them for such terminal services exceeded in each instance the sum of two dollars per car, and that the companies were making delivery at a charge less than such actual cost; that therefore the reduction of the charge by the commission to one dollar per car was unreasonable, oppressive and unlawful. A hearing was had before three judges of the Eighth Circuit and a restraining order entered as prayed for by the railroad companies, from which order an appeal was taken to this court.

Mr. Wade H. Ellis, Assistant to the Attorney General, and *Mr. S. H. Cowan*, special attorney, for the appellant:

For the history of this controversy before the courts and the commission see *Keenan* v. *Atchison & C. R. R. Co.*, 64 Fed. Rep. 992; *Walker* v. *Keenan*, 73 Fed. Rep. 755; Reports, 7 I. C. C. 513, and 555*a*; *Int. Com. Comm.* v. *C., B. & Q. R. R. Co.*, 98 Fed. Rep. 173; *S. C.*, 103 Fed. Rep. 249; *S. C.*, 186 U. S. 320; *Cattle Raisers' Assn.* v. *C., B. & Q. R. R. Co.*, 10 I. C. C. 83, and 11 I. C. C. 296; *Commodity Rates St. Louis to Texas Points*, 11 I. C. C. 238; *Cattle Raisers' Assn.* v. *C., B. & Q. R. R. Co.*, 12 I. C. C. 507; and this case below, 164 Fed. Rep. 638.

This case is even stronger for the commission than that in which the terminal charge was condemned in 186 U. S. 320. The power of the commission to make orders such as the one in-

volved is legislative and an order should not be set aside by the courts unless it violates property rights guaranteed by the Constitution. *Maximum Rate Cases*, 167 U. S. 479; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Knoxville* v. *Water Co.*, 212 U. S. 1; *Willcox* v. *Consol. Gas Co.*, 212 U. S. 19; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265; *Honolulu Transit Co.* v. *Hawaii*, 211 U. S. 282.

Under the old law the function of the Interstate Commerce Commission was in its nature judicial. It passed upon the reasonableness of existing rates and the courts reviewed its conclusions just as they review those of an inferior judicial tribunal, treating the commission as a referee of the Circuit Courts of the United States. See 37 Fed. Rep. 614; *New Orleans & Texas Pacific Ry.* v. *The Interstate Commerce Commission*, 162 U. S. 184; *Maximum Rate Cases*, 167 U. S. 479. Under the act as now amended the commission fixes the rate and the courts have the same authority to review that they would if the rate had been fixed by Congress itself. The so-called "Court Review" amendment, which is embodied in the Hepburn Act, is merely declaratory. The only thing added is the venue and the express authorization of suits against the commission as a representative of the Government.

It is not the reasonableness of the rate which is now before the court; that question is submitted exclusively to the commission. The rate fixed by the commission may in the judgment of the court be unreasonable and yet it will not be declared unlawful unless it is so unreasonable as to constitute a confiscation of property. *Knoxville* v. *Water Co.*, 212 U. S. 1; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 754.

The commission did not err in considering the terminal charge and the through rates together. That was settled in the *C., B. & Q. Case*, 186 U. S. 320, and there has been no change since then. The sole result of the terminal charge is to increase the cost to the shipper for the same service. Nor did the Hepburn Act since passed alter the situation. In neither

case has there been an obligation to make a terminal charge. The railroads have created the Union Stock Yards and made it their depot and the only available place for delivery of live stock in Chicago. It is the greatest live stock market in America and the other depots they have established are paper depots and no real terminal service exists. It is a pretense for the terminal charge. *Covington Stock Yards* v. *Keith*, 139 U. S. 128. No charge above one dollar per car is justifiable. Putting the two dollars terminal charge on at Chicago and not at other points made an unjust discrimination against Chicago and is not justifiable.

The order does not violate constitutional rights even if one dollar is less than the cost of terminal service.

The rule adopted below is that where railroad companies publish a terminal charge for terminal service, and the commission is called upon to declare whether or not it is reasonable, the commission must, as a matter of law, determine this question solely by the cost of the terminal service, independent of the fact that the through rate already includes compensation for the terminal service and independent of the fact that the transaction as a whole is profitable to the roads.

This is not sustained by reason or authority. To uphold it is to say that the railroads can charge twice for the same service, and the commission is without power to strike off the charge which is last put on. Even if the railroads had in this case, actually and in good faith, separated the terminal service from the through service, and the terminal charge from the through charge, the commission could reduce the terminal charge if they found that the through charge was high enough to include it.

But the railroads have not separated these two services and charges. They cannot separate the services because a shipment of live stock from the point of origin to the Union Stock Yards is one transaction and inseparable.

If a carrier adds a charge for a pretended separate service, which is already included in another service for which he is

amply paid, the commission may reduce the extra charge, even to a point below the cost of the pretended separate service. *Southern Railroad Co.* v. *The St. Louis Hay & Grain Co.*, 214 U. S. 297, distinguished.

The cost of a particular service is not a proper test of the reasonableness of the charge for it when the service performed is part of a larger transaction. *Minn. & St. Paul R. R.* v. *Minnesota*, 186 U. S. 257, 267; *St. Louis & S. F. R. R. Co.* v. *Gill*, 156 U. S. 649. See also *Atlantic Coast Line R. R. Co.* v. *N. C. Corp. Com.*, 260 U. S. 1; *Cov. & Lex. Turnpike Co.* v. *Sanford*, 164 U. S. 596; *A. & V. R. R. Co.* v. *Railroad Com. of Miss.*, 203 U. S. 496; *Railroad Co.* v. *Well & Neville*, 96 Texas, 408.

In the present case, even if one dollar per car be below the cost of the particular service, the railroads cannot complain, since the whole charge for the whole service is admittedly profitable.

It is not shown that the commission's allowed charge of one dollar per car is less than cost of terminal service. The commission's order applies only to whole transaction from point of origin and as so considered the charge is not below cost.

Every intendment of law and fact should avail to support the order of the commission.

When questions of fact are submitted to executive or administrative officers of the Government their conclusions are final. When questions so submitted involve both fact and law the conclusion will not ordinarily be disturbed by the courts. Even when a question of law only is submitted to other departments the courts will make every presumption in favor of the interpretation reached. *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Marquez* v. *Frisbie*, 101 U. S. 473.

Mr. William D. McHugh and *Mr. Walker D. Hines* for appellee:

The railroad companies have divided their said rates and

have made a distinct charge for transportation from the points of shipment to Chicago, and a separate terminal charge for delivery to the stock yards, a point beyond the lines of the respective carriers.

The separate terminal charge of two dollars per car made by the railroad companies for the delivery by them of live stock to the stock yards, a point beyond the lines of their respective railroads, is not excessive since it is less than the actual cost to the railroads for the performance of such service.

Each appellee had the right to divide the charge for transportation so as to have one rate from point of shipment to a point on its tracks in Chicago, and a separate charge thence to the stock yards. *Walker* v. *Keenan*, 73 Fed. Rep. 755; *S. C.*, 7 I. C. C. Rep. 548; § 6 of the Act to Regulate Commerce; *Interstate Comm. Comm.* v. *C., B. & Q. R. R. Co.*, 186 U. S. 320, 335.

The commission's order is contrary to the Constitution. Amendment V, and see as to right of carrier to compensation for additional service, *So. Ry. Co.* v. *St. Louis Hay Co.*, 214 U. S. 297, 301.

There is no authority for, nor do cases cited by appellant sustain proposition that in order to set aside a rate prescribed by the commission, the carrier must show confiscation as to all its business.

The commission's order was made under clear error of law.

The courts have power to set aside any order of the commission not conforming to the statute. As to the power conferred on the commission by the statute, see Vol. 2, Hearings Before Senate Interstate Commerce Committee, pp. 1662–1674. The power of the court to review on mixed questions of law and fact, or of law alone, may be exercised without regard as to whether a constitutional right has been violated.

Judicial intervention is expressly contemplated by the act itself and in this case is especially appropriate because the regulation is of vested rights and not of matters wholly under power of Government. The right of owners of railroads to

adequate protection exists independently of consent of the Government.

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

The controversy as to this terminal charge has been of long duration. A history of it antecedent to the present litigation is to be found in *Interstate Commerce Commission* v. *C., B. & Q. R. R. Company,* 186 U. S. 320.

It is well to understand the precise question which is presented in this case. That question is the validity of the terminal charge of two dollars per car. The report of the commission opens with this statement: "The subject of this complaint is the so-called terminal charge of $2 per car imposed by the defendants for the delivery of carloads of live stock at the Union Stock Yards in Chicago," and its order was in terms that the railroad companies be—

"required to cease and desist on or before the 1st day of February, 1908, from exacting for the delivery of live stock at the Union Stock Yards, in Chicago, Ill., with respect to shipments of live stock transported by them from points outside of that State, their present terminal charge of $2 per car.

"It is further ordered that said defendants be, and they are hereby notified and required to establish and put in force on or before the 1st day of February, 1908, and apply thereafter during a period of not less than two years, for the delivery of live stock at the Union Stock Yards, in said Chicago, with respect to shipments of live stock transported by them from points outside the State of Illinois, a terminal charge which shall not exceed $1 per car, if any terminal charge is maintained by them."

The sixth section of the act known as the "Hepburn Act," (an act to amend the Interstate Commerce Act, passed on June 29, 1906, c. 3591, 34 Stat. 584), requires carriers to file with the commission and print and keep open to inspection

schedules showing, among other things, "separately all terminal charges . . . and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates." By § 15 the commission is authorized and required, upon a complaint, to inquire and determine what would be a just and reasonable rate or rates, charge or charges. This, of course, includes all charges, and the carrier is entitled to have a finding that any particular charge is unreasonable and unjust before it is required to change such charge. For services that it may render or procure to be rendered off its own line, or outside the mere matter of transportation over its line, it may charge and receive compensation. *Southern Railway Co.* v. *St. Louis Hay Co.*, 214 U. S. 297. If the terminal charge be in and of itself just and reasonable it cannot be condemned or the carrier required to change it on the ground that it, taken with prior charges of transportation over the lines of the carrier or of connecting carriers, makes the total charge to the shipper unreasonable. That which must be corrected and condemned is not the just and reasonable terminal charge, but those prior charges which must of themselves be unreasonable in order to make the aggregate of the charge from the point of shipment to that of delivery unreasonable and unjust. In order to avail itself of the benefit of this rule the carrier must separately state its terminal or other special charge complained of, for if many matters are lumped in a single charge it is impossible for either shipper or commission to determine how much of the lump charge is for the terminal or special services. The carrier is under no obligations to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and commission that it is insisting upon it. In the case in 186 U. S. *supra*, we sustained the decree of the lower court, restraining the reduction of the terminal charge from $2 to $1 as to all stock shipped to Chicago, although the commission had stated that there had been a reduction of the through rate

from certain points by from $10 to $15, in reference to which reduction and its effect upon the order of the commission we said, speaking by Mr. Justice White, after quoting from the report of the commission (pp. 338, 339):

"In other words, it was held that the rate, which was unjust and unreasonable solely because of the $1 excess, continued to be unjust and unreasonable after this rate had been reduced by from ten to fifteen dollars. This was based, not upon a finding of fact—as of course it could not have been so based—but rested alone on the ruling by the commission that it could not consider the reduction in the through rate, but must confine its attention to the $2 terminal rate, since that alone was the subject-matter of the complaint. But, as we have previously shown, the commission, in considering the terminal rate, had expressly found that it was less than the cost of service, and was therefore intrinsically just and reasonable, and could only be treated as unjust and unreasonable by considering 'the circumstances of the case;' that is, the through rate and the fact that a terminal charge was included in it, which, when added to the $2 charge, caused the terminal charge as a whole to be unreasonable. Having therefore decided that the $2 terminal charge could only be held to be unjust and unreasonable by combining it with the charge embraced in the through rate, necessarily the through rate was entitled to be taken into consideration if the previous conclusions of the commission were well founded. It cannot be in reason said that the inherent reasonableness of the terminal rate, separately considered, is irrelevant because its reasonableness is to be determined by considering the through rate and the terminal charge contained in it, and yet when the reasonableness of the rate is demonstrated, by considering the through rate as reduced, it be then held that the through rate should not be considered. In other words, two absolutely conflicting propositions cannot at the same time be adopted. As the finding was that both the terminal charge of $2 and the through rate as reduced when separately considered were

just and reasonable, and as the further finding was that as a consequence of the reduction of from ten to fifteen dollars per car, the rates, considered together, were just and reasonable, it follows that there can be no possible view of the case by which the conclusion that the rates were unjust and unreasonable can be sustained."

The tariff schedules of the appellees make clear the separate terminal charge for delivery from their own lines to the Union Stock Yards. We quote the schedule of the Chicago and Northwestern Railroad Company:

"The live stock station and stock yards of this company in Chicago are located at Mayfair, and the rates named herein apply only to live stock intended for delivery at, or received and transported from the stock yards of the company at Mayfair, in Chicago.

"Upon all live stock consigned to or from the Union Stock Yards in Chicago, or industries located on the Union Stock Yards Railway or the Indiana State Line Railway, and transported and delivered to or received and transported from said Union Stock Yards or said industries located on said Union Stock Yards Railway, or the Indiana State Line Railway, aforesaid, a charge of two dollars ($2.00) per car will be made for the special and separate service of transporting such cars to said Union Stock Yards, or to said industries on said Union Stock Yards Railway, or the Indiana State Line Railway, from this company's own rails, or of transporting such cars from said Union Stock Yards, or said industries on said Union Stock Yards Railway, or the Indiana State Line Railway, to this company's own rails."

The others are equally specific. In some of them, as in those of the Atchison, Topeka and Santa Fe Railway Company, it is provided:

"The attention of the shipper must be and is called to the fact that the transportation charge on live stock delivered at our own yards at Corwith in Chicago will be two dollars ($2.00) per car less than when delivered at the Union Stock Yards

at Chicago, or at industries located on the Union Stock Yards Railway or the Indiana State Line Railway, and the agent should ascertain definitely at which point the shipper desires delivery to be made. The live stock contract must then be filled out so as to show the correct destination and rate as provided by the tariff and amendments."

Further, it is shown by the affidavits that the amount of such terminal charge is not entered upon the general freight charges of the companies, but is kept as a separate item. The Union Stock Yards Company is an independent corporation and the fact, if it be a fact, that most or even all of its stock is owned by the several railroad companies entering into Chicago does not make its lines or property part of the lines or property of the separate railroad companies.

With reference to the reasonableness of the terminal charge, it was stipulated on the hearing before the Interstate Commerce Commission that all the testimony taken in the former proceedings might be considered. It also appears that additional testimony was there offered. None of this testimony has been printed in the record presented to us. We have, however, our former decision as well as the report of the commission on the recent hearing, and also the affidavits filed on this application, and can consider them. It appears from the former case that, after some discussion, when testimony was being offered on the question of reasonableness, the commission suggested that it was probably unnecessary to offer further evidence, and said (186 U. S. 327):

"'To remove all doubt upon that subject, however, if it is not clearly found, we now find that, looking entirely to the cost of service, and including as a part of that cost the trackage charge paid the Union Stock Yards and Transit Company and the unloading charge paid that same company, the amount of this terminal, if, under the circumstances of this case, it is proper to impose the charge is reasonable. If any modification of the present findings is necessary, they are hereby modified to that extent.'"

And in the excerpt put into the margin in the opinion of this court is a statement of the actual and estimated expense to the different railroads for making such delivery, which makes it quite clear that the charge was a reasonable one. This finding as to the reasonableness of the charge was repeated again by the commission.

In its report in the present case it said:

"The original case did not show the cost of making delivery of other kinds of carload freight at this market, but the present record shows that the average cost to one defendant, the Atchison, Topeka and Santa Fe Railway Company, of delivering all kinds of carload freight, including live stock, is $5.40 per car, while the cost of delivering live stock is not far from $2 per car. The testimony further indicates that the average cost of delivering all kinds of carload freight does not differ much in the case of the Santa Fe from that in the case of the other defendants, although it does not appear that several of the defendants are at greater expense than $2 per car in making delivery of live stock at the stock yards. We think it fairly appears upon this record that the total cost to these defendants of delivering live stock at the Union Stock Yards, including the trackage charge, is not much, if any, above one-half the average cost of handling all carload freight in the city of Chicago."

Under those circumstances it seems impossible to avoid the conclusion that, considered of and by itself, the terminal charge of two dollars a car was reasonable. If any shipper is wronged by the aggregate charge from the place of shipment to the Union Stock Yards it would seem necessarily to follow that the wrong was done in the prior charges for transportation, and, as we have already stated, should be corrected by proper proceedings against the companies guilty of that wrong, otherwise injustice will be done. If this charge, reasonable in itself, be reduced the Union Stock Yards Company will suffer loss while the real wrongdoers will escape. It may be that it is more convenient for the commission to strike at the terminal

charge, but the convenience of commission or court is not the measure of justice.

We are unable to find any error in the conclusions of the trial judges, and their order is, therefore,

Affirmed.

HANOVER NATIONAL BANK OF NEW YORK *v.* SUDDATH, RECEIVER OF AMERICAN NATIONAL BANK OF ABILENE.

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

No. 12. Argued April 20, 1909.—Decided November 29, 1909.

When a bank refuses to do the particular thing requested with securities delivered to it for that purpose only, it is its duty to return the securities and no general lien in its favor attaches to them.

The fact that a bank has in its possession securities which were sent to it for a particular purpose and which it is its duty to return to the sender, does not justify its retaining them for any other purpose under a banker's agreement giving it a general lien on all securities deposited by the sender.

A banker's agreement giving a general lien on securities deposited by its correspondent will not be construed so as to give it a broad meaning beyond its evident scope and in conflict with the precepts of duty, good faith and confidence necessary for commercial transactions; nor will a printed form prepared by the banker be so extended by the construction of any ambiguous language.

In this case it was held that the retention by a bank of securities for a purpose different from that for which they were sent by its correspondent could not be predicated on the consent of the latter, and that inaction of the correspondent could not be construed as consent.

149 Fed. Rep. 127, affirmed.

THE facts are stated in the opinion.

Mr. Percy S. Dudley for plaintiff in error:

Plaintiff in error had the right to retain the notes under the express terms of the collateral agreement. *Auten* v. *Bank*, 174 U. S. 125, 145; *Hiscock* v. *Varick Bank*, 206 U. S. 28, and cases cited. As to scope of words "or otherwise" see *Farr* v. *Nichols*, 132 N. Y. 327. As bailee of the notes the Hanover Bank had a lien on them. Benjamin on Sales, § 2, Am. note. As to construction of the agreement, see *Gillet* v. *Bank*, 160 N. Y. 549; *Sattler* v. *Hallock*, 160 N. Y. 291, 297; *Church* v. *Hubbart*, 2 Cranch, 233; *Hutchinson* v. *Manhattan Co.*, 150 N. Y. 250; 21 Am. & Eng. Ency. Law, 2d ed., 1016. Plaintiff in error had the right to retain the notes by virtue of its bankers' lien. 1 Daniel's Neg. Inst., 5th ed., 342; 1 Morse on Banks, 4th ed., § 324; *Reynes* v. *Dumont*, 130 U. S. 354, 390; *Biebinger* v. *Continental Bank*, 99 U. S. 143; *Bank of Montreal* v. *White*, 154 U. S. 660; *Petrie* v. *Myers*, 54 How. Pr. 513, distinguished, and see *Armstrong* v. *Chemical Bank*, 41 Fed. Rep. 234; *Continental Bank* v. *Weems*, 60 Texas, 489.

The receiver of the Abilene Bank took the assets subject to the claim of the Hanover Bank and obligation existing when he took possession. *Scott* v. *Armstrong*, 146 U. S. 499; *Rankin* v. *City Nat. Bank*, 208 U. S. 541.

The Hanover Bank had the consent of the Abilene Bank to retain the notes. Mailing the letters was a delivery and had the Abilene Bank mailed cash it would have been subject to lien of Hanover Bank although not delivered until after the failure; it is so also as to these notes. *McDonald* v. *Chemical Nat. Bank*, 174 U. S. 610; *Ruggles* v. *Am. Cent. Ins. Co.*, 114 N. Y. 415.

Mr. Edward B. Whitney, with whom *Mr. Francis F. Oldham* was on the brief, for defendant in error:

The Hanover Bank had no general lien on the notes involved. *Brandao* v. *Barnett*, 12 Cl. & Fin. 787; Story on Agency, § 381; 1 Morse on Banks, 4th ed., 597; *Bank of Met.*

v. *N. E. Bank*, 1 How. 234, 239; *Leese* v. *Martin*, L. R. 17 Eq. 224, 235; *Reynes* v. *Dumont*, 130 U. S. 354. These and other cases all hold that where securities are sent for a specific purpose the recipient cannot hold them for any other purpose but must return them. 1 Jones on Liens, 2d ed., 244; *Lucas* v. *Dorrien*, 7 Taunt. 278; *Petrie* v. *Myers*, 54 How. Pr. 513; *Bank of Montreal* v. *White*, 154 U. S. 660. The bank becomes a trustee to apply the securities as directed by the sender. *Libby* v. *Hopkins*, 104 U. S. 309.

The Hanover Bank had no lien on the notes under the agreement and there was no other agreement or consent under which that bank could hold them. There was no proposal or acceptance as to the collateral loan and payment of overdraft. 9 Cyc. 293; *Meyrell* v. *Surtees*, 25 L. J. Ch. 257, 262; *Scott* v. *Armstrong*, 146 U. S. 511.

Mr. Justice White delivered the opinion of the court.

The predecessor of the present receiver of the American National Bank of Abilene, Texas, sued, in April, 1905, to recover from the Hanover National Bank of New York four promissory notes or their value.

We shall refer to the corporations as the Abilene Bank and the Hanover Bank.

At the trial, under instruction, there was verdict for the Hanover Bank, and the judgment thereon was reversed. *Van Zandt* v. *Hanover Nat. Bank*, 149 Fed. Rep. 127. In conformity to the opinion of the Circuit Court of Appeals, on the new trial a verdict was directed in favor of the receiver, and to reverse the affirmance of that judgment (*Hanover Nat. Bank* v. *Suddath*, 153 Fed. Rep. 1021) this writ of error is prosecuted.

The facts are these: Prior to November, 1903, the Abilene Bank was a correspondent of the Hanover Bank, and had an account with the latter. The credit of this account was principally made up by the proceeds arising from the rediscount-

ing by the Hanover Bank of commercial paper for account of the Abilene Bank. On November 27, 1903, the Abilene Bank signed an agreement concerning the right of the Hanover Bank, under conditions stated, to attribute to the payment of debts due it by the Abilene Bank securities in its hands belonging to the Abilene Bank. In January, 1905, the Hanover Bank was contingently responsible for commercial paper, aggregating probably sixteen or seventeen thousand dollars, which it had rediscounted for the Abilene Bank, and upon which the latter bank was ultimately liable.

On January 9, 1905, the Abilene Bank transmitted by mail to the Hanover Bank a note of the Hayden Grocery Company for $2,000, drawn to the order of the Abilene Bank and by it indorsed, the letter stating that the note was sent for discount and credit. On the next day—the tenth—the Abilene Bank also transmitted by mail a note drawn by R. H. Logan and W. R. Logan to its order, and by it indorsed likewise, with a statement that it was sent for discount and credit. On the twelfth of the same month the Abilene Bank again transmitted to the Hanover Bank for discount and credit two other notes, one drawn by L. W. Hollis for $3,500, and indorsed, as were the previous notes and a note of C. B. and W. F. Scarborough, for $1,500 likewise so indorsed, the letter of transmittal yet again stating that they were sent for discount and credit.

The Hayden Grocery Company and the Logan notes, forwarded on the ninth and tenth of January, reached the Hanover Bank on the fourteenth; and on that day it telegraphed to the Abilene Bank, declining to discount the notes, and by a second telegram said: "Referring to previous dispatch transfer or ship currency," which, according to the counsel for the Hanover Bank, meant to call upon the Abilene Bank either to transfer a credit from some other bank or ship currency direct. It is not shown that any reply, either by telegram or letter, was made to the messages thus sent on the fourteenth. The notes forwarded on the twelfth reached the Hanover Bank on the sixteenth, and the latter at once tele-

graphed, "Not satisfactory," and confirmed the telegram by a letter, saying: "We are not discounting inclosures for you, but hold same as collateral to your indebtedness to us." The Abilene Bank did not reply by telegram but on the same day wrote to the Hanover Bank as follows:

"We have just received your wire. The rediscounts we sent you were mostly renewals and in every instance 'good as gold.'

"Since the drop in cotton, collections are at a standstill, and our clients expect us to stay with them, and we are obliged to ask the same indulgence from our correspondents.

"Should you prefer, we will send our B/P with collaterals attached.

"We trust you will accord us the leniency asked for."

On the morning of January 17, 1905, there stood on the books of the Hanover Bank to the credit of the Abilene Bank the sum of $616.15. On that day a check on the Hanover Bank, dated January 11, 1905, drawn by the Abilene Bank for the sum of $3,825.45, payable to the New York Life Insurance Company, as also some small checks, passed through the clearing house. Upon attention being directed to the overdraft which thereby resulted a telegram was sent to the Abilene Bank, referring to the previous letters and telegrams, and asking that bank what it had done. No reply having been received before the close of business on that day, the vice-president of the Hanover Bank, after examining the written agreement to which we have previously alluded, allowed the overdraft to stand, and to cover the same made an entry of a loan of $3,500 to the Abilene Bank, which was placed to the credit of that bank, and after absorbing the overdraft, left to its credit the sum of $63.74. On the same day the Hanover Bank wrote to the Abilene Bank, saying: "As your account showed overdrawn to-day over $3,000, have made you a temporary loan of $3,500 against collateral in our hands." On the next day (January 18) the Abilene Bank closed its doors.

It is to be observed that of the letters, the one by the Hanover Bank, written on the seventeenth of January, and the one written on the previous day by the Abilene Bank, did not reach their destination until after the failure of the Abilene Bank.

Thereafter Richard L. Van Zandt was appointed receiver, and, as we have said, commenced this action to recover the possession of the four notes which had been transmitted to the Hanover Bank as above stated, or the value of such notes, and in the course of the action the proceedings took place to which we have at the outset referred. The ground relied upon for recovery was that as the notes had been sent to the Hanover Bank for discount for the account of the Abilene Bank, upon the Hanover Bank refusing to discount them that bank had no claim whatever upon the notes, and had no right to apply them as collateral to the payment of the voluntary overdraft which had been allowed on the seventeenth of January, and thus obtain a preference to the extent of the appropriation over the general creditors of the Abilene Bank. It suffices to say that the defense of the Hanover Bank controverted this contention, and asserted that the appropriation of the notes was justified under its general bankers' lien or under the terms of the special agreement of November 27, 1903. During the pendency of the action the Hanover Bank collected three of the notes, deducted from their proceeds the sum of $3,725.86 then due, and paid to the receiver the balance and also delivered to him the uncollected note, being the note of R. H. Logan and W. R. Logan, which had been transmitted to the Hanover Bank on January 10 and was by it received on the fourteenth.

It is contended that the appellate court erred in affirming the ruling of the Circuit Court, directing a verdict for the receiver. The grounds for this contention are that the evidence showed that the Hanover Bank had the right to retain the four notes or the balance of their proceeds, by virtue of its general bankers' lien; and, if not, as a result of the express

provisions of the agreement of November 27, 1903; and, in any event, by the authority or consent of the Abilene Bank. Without stopping to consider whether the third contention is not really involved in the first two, we pass to their consideration in the order mentioned.

1. *Was there a right of retention in the New York bank by virtue of its general bankers' lien?*

The rulings of this court foreclose this question, since they conclusively establish that a general lien in favor of a bank cannot attach to securities which are delivered to it in order that it may do a particular thing with them, and that when it refuses to do that thing the duty to return exists. The general subject was elaborately considered and the authorities were fully reviewed in *Reynes* v. *Dumont*, 130 U. S. 354. In that case securities had been sent to bankers for a specific purpose. That purpose having been accomplished, the securities were permitted to remain in the custody of the bankers as depositaries, because they were in a good market and a place convenient for procuring loans, and because the expressage upon their return would have been great. The right to a general bankers' lien upon the securities was denied. Such a lien, it was said (on p. 390), would arise "in favor of a bank or banker out of contract expressed, or implied from the usage of the business, in the absence of anything to show a contrary intention." Ordinarily, it was declared (p. 391) the lien would attach in favor of a bank upon securities and moneys of the customer deposited in the usual course of business, etc. It was, however, expressly declared not to "arise upon securities accidentally in the possession of the bank, or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances, or where there is a particular mode of dealing, inconsistent with such general lien." *Biebinger* v. *Continental Bank*, 99 U. S. 143, was one of the authorities cited in the opinion. In that case it appeared a deed had been deposited with the bank as collateral security for the customer's current indebtedness

and discounts. After payment of this indebtedness and a temporary suspension of dealings, the customer incurred new indebtedness to the bank, but as it did not appear that the money was loaned or debt created on the faith of the deposit of the deed, the bank's claim of a lien thereon was denied. *Bank of Montreal* v. *White*, 154 U. S. 660, is also a pertinent decision. Without elaborating the issues which were there involved, it suffices to say that in an action to recover upon a promissory note, in order to escape the contention that it was not an innocent holder the bank contended that before the note was sent to it for discount the sender was under a promise to furnish security for advances to be made, and therefore the rights of the bank as an innocent holder were to be determined by the state of its knowledge at the time the note was received, although the discount was declined, and not by the state of knowledge existing when at a subsequent date the note was actually discounted. In disposing of a contention that the trial court had committed error in not giving an instruction which the bank asked in accord with its contention as just stated, the court said:

"There can be no pretense in this case that the note in suit was ever actually delivered to the bank as collateral security for past or future indebtedness. In the letter transmitting it, the bank manager was asked to discount it and place the proceeds to the credit of the manufacturing company. In that event, the 'overdraft kindly allowed on Friday,' was to be charged against the credit, but it is nowhere, even in the remotest degree, intimated that if the discount was declined the note might be kept as collateral. The charge asked and refused was, therefore, wholly immaterial, and the judgment cannot be reversed because it was not given."

2. *Was the Hanover Bank entitled to retain the notes under the terms of the agreement of November* 27, 1903?

The material portions of the agreement are as follows:

"For and in consideration of one dollar [&c.], the undersigned agree with said bank that all bills of exchange, notes,

checks, and the proceeds thereof, and all other securities, money and property of every kind owned by the undersigned, or either or any of them, or in which they, or any or either of them, have any interest deposited with said bank, or which may hereafter be deposited with said bank, or which may be in any wise in said bank, or under its control, as collateral security for loans or advances already made or hereafter to be made to or for account of the undersigned, by said bank, or otherwise, may be held, collected and retained by said bank until all liabilities, present or future, of the undersigned, or any or either of them, due or not due of every kind to said bank, now or hereafter contracted, shall be paid and fully satisfied."

For the Hanover Bank it is contended that although the notes were not in its possession as collateral security for any debt due it, nevertheless, as it had the physical possession of the notes and they were not unlawfully in its hands, it had under the agreement the power to make the advance to cover the overdraft and to attribute, without the consent of the Abilene Bank, the notes in question as collateral security for the loan which was made. The construction upon which this proposition is rested gives to the agreement the most latitudinarian meaning, and besides, in effect, depends upon considering one or more clauses separately from their context, thereby affixing to them a significance to which they would not be entitled if considered in connection with the text in which they are found. To illustrate: It is said the words which give the power to the Hanover Bank to appropriate any securities "deposited with said bank, or which may hereafter be deposited with said bank, or which may be in any wise in said bank, or under its control," are broad enough to embrace securities in the hands of the Hanover Bank, without considering how they came into the possession of that bank or without taking into account whether that bank had any claim whatever aside from the agreement in question, and without considering whether it was under the plain duty to

return the securities upon demand, and had no right to require the performance of any act or duty by the Abilene Bank in respect thereto. But this broad interpretation is, we think, unreasonable, since it cannot be assumed, if there be room for implication to the contrary, that the agreement was intended to confer the right upon the Hanover Bank to appropriate securities merely because such securities had come into its physical control and with the obligation to return on demand. We say this, because it is manifest that to attribute the broad meaning claimed would be in conflict with the precepts of duty and good faith, and would be destructive of that confidence and fair dealing so essentially necessary in commercial transactions. In the light of these considerations we think the language relied upon should not receive the all-embracing meaning sought to be attributed to it, but should be limited so as to cause the same to embrace only property deposited with the Hanover Bank, "or which may hereafter be deposited with said bank, or which may be in any wise in said bank, or under its control," under circumstances and conditions which gave to that bank by operation of law or otherwise some right to retain such property for a particular purpose. And irrespective of the meaning which we attribute to the language relied upon, when independently considered, we are of opinion that the want of merit in the construction given to the agreement by the Hanover Bank is clearly demonstrated when the context is brought into view. That is to say, we consider that the provision of the agreement to which we have just referred is qualified by the language which follows it, viz., "as collateral security for loans or advances already made or hereafter to be made to or for account of the undersigned, by said bank, or otherwise." In other words, the provision just quoted, we think, must be considered as limitative in its character and as controlling, therefore, the previous stipulations, thus confining the right to apply securities in the possession of the Hanover Bank to such as had come into its possession or control for the purposes de-

scribed. The contention that the words "or otherwise" deprive the provision in question of its limitative effect is, we think, clearly without merit, since that view cannot be upheld without causing the words in question to dominate and destroy the meaning of the agreement as derived from a consideration of all its provisions. Particularly is this the case, as those words are susceptible of a meaning in harmony with the context; that is to say, may be held to give the right to retain securities under the circumstances stated, even although the loan may not have been made directly to the Abilene Bank, as, for instance, where the securities belonging to the Abilene Bank came into the possession of the Hanover Bank as the result of a rediscounting of paper of the Abilene Bank. Conclusive as we think are the reasons just stated, they are additionally fortified by the considerations which the lower court so cogently pointed out in the opinion by it announced, that is, that the contract was one prepared by the Hanover Bank and embodied in a printed form in general use by that bank, and therefore should have expressed its purpose beyond doubt and not ambiguously if the language in question was intended to convey the far-reaching meaning now sought to be attributed to it.

3. *Was there otherwise a right of retention by the authority or consent of the Abilene Bank?*

By its answer, the Hanover Bank based its claim of right to retain the notes in question solely upon its general bankers' lien and the written collateral agreement. The letters to the Abilene Bank, coupled with the statement of its vice-president, make plain the fact that the sole reliance of the Hanover Bank in asserting a claim upon the notes was, in reality, the written agreement. Thus, by its communication of January 12, 1905, confirming the telegram advising that the Logan and Hayden notes would not be discounted, the Hanover informed the Abilene that it held the notes as collateral for the indebtedness of the Abilene. Again, on the seventeenth of the same month, following the allowance of the overdraft,

the New York bank wrote: "As your account showed overdrawn to-day over $3,000 we have made you a temporary loan of $3,500 against collateral in our hands." And the belief of the vice-president, that the Hanover Bank was entitled to hold the four notes as collateral which led to the allowance of the overdraft, is clearly shown by the record to have been induced by the terms of the collateral agreement, which he at the time inspected. It may well be that the check of January 11, 1905, for $3,825.45 was issued in the expectation that it would be paid from the proceeds of the Logan note of $2,000 and the Hayden note of $3,000, forwarded for discount on January 9 and 10. But these and the subsequent notes were not sent to be held as collateral security, but to be discounted. The Abilene Bank had been notified by telegram not only that the Logan and Hayden notes would not be discounted, but that it should either transfer credits from other banks or ship currency. The information plainly conveyed by this notification was that checks drawn upon the faith of the discount of the notes referred to must be protected with funds to be furnished. In reason, the Hanover Bank was not entitled to act upon the assumption that the inaction of the Abilene Bank was equivalent to a request to pay the drafts as presented and to hold as collateral the notes which had been sent for discount. The Hanover Bank should, on the contrary, in view of the action of the Abilene Bank, have assumed the possibility that funds could not be supplied, and that the Abilene Bank might therefore be unable to meet its paper and be compelled to cease business. It is apparent that the Hanover Bank in allowing the overdraft did not act upon the assumption that the possession merely of the notes justified its reliance upon them as a security for the advance. We say this because the record leaves no doubt that the device of a temporary loan in order to secure the payment of the overdraft was resorted to upon the faith of rights supposed to inhere in the written agreement. There is no basis, therefore, for the contention that from the circumstances of the

overdraft and the possession of the notes a right of retention existed created by authority or consent of the Abilene Bank.

Affirmed.

HANOVER NATIONAL BANK OF NEW YORK, APPELLANT, *v.* SUDDATH, AS RECEIVER OF AMERICAN NATIONAL BANK OF ABILENE (NO. 2).

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

No. 13. Argued April 20, 1909.—Decided November 29, 1909.

Where a bank, after refusing to discount paper sent to it by the insolvent for that purpose, has retained the paper, it cannot, as against general creditors, set off against that paper, or its proceeds, the bankrupt's overdraft although made after such refusal and pending the retention of the paper.

153 Fed. Rep. 1022, affirmed.

THE facts are stated in the opinion.

Mr. Percy S. Dudley for appellant:

The Hanover Bank was entitled in equity to set off the advance made against the notes which it held. *Scott* v. *Armstrong*, 146 U. S. 499; *Carr* v. *Hamilton*, 129 U. S. 252; *Scammon* v. *Kimball*, 92 U. S. 362; Bispham's Equity, 7th ed., 1905, § 327; 2 Bolles' Modern Law of Banking, 742; *Rolling Mill* v. *Ore & Steel Co.*, 152 U. S. 596, 615; *Schuler* v. *Israel*, 120 U. S. 506; *Armstrong* v. *Chemical Bank*, 41 Fed. Rep. 234; *Bank* v. *Massey*, 192 U. S. 138. In New York the set-off would have been allowed under the Code. *Fera* v. *Wickham*, 135 N. Y. 223; *DeCamp* v. *Thompson*, 159 N. Y. 444; *Empire Feed Co.* v. *Chatham Bank*, 30 App. Div. 476; *Thompson* v. *Kessel*, 30 N. Y. 383; *G. & H. Co.* v. *Hall*, 61 N. Y. 226, 236; *Brown* v. *Buckingham*, 21 How. Pr. 190.

Mr. Edward B. Whitney, with whom *Mr. Francis F. Oldham* was on the brief, for appellee:

There is no question of set-off, legal or equitable, in the case, nor is there any equity in the bill. The receiver's case was really one in replevin. N. Y. Code of Civ. Pro., §§ 1718, 1726, 1730, and see also § 501; 2 Abbot's Form of Pleading, 869; *Moffatt* v. *Van Doren*, 4 Bosw. 609; 1 Nichols N. Y. Prac. 972, and cases cited; *Dinan* v. *Coneys*, 143 N. Y. 544.

MR. JUSTICE WHITE delivered the opinion of the court.

This is an outgrowth of a litigation between the same parties, which we have just decided in case No. 12, and we shall therefore refer to the banks as we did in No. 12, the one as the Abilene Bank and the other as the Hanover Bank. On October 11, 1906, in reversing the judgment entered in that action on the first trial in favor of the Hanover Bank, the Circuit Court of Appeals observed (149 Fed. Rep. 127, 130):

"The contention for the defendant in error that it was entitled to set off or counterclaim the indebtedness owing to it by the Abilene Bank when the latter became insolvent, is wholly untenable. Such a defense is not available in an action at law for conversion, and, if the defendant had any right of equitable set-off, this should have been asserted by a bill in equity."

On November 20, 1906, as we have seen, at the second trial of the action at law the court directed the jury to find a verdict in favor of the Abilene Bank. A few days afterwards the bill in this cause was filed on behalf of the Hanover Bank, the receiver of the Abilene Bank being the defendant, the suit, it is intimated, having been commenced because of the statement made by the Circuit Court of Appeals in the passage from its opinion above quoted. The course of dealing between the two banks, the execution of the written agreement, the forwarding of the four notes for discount, the refusal to discount, the overdrawing by the Abilene Bank of its account

with the Hanover Bank, the allowance of the overdraft and the temporary loan of $3,500, the collection of three of the notes and retention of a sufficient sum to cancel the indebtedness created by the overdraft and the surrender of the balance to the receiver, together with the uncollected note, were alleged in the bill substantially as we have stated them in the opinion in No. 12. The commencement and prosecution of the action at law was next averred and the various steps in that litigation were detailed, culminating in an averment of the rendering upon the second trial of the action at law of a verdict in favor of the Abilene Bank for $3,725.86. It was charged that the receiver was threatening to enter judgment upon the verdict. Averring a right in equity to offset the indebtedness due to it by the Abilene Bank on January 18, 1905, against the demand of that bank or its receiver for the four notes or their proceeds, the Hanover Bank prayed that its set-off might be allowed against the receiver, and that he be enjoined from further prosecuting the action at law. A demurrer to the bill was sustained and a dismissal was entered. The decree was affirmed by the Circuit Court of Appeals (153 Fed. Rep. 1022), and the cause was then brought here.

The decision just announced in case No. 12 establishes the want of equity in the bill. The mere possession of the notes by the Hanover Bank after its refusal to discount them did not justify that bank in relying upon the notes as collateral security for the indebtedness which arose from the voluntary payment of the draft drawn by the Abilene Bank upon the Hanover Bank, when there were no funds in the latter bank to meet the draft. The notes forwarded January 9 and 10 were sent to be discounted, and the draft drawn on January 11, which created the overdraft, was presumably drawn upon the faith that those notes would be discounted, and that the draft would be paid out of the proceeds. As matter of fact, however, the Hanover Bank recouped itself out of the proceeds of but one of the notes, together with the proceeds of notes

subsequently forwarded to it. In view of the fact that the Hanover Bank not only notified the Abilene Bank that the notes would not be discounted, but also by telegram in effect demanded that the Abilene Bank should forward funds to meet its drafts, the assumption cannot be rightfully indulged that the Hanover Bank allowed the overdraft in the belief that the silence of the Abilene Bank signified that it expected the draft to be paid, and that to enable the payment the Hanover Bank might use the notes sent for discount as it saw fit. It is not contended that there was an express agreement between the parties that the draft which created the overdraft should be paid, and that the funds should be realized in the mode pursued by the Hanover Bank. Considering the transaction either from the standpoint of the forwarding of the notes for discount and the making of the draft, or from the standpoint of the sending of the notes for discount, and the failure of the Abilene Bank to forward funds or to promptly make known to the Hanover Bank its wishes in the matter, we are of the opinion that the circumstances of the transaction were not such as to raise the presumption of agreement for a set-off available as against the general creditors. *Scott* v. *Armstrong*. 146 U. S. 499.

Affirmed.

KENNEY *v.* CRAVEN.[1]

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 31. Argued November 12, 1909.—Decided November 29, 1909.

The determination by a state court that a purchaser *pendente lite* from the trustee of a bankrupt is bound by the decree against the trustee in the action of which he has notice gives effect to such decree under

[1] Docket title originally Corbett *v.* Craven. Death of plaintiff in error suggested, and Kenney and McVey, special administrators, substituted November 11, 1909.

the principles of general law; and if, as in this case, it does not involve passing on the nature and character of the rights of the parties arising from the transaction of purchase and sale, no Federal question is involved.

Writ of error to review 196 Massachusetts, 319, dismissed.

JAMES CONNOR, a manufacturer of woolen cloth, operating two mills located in Holyoke, Massachusetts, sold to Michael Craven machinery contained in the mills and evidenced the same by three bills of sale executed respectively on October 12, 1883, April 6, 1885, and March 10, 1891. On June 18, 1901, Connor was adjudicated a bankrupt, and in August following Nathan B. Avery was appointed trustee. In the same month Avery, as trustee, commenced a suit in equity in a state court of Massachusetts, and therein assailed the validity of the bills of sale to Craven, above referred to, and prayed that they might be set aside and the property decreed to belong to the estate of the bankrupt. While that suit was pending and on September 18, 1901, Avery, trustee, sold to William J. Corbett, as part of the bankrupt estate, certain of the machinery situated in the mills already referred to. In 1905 Corbett brought this action against Craven to recover from him the value of the machinery so as aforesaid transferred to him by Avery, trustee, alleging that Craven had taken possession of and converted the property sued for to his own use. During the pendency of the action the equity cause was decided, and, after the entry of the decree therein, an amended answer was filed in this action. Therein, in addition to a general denial, the decree in the equity suit in favor of Craven was specially pleaded in bar, and it was averred that the title and right of possession of the property in controversy in this action was in issue in said equity cause and had been adjudicated by the decree to be in Craven. An auditor was appointed "to hear the parties, to examine their vouchers and evidence, to state the accounts, and make report thereof to the court." After the taking of evidence had been concluded the auditor filed a lengthy report, in which were embodied numerous findings of

fact. On the ultimate issues the auditor found for the plaintiff. As regards the decree in the equity cause pleaded in bar, it was found that the title to the property alleged in this action to have been converted by the defendant Craven had not been the subject of litigation in the equity cause, and that the decree in that cause was not a bar to a recovery by the plaintiff. The case was then by the court committed to a jury, who found for the plaintiff, and assessed his damages at $4,696.01. The defendant, on exceptions, carried the cause to the Supreme Judicial Court of Massachusetts. There the exceptions were sustained, upon the sole ground that the decree in the suit in equity was a bar to the claim of plaintiff. *Corbett* v. *Craven*, 193 Massachusetts, 30. Subsequently in the trial court the plaintiff was allowed to amend his declaration by adding thereto the following paragraph:

"And the plaintiff says that said goods and chattels were the property of one James Connor, who was adjudicated a bankrupt by the District Court of the United States for the District of Massachusetts, June 18, 1901; that on August 3, 1901, Nathan P. Avery, of Holyoke, was duly appointed trustee in bankruptcy of the estate of said Connor; that on August 6, 1901, the said Avery duly filed bond and duly qualified as such trustee; that on September 18, 1901, the said plaintiff acquired title to said goods and chattels by purchase from said Avery as trustee aforesaid, the said Avery being duly authorized by said District Court to make sale of said goods and chattels; and that the plaintiff in this action, relying upon such title acquired as aforesaid from said Avery, specially sets up and claims that said title was acquired under an authority exercised under the United States within the meaning of section 709 of the Revised Statutes of the United States."

A similar averment was also embodied in a reply filed at the same time to that part of the answer of defendant which sets up "a former judgment as a bar." Certain other matters were also stated in the replication in avoidance of the effect of the adjudication in the equity cause, but they need not be par-

ticularly referred to, as no contention based upon them was pressed at bar or called to our attention in any form.

The action was again tried to a jury, who, by direction of the court, returned a verdict for the defendant. The cause was again heard on exceptions in the Supreme Judicial Court of Massachusetts, and, after consideration of the new matter contained in the replication to the answer, the exceptions were overruled. *Corbett* v. *Craven*, 196 Massachusetts, 319. The trial court thereupon entered judgment on the verdict, and this writ of error was prosecuted.

Mr. Christopher T. Callahan for plaintiff in error:

As to the jurisdiction: The decision of the state court that the trustee's authorized sale to plaintiff passed no title presents a Federal question. It is not as though the state court had merely the question on principles of general law. This court has jurisdiction. *Scott* v. *Kelley*, 22 How. 57; *Mays* v. *Fillon*, 20 Wall. 14; *McHenry* v. *La Société*, 95 U. S. 58; *Davis* v. *Friedlander*, 104 U. S. 570, 575; *McKenna* v. *Simpson*, 129 U. S. 506; *Cramer* v. *Wilson*, 195 U. S. 408. The state court's rejection of the trustee's title rested not on conditions existing at time he acquired it but on a subsequent official act. For other cases in which this court has taken jurisdiction in cases involving title of persons holding under Federal authority, see *Clements* v. *Berry*, 11 How. 398, 408; *Buck* v. *Colbath*, 3 Wall. 334, 340; *Sharp* v. *Doyle*, 102 U. S. 686; *New Orleans R. R.* v. *Delamore*, 114 U. S. 501, 506; *Williams* v. *Heard*, 140 U. S. 529, 535; *Stanley* v. *Schwalby*, 147 U. S. 508, 519; *Hussman* v. *Durham*, 165 U. S. 144; *Aldrich* v. *Aetna*, 8 Wall. 491; *Dupassier* v. *Rochereau*, 21 Wall. 130; *O'Brien* v. *Weld*, 92 U. S. 81; *Baldwin* v. *Stark*, 107 U. S. 463; *Pittsburg &c. R. R.* v. *Long Island Co.*, 172 U. S. 493; *Publishing Co.* v. *Beckwith*, 188 U. S. 567; *Yates* v. *Jones National Bank*, 206 U. S. 155, 167.

A Federal question is presented by the contention that due effect is denied to a decree of the Federal court in sustaining

a plea of *res judicata*. *National Foundry* v. *Oconto Water Co.*, 183 U. S. 216, distinguishing *Avery* v. *Popper*, 179 U. S. 305.

Mr. Charles G. Gardner for defendant in error:

As to the jurisdiction: A Federal question is not presented merely because the plaintiff claims title from one who derives his authority to sell from a Federal statute. *Blackburn* v. *Portland Mining Co.*, 175 U. S. 571, 579; *Continental Bank* v. *Buford*, 191 U. S. 119, 125.

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

The assertion that this court has jurisdiction is based upon the contention of the plaintiff in error that he specially set up in his replication filed below a title acquired under an authority exercised under the United States, that is, a purchase of property from a trustee in bankruptcy under the sanction of the bankruptcy court, and that such title was denied by the decision of the state court. We are not called upon to consider these propositions from a purely abstract point of view, since, of course, we are only required to determine their import in so far as they are involved in the decision of the question arising on the record. Confining our contemplation to that subject it, we think, becomes clear that the contentions are wholly irrelevant to the question of jurisdiction concerning which they are advanced and relied on. We say this, because it is obvious on the face of the record that the court below rested its decision solely on the ground that the plaintiff, as a purchaser *pendente lite* from the trustee, was bound by the decree rendered against the trustee in the equity cause, and that, giving to that decree the effect which it was entitled to have as the thing adjudged, under general principles of law it operated to estop the trustee and the plaintiff, his privy, from asserting title to the property. As, therefore, the court below did not, as an original question, consider and pass upon

the nature and character of the rights of the parties arising from the transaction of purchase and sale, but its judgment was solely based upon the operation and effect of the prior judgment between the parties or their privies, it follows that the decision of the case was placed upon no Federal ground but involved solely the decision of a question of general law, that is, the effect and scope of the thing adjudged as arising from the prior judgment of the state court. *Chouteau* v. *Gibson*, 111 U. S. 200; *San Francisco* v. *Itsell*, 133 U. S. 65; *Covington* v. *First Nat. Bank*, 198 U. S. 100, 107. Indeed the fallacy underlying all the contentions urged in favor of our jurisdiction and the arguments of inconvenience by which those propositions are sought to be maintained, in their ultimate conception involve the assumption either that the correctness of the state decree, which was held to be *res judicata*, is open for consideration on this record, or assail the conclusively settled doctrine that the scope and effect of a state judgment is peculiarly a question of state law, and therefore a decision relating only to such subject involves no Federal question.

Dismissed for want of jurisdiction.

THE STEAMSHIP JEFFERSON.[1]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 243. Submitted May 17, 1909.—Decided November 29, 1909.

Where the District Court has allowed an appeal, but has not certified that the question of jurisdiction alone was involved, as required by § 5 of the act of March 3, 1891, c. 517, 26 Stat. 826, if it appears from the face of the record, irrespective of recitals in the order, that the

[1] Docket title, Simmons, late Master of the Tug Helen, and Others, *v.* The Steamship Jefferson, The Old Dominion Steamship Company, Claimant and Owner.

cause was dismissed for want of jurisdiction, the question of jurisdiction, if it is of such a character as to sustain the appeal, is sufficiently certified. *United States* v. *Larkin*, 208 U. S. 333.

Where the case is dismissed because the character of the action is one cognizable exclusively by a court of admiralty and the jurisdiction is challenged because the situation of the vessel and the character of the services rendered afforded no jurisdiction in admiralty, the jurisdiction of the court as a Federal court is involved and the case is one cognizable by this court under § 5 of the act of 1891.

Salvage service, over which a court of admiralty has jurisdiction, may arise from all perils which may encompass a vessel when on waters within the admiralty jurisdiction of the United States, and this includes services rendered to a vessel undergoing repairs in dry dock and in danger of being destroyed by fire which originated on land.

A vessel used for navigation and commerce does not cease to be a subject of admiralty jurisdiction because temporarily in a dry dock without water actually flowing around her.

158 Fed. Rep. 255, reversed.

THE facts, which involved the jurisdiction of the admiralty court of a case for salvage services rendered to a vessel in dry dock and in peril from a fire originating on land, are stated in the opinion.

Mr. R. T. Thorp, *Mr. Henry Bowden* and *Mr. D. Lawrence Groner* for appellants:

The jurisdictional question is properly certified. *Shields* v. *Coleman*, 157 U. S. 176; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217; *Chappell* v. *United States*, 160 U. S. 499; *Merritt* v. *Bowdoin College*, 167 U. S. 745; *Filhiol* v. *Forney*, 194 U. S. 356; *Petri* v. *Creelman*, 199 U. S. 487; *Excelsior Co.* v. *Pacific Bridge Co.*, 185 U. S. 282. The jurisdiction of the Federal court was denied as such. *Dudley* v. *Lake County*, 103 Fed. Rep. 209; *Sun Printing Co.* v. *Edwards*, 121 Fed. Rep. 826. A vessel is not removed from admiralty jurisdiction because at the time it is in dry dock, for such jurisdiction depends not on whether the vessel is actually afloat but on the purposes for which it is used. *The Old Natchez*, 9 Fed. Rep. 476. So also admiralty does not lose jurisdiction over a naviga-

ble river because at times the river becomes unnavigable. *Nelson* v. *Leland*, 22 How. 18. Although a dry dock itself may not be a subject of salvage service, *Cope* v. *Valette Dry Dock Co.*, 119 U. S. 625, as to repairs in dry dock, see *Perry* v. *Haines*, 191 U. S. 17; *Simpson's Dock* v. *Steamship Co.*, 108 Fed. Rep. 425; *The Sapho*, 44 Fed. Rep. 359; *Hoffner* v. *Crane*, 115 Fed. Rep. 404; *United States* v. *Coombs*, 12 Pet. 72. That the fire originated on land is immaterial; vessels afloat saved by being towed from a land fire are subject to salvage. *Kaiser Wilhelm der Grosse*, 106 Fed. Rep. 963; *The J. I. Brady*, 109 Fed. Rep. 912; *The Barge No. 127*, 113 Fed. Rep. 529; *The Old Natchez*, 9 Fed. Rep. 476; *The Lone Star*, 35 Fed. Rep. 793; *Grinby* v. *The Khio*, 46 Fed. Rep. 207; *The Oregon*, 27 Fed. Rep. 871; *Wilson* v. *Winchester*, 30 Fed. Rep. 204. Admiralty jurisdiction extends to a salvage suit for services rendered from land to a vessel burning at a wharf. *The Huntsville*, 12 Fed. Cas. No. 6,916; and see *The Ella*, 48 Fed. Rep. 569, as to salvage for digging out vessel which had been driven ashore.

Mr. Walter H. Taylor and *Mr. Harrington Putnam* for appellee:

This court is without jurisdiction. The appeal should have been taken to the Circuit Court of Appeals. If to this court it is not properly certified under § 5 of the act of 1891. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Smith* v. *McKay*, 161 U. S. 358; *Maynard* v. *Hecht*, 151 U. S. 324; *Blythe Co.* v. *Blythe*, 172 U. S. 644; *Schweer* v. *Brown*, 195 U. S. 171.

The decision below was correct and the libel properly dismissed. Quenching a fire on a ship in emptied dry dock is not a basis of salvage. *The Warfield*, 120 Fed. Rep. 847; *The Robt. W. Parsons*, 191 U. S. 17. The Jefferson was not saved from a peril of the sea. 1 Parson's Mar. Ins., 544; *Phillips* v. *Barber*, 5 B. & Ald. 161; *Frame* v. *Ella*, 48 Fed. Rep. 569.

The property salved must be a vessel engaged in commerce or the cargo of a vessel. *The Murphy Tugs*, 28 Fed. Rep. 429; *The*

Island City, 1 Lowell, 375; *The Pulaski*, 33 Fed. Rep. 383; *The Hendrick Hudson*, 3 Benedict, 419; *S. C.*, Fed. Cas. No. 6,355.

Salvage is only awarded for saving property from sea perils. *Mason* v. *Ship Blaireau*, 2 Cranch, 240, 266; Benedict's Admiralty, 3d ed., § 300; *The Emulous*, 1 Sumner, 207; 2 Kent's Com., *245; Desty's Shipping and Admiralty, § 303; *M. Benefante*, 5 Revue Int. du Droit Maritime, 568; Schaps Das Deutsche Seerecht, 701; Sieveking, German Law Relating to Carriage of Goods by Sea, Eng. trans., p. 145; *The Merchant Prince*, Hanseatische Gerichszeitung, 1888, Part I, No. 120, p. 276; Burchard on Salvage, Hanover, 1897, p. 29.

English courts before 1821, could not award salvage for services between high and low water mark. 11 Ency. Laws of Eng., 368; Benedict's Adm., § 111; Kennedy, Law of Civil Salvage, 2d ed., p. 2. In England and the United States the question of locality is important as admiralty courts alone can award salvage. *Ex parte Easton*, 95 U. S. 68; *50,000 Feet of Lumber*, 2 Lowell, 64. Fire originating on land is not a sea peril, *The Plymouth*, 3 Wall. 20; and as to adhering to ancient limits of admiralty jurisdiction, see *Cleveland Terminal Co.* v. *Steamship Co.*, 208 U. S. 315; *The Troy*, 208 U. S. 321; *The Poughkeepsie*, 162 Fed. Rep. 494; Adm. Juris. of Torts by Mr. Justice Brown in Columbia Law Review, January, 1909.

In the absence of sea perils claims for salvage rewards are against public policy and the tendency of later cases is not to enlarge but to restrict the subjects of salvage. *Gas Float Whitton*, App. Cas. [1897], 337; *Cope* v. *Vallette Dry Dock*, 119 U. S. 625; Hughes' Handbook of Admiralty, 129. Shipowners' suits against owners of dry docks for injuries on the dock depend for admiralty jurisdiction on maritime nature of contract and on locality. *The Sapho*, 48 Fed. Rep. 359; *Waitman* v. *Griffiths*, 3 Blatchford, 528; but see *The Professor Morse*, 23 Fed. Rep. 803.

Mr. Justice White delivered the opinion of the court.

From a decree dismissing this suit for want of jurisdiction

the present direct appeal is prosecuted. Dismissal of the appeal is moved on the ground that the jurisdiction of the court below was not involved in the sense of the fifth section of the act of March 3, 1891, c. 517, 26 Stat. 826, and, in any event, because the question of jurisdiction was not certified as required by that act.

The libel by which the suit was commenced was filed on behalf of the master of the tug Helen, for himself and others entitled to participate, in a salvage allowance if made. The cause of action was thus stated:

"1. That in the afternoon of the twenty-fifth day of December, 1906, the tug Helen whereof said E. W. Simmons was Master, and having a crew of six men besides said master, was, together with the tug Alice, towing a certain barge from Norfolk, in said district, to the piers of the Chesapeake and Ohio Railway Company at Newport News, in said district; that about four or four-thirty o'clock on said day, when said tugs had arrived almost at their destination at Newport News, it was discovered that a fire was raging in the ship yard of the Newport News Ship Yard and Dry Dock Company, and thereupon the libellant, with the said tug Helen, docked his tow at one of the said piers of the Chesapeake and Ohio Railway Company, and proceeded with all possible speed to the said fire:

"2. That when libellant arrived at the said ship yard it was found that a large and fierce fire was raging therein and that said steamship Jefferson, which had been undergoing repairs at the said ship yard, was locked in one of the dry docks out of which the water had been emptied, and was afire, her upper works being then in full blaze and her hull smoking throughout nearly its whole length; that there was no one on board at the time and no one could have stayed aboard under the circumstances; that the water pipes intended for the use of the fire department were frozen up and there was no water available for their use, and that this, together with the fact that the Jefferson was in a peculiar and inaccessible situation being

in a dry dock, rendered the fire engines and fire department totally unable to render any assistance whatsoever; under which circumstances said steamer would have been completely destroyed but for the assistance rendered by libellant and other salvors hereinafter mentioned:

"3. That thereupon libellant with his said tug Helen and crew lay at a bulkhead of one of the piers as close to the said dry dock as possible, and together with the tugs Alice and James Smith, Jr., played streams of water from their fire hose upon said steamship Jefferson, and continued so to do until the fire was completely extinguished; that libellant and other salvors were thus engaged from about four-thirty o'clock in the afternoon of said day until about eight-thirty o'clock at night, during all of which time libellant and said salvors rendered every possible assistance to said steamship, and during all of which time libellant and others entitled as salvors as aforesaid, underwent great suffering from smoke, flame and sparks, and endured great hardship from exposure to the wind and water in the bitter coldness of the weather, and libellant and other salvors incurred great danger from said smoke, flames and sparks, and from electric wires, falling poles, adjacent burning buildings, etc.

"4. That the said steamship Jefferson is of great value; that the aforementioned efforts and services rendered by libellant and other salvors saved the said steamship from total and complete destruction; that libellant, by reason of the hardships necessarily incurred, and especially by reason of the nature and the great importance of the services rendered in saving said steamship, reasonably deserved to have, and therefore claim a commensurate reward for salvage therefor."

By an intervening petition the crew of the tug Helen and the masters and crews of two other tugs, the James Smith, Jr., and the Alice, asserted claims to salvage, on the ground that they had rendered services at the same time and under the same conditions as those which the libel alleged had been rendered by the Helen. The libel and intervening petition

were excepted to by the owner and claimant of the Jefferson upon these grounds:

"First. That the property proceeded against was not at sea or on the coast of the sea or within public navigable waters or on the shores thereof.

"Second. That the property proceeded against was not a vessel engaged in maritime commerce.

"Third. That the libellants did not render any service at sea or in saving property from any peril of the sea.

"Fourth. That there is not shown any sea peril or such peril as may be the basis of a claim for salvage.

"Fifth. That the Jefferson while in a dry dock, from which all the water had been emptied, when threatened with fire from land was not a subject of salvage services.

"Sixth. That there is not shown any admiralty or maritime lien upon the Jefferson in favor of the libellants for salvage."

The court, on January 14, 1908, handed down an opinion, stating its reasons for concluding that the exceptions were well taken, and hence that it had no jurisdiction over the cause. 158 Fed. Rep. 358. On the twenty-ninth of the same month a final decree was entered dismissing the libel and intervening petitions. In this decree it was recited:

"The court is of opinion, for the reasons stated in the opinion filed on the fourteenth day of January, 1908, that it is without jurisdiction in the premises and that the exceptions should be sustained. . . ."

In the following July the present appeal was prayed on the ground that, as the court had dismissed the case for want of jurisdiction, its action was susceptible of review by direct appeal to this court. In its order allowing the appeal the court stated that "the claim of appeal is allowed as prayed for from the final order and decree dismissing said cause for want of jurisdiction. . . ." As upon the face of the record, irrespective of the recitals in the order made on the allowance of the appeal, it is apparent that the only question

which was decided below was one of jurisdiction, and as the decree, which was appealed from, on its face shows that the cause was dismissed for want of jurisdiction, the question of jurisdiction, if it is of such a character as to sustain the appeal, was sufficiently certified. *United States* v. *Larkin*, 208 U. S. 333, 338. We therefore put the contentions as to the absence of a certificate out of view.

It is settled that, under the act of 1891, in order to entitle to a direct appeal from the decree of a District or Circuit Court dismissing a cause for want of jurisdiction, the decree which is sought to be reviewed must have involved the jurisdiction of the court below as a Federal court. *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18; *Schweer* v. *Brown*, 195 U. S. 171. Relying upon this doctrine, the contention is that the appeal was wrongfully allowed, because, although it may be that in form of expression the court below dismissed the suit for want of jurisdiction, its action was, in substance, alone based upon the conclusion that the facts alleged were insufficient to authorize recovery, even although the cause was within the jurisdiction of the court. The claim which the libel asserted was for salvage compensation, and it therefore presented a character of action cognizable exclusively by a court of admiralty of the United States. *Houseman* v. *The Cargo of the Schooner North Carolina*, 15 Pet. 40, 48. It is clear that the exceptions to the libel and intervening petition challenged the jurisdiction of the court over the cause of action which the libel asserted, because, from the situation of the vessel, the place where the alleged salvage services were rendered, and the nature and character of those services, they afforded no basis for the jurisdiction of the court as a court of admiralty of the United States. That this was also the conception upon which the court below acted in dismissing the libel and intervening petition is apparent from its opinion and the terms of the decree which we have previously referred to. After stating the elements constituting a salvage service, the court observed (158 Fed. Rep., p. 359):

"These, however, have relation to perils encountered and services rendered and performed to vessels actually engaged in commerce, either on the high seas or other public navigable waters. . . . The Jefferson, at the time of the service sued for, was not a medium of commerce subject to dangers and hazards of the sea. She, on the contrary, was in an unseaworthy condition, undergoing repairs. She could not move of her own volition nor could she be moved at the time in furtherance of commerce. She was neither pursuing nor capable of engaging in her ordinary business of navigation of the seas."

Again, in considering the averments of the libel concerning the origin of the fire which, it was alleged, enveloped the Jefferson, and which, it was asserted, had been extinguished by the exertions of the alleged salvors, the court observed, p. 360:

"This language makes it clear that the peril in which the Jefferson was placed arose from a fire on the shore, and that there was no peril in connection with the sea or the navigation thereof."

In summing up its conclusion the court said, p. 361:

"The mere fact that the property upon which the fire was extinguished was that of a vessel will not suffice. There must have been a sea peril from which it was rescued, and the vessel itself must have been at the time the subject of a sea peril, in order to support a maritime lien and afford jurisdiction *in rem* in the admiralty."

As the foregoing considerations demonstrate that the case was dismissed below because of the conclusion that there was no jurisdiction as a Federal court over the subject-matter of the controversy, it results that the motion to dismiss is without merit. *Cope* v. *Vallette Dry Dock Co.*, 119 U. S. 625; *The Resolute*, 168 U. S. 437; *Cleveland Terminal & Valley R. R. Co.* v. *Cleveland Steamship Co.*, 208 U. S. 316; *Duluth & S. Bridge Co.* v. *The Troy*, 208 U. S. 321; *Scully* v. *Bird*, 209 U. S. 481; *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356.

Passing to the merits, the question is this: Did the facts set forth in the libel *prima facie* state a claim for salvage within the admiralty jurisdiction?

The contention on the part of the appellee that a negative answer should be given to this question is based upon the propositions which controlled the action of the court below. They are: *a*, That at the time the services sued for were rendered the Jefferson was in a dry dock undergoing repairs, was not on the sea, but was virtually on the shore, and was consequently at such time not an instrumentality of navigation, subject to the dangers and hazards of the sea; *b*, The services were not rendered in saving the Jefferson from a maritime peril, as the danger relied on arose outside of the admiralty jurisdiction and not in connection with the sea or the navigation thereof. We shall consider the contentions together.

In the nature of things it is manifest, and indeed it is settled, that because of the broad scope of the admiralty jurisdiction in this country, the perils out of which a salvage service may arise are all of such perils as may encompass a vessel when upon waters which are within the admiralty jurisdiction of the United States, from which it follows, that the right to recover for salvage services is not limited to services concerning a peril occurring on the high seas or within the ebb and flow of the tide. And although in defining salvage the expression "peril of the sea" has sometimes been used as equivalent to peril on the sea, it is settled that the distress or danger from which a vessel has been saved need not, in order to justify a recovery of salvage compensation, have arisen solely by reason of a peril of the sea in the strict legal acceptation of those words. The varied character of services upon which a claim to salvage may be based was pointed out in the definition of salvage given in the opinion in *The Blackwall*, 10 Wall. 1, where it was said (p. 12): "Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending

peril on the sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict or recapture."

In *The Blackwall* the facts, in substance, were these: An English ship, with cargo aboard and ready to sail, while lying at anchor in the harbor of San Francisco, about seven or eight hundred yards from the wharves, was discovered to be on fire. A steam tug was utilized in conveying alongside of the ship members of the fire department and two steam fire engines belonging to the city. After the fire had been extinguished the tug took the ship in tow and safely placed her on adjacent flats, in charge of her master and crew. Upholding the right of the owners of the steam tug and her master and crew to salvage compensation, the court said (p. 11):

"Service, undoubtedly, was performed by the members of the fire department; but it is a mistake to suppose that service was not also performed by the steam tug, as it is clear that without the aid of the steam tug and the services of her master and crew the members of the fire company would never have been able to reach the ship with their engines and necessary apparatus, or to have subdued the flames and extinguished the fire. Useful services of any kind rendered to a vessel or her cargo, exposed to any impending danger and imminent peril of loss or damage, may entitle those who render such services to salvage reward.

"Persons assisting to extinguish a fire on board a ship, or assisting to tow a ship from a dock where she is in imminent danger of catching fire, are as much entitled to salvage compensation as persons who render assistance to prevent a ship from being wrecked, or in securing a wreck or protecting the cargo of a stranded vessel." *The Rosalie*, 1 Spink, 188; *Eastern Monarch*, Lush. 81; *The Tees*, Lush. 505; Williams & Bruce Adm. Prac. 92.

The case of *The Rosalie* was one of salvage of a vessel in danger from a fire at sea, and among other things treated as constituting the salving services was the unloading of the cargo upon land. In *The Tees*, salvage was awarded for tow-

ing to a place of safety a vessel lying in a dock and in danger of catching fire from the surrounding warehouses which were in flames. To the English cases cited in the opinion in *The Blackwall* may be added that of *The City of Newcastle*, 7 Asp. Mar. Cas. (N. S.) 546. That case was heard before Justice Bruce, assisted by the Trinity Masters, and the facts in brief were as follows: A fire broke out on board a vessel which was lying alongside a jetty at the entrance to a dock. The vessel was under repairs, with no steam up, and had no one but the master and watchman on board. At the request of the master a steamship, which had just arrived, hove alongside, and getting her hose on board the burning vessel, extinguished the fire, which, if it had remained unchecked, would have caused a very serious damage. The services were such as might have been rendered by a fire engine on shore. The value of the salved vessel was £9,500. The defendants tendered £200. The court upheld the tender, being of opinion that the services were not of such character as to require that the award should be assessed upon the same liberal principles as obtained in the ordinary cases of sea salvage rendered by one ship to another.

And the doctrine of *The Blackwall* and the other cases just reviewed was in substance reiterated in *The Clarita* and *The Clara*, 23 Wall. 1. In that case remuneration was claimed by the libellants as owners of the steam tug Clarita for salvage services rendered by the tug and the officers and crew, in subduing a fire on board the schooner Clara. While at anchor in the middle of the Hudson River the Clara caught fire from contact with a burning ferryboat, which, after being towed from a ferry slip, had gotten adrift. It was not questioned that the services intrinsically considered were salvage services, but because the injury to the schooner was occasioned by the fault of the tug, whose owner, master and crew asserted the salvage claim, the right to salvage was denied. And the principles just announced, when duly appreciated, also establish that the Jefferson while in dry dock undergoing

repairs was subject to the jurisdiction of a court of admiralty and liable for a salvage service. By necessary implication it appears from the averments of the libel that the steamship before being docked had been engaged in navigation, was dedicated to the purposes of transportation and commerce, and had been placed in the dry dock to undergo repairs to fit her to continue in such navigation and commerce. As said in *Cope* v. *Dry Dock Co.*, 119 U. S. 625, 627, "A ship or vessel used for navigation and commerce, though lying at a wharf and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects, and are capable of receiving salvage service." In reason we think it cannot be held that a ship or vessel employed in navigation and commerce is any the less a maritime subject within the admiralty jurisdiction when, for the purpose of making necessary repairs to fit her for continuance in navigation, she is placed in a dry dock and the water removed from about her, than would be such a vessel if fastened to a wharf in a dry harbor, where, by the natural recession of the water by the ebbing of the tide, she for a time might be upon dry land. Clearly in the case last supposed the vessel would not cease to be a subject within the admiralty jurisdiction merely, because for a short period by the operation of nature's laws, water did not flow about her. Nor is there any difference in principle between a vessel floated into a wet dock, which is so extensively utilized in England for commercial purposes in the loading and unloading of vessels at abutting quays, and the dry dock into which a vessel must be floated for the purpose of being repaired, and from which, after being repaired, she is again floated into an adjacent stream. The status of a vessel is not altered merely because in the one case the water is confined within the dock by means of gates closed when the tide begins to ebb, while in the other the water is removed and the gates are closed to prevent the inflow of the water during the work of repair.

It was long ago recognized by this court that a service rendered in making repairs to a ship or vessel, whether in or

out of the water, was a maritime service. *Peyroux* v. *Howard*, 7 Pet. 324.

But we need not further pursue the subject, since the error of the contention that a vessel, merely because it is in a dry dock, ceases to be within the admiralty jurisdiction, was quite recently established in *The Robert W. Parsons*, 191 U. S. 17. In disposing of the proposition we are now considering it was further said (p. 33):

"A further suggestion, however, is made that the contract in this case was not only made on land, but was to be performed on land, and was in fact performed on land. This argument must necessarily rest upon the assumption that repairs put upon a vessel while in dry dock are made upon land. We are unwilling to admit this proposition. . . . A dry dock differs from an ordinary dock only in the fact that it is smaller, and provided with machinery for pumping out the water in order that the vessel may be repaired. All injuries suffered by the hulls of vessels below the water line, by collision or stranding, must necessarily be repaired in a dry dock, to prevent the inflow of water, but it has never been supposed, and it is believed the proposition is now for the first time made, that such repairs were made on land. . . . But as all serious repairs upon the hulls of vessels are made in dry dock, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs. No authorities are cited to this proposition, and it is believed none such exists."

There is in reason no distinction between the continued control of admiralty over a vessel when she is in a dry dock for the purpose of being repaired and the subjection of the vessel when in a dry dock for repairs to the jurisdiction of a court of admiralty for the purpose of passing upon claims for salvage services, by which it is asserted the vessel while in the dock was saved from destruction.

Reversed and remanded.

SCULLY *v.* SQUIER

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 21. Argued November 5, 1909.—Decided November 29, 1909.

Where plaintiff bases his bill on the contention that under the townsite law, § 2387, Rev. Stat., the ascertainment of boundaries by official survey is a condition subsequent upon which the vesting of the equitable rights of the occupant depends, the construction of a law of the United States is involved, and, if passed on adversely by the state court, this court has jurisdiction under § 709, Rev. Stat., to review the judgment.

The object of local legislation authorized by the townsite law, § 2387, Rev. Stat., is to consummate the grant of the Government to the townsite occupants—not to alter or diminish it—and in this case the construction by the state court of the territorial statute followed to the effect that the trustee and surveyor had no power to alter or diminish the holdings of *bona fide* occupants by laying out or widening streets.

13 Idaho, 428, affirmed.

THE facts are stated in the opinion.

Mr. H. Winship Wheatley, with whom *Mr. Ben F. Tweedy* was on the brief, for plaintiff in error:

As to the jurisdiction: The legal title after entry and until patent to the mayor-trustee was in the United States, *Hussey* v. *Smith*, 99 U. S. 20; *Ashby* v. *Hall*, 119 U. S. 526; *Cofield* v. *McClelland*, 16 Wall. 331; *Stringfellow* v. *Cain*, 109 U. S. 610, and one having an equitable title had an absolute right to have his title confirmed by the trustee under § 2387, Rev. Stat., the townsite law. *Hussman* v. *Durham*, 165 U. S. 144; *Chever* v. *Horner*, 142 U. S. 122; *McDonough* v. *Millandon*, 3 How. 693.

When the question decided by the state court is not merely of weight or sufficiency of evidence but of its competency and effect as bearing on question of Federal law jurisdiction to re-

view exists. *Dower* v. *Richards*, 151 U. S. 658; *Mackey* v. *Dillon*, 4 How. 419; *Almonester* v. *Kenton*, 9 How. 1.

The mayor-trustee was an officer of both the Federal and Territorial governments. *Anderson* v. *Barlets*, 3 Pac. Rep. 225; *Ming* v. *Foote*, 23 Pac. Rep. 515; *Helena* v. *Albertose*, 20 Pac. Rep. 817.

For other cases on the jurisdiction of this court to review decisions involving confirmation of title and authority of United States officers, see *Maguire* v. *Tyler*, 1 Black, 196; *Carondelet* v. *St. Louis*, 1 Black, 179; *Mobile Transp. Co.* v. *Mobile*, 187 U. S. 479; *Canal Co.* v. *Paper Co.*, 172 U. S. 58; *Hussman* v. *Durham*, 165 U. S. 144; *Nor. Pac. R. R. Co.* v. *Colburn*, 164 U. S. 383; *Shively* v. *Bowlby*, 152 U. S. 1; *Pickering* v. *Lomax*, 145 U. S. 310; *Anderson* v. *Carkins*, 135 U. S. 483; *Neilson* v. *Lagon*, 7 How. 772; *Chouteau* v. *Eckhart*, 2 How. 334; *Pollard* v. *Kibbe*, 14 Pet. 353; *Wallace* v. *Parker*, 6 Pet. 680; *Ross* v. *Barland*, 1 Pet. 655; *Water Power Co.* v. *Green Bay Canal Co.*, 178 U. S. 254; 11 Cyc. 936; *Stanley* v. *Schwalby*, 162 U. S. 255.

Under § 2387, Rev. Stat., the entry initiates the grant collectively and the grant to the individual cannot take effect until the extent of his occupancy has been defined. *Newhouse* v. *Semini*, 3 Washington, 648, 652; *Ashby* v. *Hall*, 119 U. S. 526. The grant was not confirmed until the official survey was subsequently filed, and the survey after confirmation cannot be impeached, and power exists to have the grant correctly surveyed before individual rights attach: *Moore* v. *Walla Walla*, 2 Pac. Rep. 187; *Boise City* v. *Flanagan*, 53 Pac. Rep. 453; *Laughlin* v. *Denver*, 50 Pac. Rep. 917; *Galt* v. *Galloway*, 4 Pet. 332; *Haydel* v. *Dufresne*, 17 How. 23; *Greer* v. *Mezes*, 24 How. 268; *Cragin* v. *Powell*, 128 U. S. 691.

The mayor-trustee had no power to deed any person a part of a surveyed street. *Amador County* v. *Gilbert*, 65 Pac. Rep. 130; *Pachen* v. *Ashby*, 1 Pac. Rep. 130; § 3, Idaho Territorial Act; *State* v. *Webster*, 72 Pac. Rep. 295.

The deeds and the official survey are conclusively binding

upon the defendants in error, and they can have no equitable rights in and to the land claimed by them and have not the legal title to any of it. The land claimed by them forms a part of the Congressional grant to the aggregation, to the city of Lewiston, possession of such land has been, at all times since the acceptance of deeds upon the official survey of D street, if any possession dates back to this period, wrongful and unlawful and the maintenance of a private and public nuisance, giving no possessor thereof any rights in law or in equity as against the city or as against the plaintiff in error. Cases *supra; Woodrull* v. *Mining Co.*, 9 Sawy. 513, 517; *S. C.*, 18 Fed. Rep. 753; *Mills* v. *Hall*, 9 Wend. 315; *McLean* v. *Iron Works*, 83 Pac. Rep. 1083; *Wolfe* v. *Sullivan*, 32 N. E. Rep. 1018; *Hall* v. *Breyfogle*, 70 N. E. Rep. 883; *Blin* v. *Blankenship*, 77 S. W. Rep. 919; *Village of Lee* v. *Harris*, 69 N. E. Rep. 230; *Atlantic City* v. *Snee*, 52 Atl. Rep. 372; *Lewiston* v. *Booth*, 34 Pac. Rep. 809; *Webb* v. *Birmingham*, 9 So. Rep. 161; *Oakland* v. *Oakland Co.*, 50 Pac. Rep. 277; *Orena* v. *Santa Barbara*, 28 Pac. Rep. 268; *Mills* v. *Los Angeles*, 27 Pac. Rep. 354; *Visala* v. *Jacobs*, 4 Pac. Rep. 433; *People* v. *Pope*, 53 California, 437; *Sullivan* v. *Tichner*, 53 N. E. Rep. 759; *Cheek* v. *Aurora*, 92 Indiana, 107; *Lee* v. *Mund Station*, 8 N. E. Rep. 759; *Waterloo* v. *Union Mills Co.*, 34 N. W. Rep. 197; *Louisiana &c. Co.* v. *New Orleans*, 9 So. Rep. 21; *Sheen* v. *Stothart*, 29 La. Ann. 630; *New Orleans* v. *Magoon*, 4 Mart. (La.) 2; *Thibodeaux* v. *Maggiole*, 4 La. Ann. 73; *Witherspoon* v. *Meridian*, 13 So. Rep. 843; *Vicksburg* v. *Marshall*, 59 Mississippi, 563; *Territory* v. *Deegan*, 3 Montana, 82; *Hoboken Land Co.* v. *Hoboken*, 36 N. J. L. 540; *State* v. *Trenton*, 36 N. J. L. 198; *Jersey City* v. *State*, 30 N. J. L. 521; *Tainter* v. *Morrison*, 18 N. J. L. 46; *Cross* v. *Morrison*, 18 N. J. L. 306; *Jersey City* v. *Morris Canal Co.*, 12 N. J. Eq. 547; *Orphan Asylum* v. *Troy*, 32 Am. Rep. 286; *Morrison* v. *New York Co.*, 74 Hun (N. Y.), 398; *Milhau* v. *Sharp*, 27 N. Y. 611; *Mills* v. *Hall*, 9 Wend. (N. Y.), 315; *Commonwealth* v. *Moorhead*, 12 Atl. Rep. 424; *Kopf* v. *Utter*, 101 Pa. St. 27; *Kittaning Academy* v. *Brown*, 41 Pa. St. 269; *Baxter* v. *Com-*

monwealth, 3 Penn. & W. 253; *Commonwealth* v. *McDonald*, 16 Serg. & R. (Pa.) 390; *Philadelphia* v. *Crump*, 1 Brewst. (Pa.) 320; *Philadelphia* v. *Friday*, 6 Philadelphia, 276; *Chafe* v. *Aiken*, 35 S. E. Rep. 800; *Sims* v. *Chattanooga*, 2 Lea (Tenn.), 694; *Memphis* v. *Lenore R. Co.*, 6 Coldw. (Tenn.) 412; *Raht* v. *Southern R. Co.*, 50 S. W. Rep. 72; *Pates* v. *Warrenton*, 84 Virginia, 337; *Taylor* v. *Commonwealth*, 29 Gratt. (Va.) 780; *Ralston* v. *Weston*, 33 S. E. Rep. 326; *Teas* v. *St. Albans*, 17 S. E. Rep. 400; *Childs* v. *Nelson*, 33 N. W. Rep. 587; *Simplot* v. *Chicago R. Co.*, 5 McCreary, 158; *Grogan* v. *Hayward*, 6 Sawy. 498; *Miller* v. *Indianapolis*, 101 Indiana, 200.

The enclosure and possession of a platted street which has been dedicated are immaterial, however long continued. Cases *supra; Hall* v. *Breyfogle*, 70 N. E. Rep. 883; *Wolfe* v. *Sullivan*, 32 N. E. Rep. 1018; *Village* v. *Harris*, 69 N. E. Rep. 230.

The possession relied upon by the defendants in error has at all times been wrongful and unlawful and they encroach upon the legal and lawful street with an occupation which deprives the plaintiff in error of his rights under the laws of Congress and he should have a mandatory injunction against them; for the appurtenant rights of the plaintiff in error are not confined to the front of his lot, but extend to that part of the street in front of adjoining lots. *Dooly Block* v. *Salt Lake Co.*, 33 Pac. Rep. 229; *First National Bank* v. *Tyson*, 32 So. Rep. 144; *Lahr* v. *Metropolitan Co.*, 104 N. Y. 268; *Beaver* v. *Baltimore &c. Co.*, 58 Atl. Rep. 21; *Dill* v. *Board*, 10 L. R. A. 281; *Healy* v. *Kelly*, 54 Atl. Rep. 588; *McLean* v. *Llewellyn Iron Works*, 83 Pac. Rep. 1083; *Tilly* v. *Mitchell & Lewis Co.*, 98 N. W. Rep. 969; *Hall* v. *Breyfogle*, 70 N. E. Rep. 883; *Wolfe* v. *Sullivan*, 32 N. E. Rep. 1018; *Atlantic City* v. *Snee*, 52 Atl. Rep. 372; *Bohne* v. *Blankenship*, 77 S. W. Rep. 919.

Mr. James H. Forney and *Mr. Isham H. Smith* for defendant in error submitted:

The writ of error should be dismissed. There is no Federal

question. The only question is one of boundary. *Telluride Co.* v. *Rio Grande Ry. Co.*, 175 U. S. 639; *Moreland* v. *Page*, 20 How. 523; *Lanfear* v. *Hunley*, 4 Wall. 204; *McDonough* v. *Milandon*, 3 How. 693; *Almonester* v. *Kenton*, 9 How. 1; *Farmers' Heirs* v. *Eslava*, 9 How. 420; *Farmers' Heirs* v. *Mobile*, 9 How. 451.

The judgment is sustained on grounds other than Federal. *Chapman Land Co.* v. *Bigelow*, 206 U. S. 41; *Rutland R. R. Co.* v. *Central Vermont R. R. Co.*, 159 U. S. 630.

The nature of the grant under the Federal townsite laws, is that of confirmation of rights in existence. No new grant is made—simply the ascertainment of rights already in existence, and their certification. This is analogous to the deed of confirmation described by Blackstone. *Scully* v. *Fix*, 13 Idaho, 471; *Goldberg* v. *Kidd*, 58 N. W. Rep. 574; *Pueblo* v. *Budd*, 36 Pac. Rep. 599; *Cofield* v. *McClelland*, 16 Wall. 334; *Stringfellow* v. *Cain*, 99 U. S. 610; *Town Co.* v. *Maris*, 11 Kansas, 128–151; *Rathbone* v. *Sterling*, 25 Kansas, 444; *Helena* v. *Albertose*, 20 Pac. Rep. 817; *McCloskey* v. *Pac. Coast Co.*, 160 Fed. Rep. 194.

The mayor-trustee and the surveyor were not "granting" lands to these occupants. Their rights and duties were prescribed by the law itself, and neither could by exceeding the power given him, divest property rights nor defeat vested rights. *United States* v. *Thurber*, 28 Fed. Rep. 56; *Parcher* v. *Ashby*, 1 Pac. Rep. 204; *Ashby* v. *Hall*, 119 U. S. 526; *Bingham* v. *Walla Walla*, 13 Pac. Rep. 408; *Goldberg* v. *Kidd*, 48 N. W. Rep. 574; *Cofield* v. *McClelland*, 16 Wall. 334; *Treadway* v. *Wilder*, 8 Nevada, 91; *Alimany* v. *Petaluma*, 38 California, 553; *Aspen* v. *Rucker*, 10 Colorado, 184; *Town Co.* v. *Maris*, 11 Kansas, 128; *Rathbone* v. *Sterling*, 25 Kansas, 444.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The relation of the parties to the cause of action is the same in this court as in the state courts, and we will refer to plaintiff

in error as plaintiff and to the defendants in error as defendants.

The pleadings in the case are exceedingly voluminous and equally so are the findings of fact. It is enough for our purpose to say that the city of Lewiston, State of Idaho, was entered as a townsite under § 2387 of the Revised Statutes, hereinafter quoted, and a patent was issued by the United States to the mayor of the city in trust for the occupants of the lands conveyed. In pursuance of the trust the mayor executed conveyances to the predecessors in title of plaintiff and defendants. The rights derived through these deeds, and the occupation of the land preceding and subsequent to them, and the effect of a survey made by one E. P. True, hereinafter referred to, and the plat thereof filed by him, constitute the questions in the case. Plaintiff seeks by this suit to enjoin defendants from encroaching on D street, as laid down on said plat, by certain buildings which, it is alleged, they proposed to erect. It is prayed, besides, that the buildings, if erected before an injunction can be obtained, be declared a public nuisance, "damaging the public and this plaintiff's private rights," and be abated. The special damage alleged is that plaintiff, having erected a building, on what he alleges to be the true boundary line of D street, will be, as it was said in the argument, "put into a hole" by the buildings of defendant projecting beyond it, and that light and air thereto, through the doors and windows of plaintiff's building, will be prevented, and the view therefrom to all parts of D street obstructed, and that "the light and air and view from all parts of the said D street as the said building [plaintiff's building] is constructed, necessarily ensue and benefit the said property materially, and are of great value to the plaintiff, and as is also the right of egress and ingress."

It is further alleged that before erecting his building plaintiff applied to the city engineer to be shown the original south line of D street according to the original survey, and the engineer ran "the lines on the ground according to the said

original survey and plat," and that plaintiff erected his building in accordance therewith, "covering the entire lot."

It is also alleged that the lots owned by defendants were conveyed by the mayor to the original owners according to the original survey, and "deeds thereto accepted according to the said original survey and plat, and said lots have since been conveyed to the defendants and their grantors according to the said original survey and plat." A dedication of the street to the public is averred as hence resulting, and an estoppel against defendants to dispute the survey and plat. The answer of the defendants, in effect, denies the correctness of the survey and plat made by True, and avers that there was an amendment of the latter which exhibited the streets and alleys according to the occupation of the respective claimants of the lots. It is admitted, however, that some of the deeds issued were in accordance with the plat, but it is denied that all the deeds were, and averred "that the same were in accordance with the use and occupation of the lands prior to the survey, and with the said survey and plat, as the same were and had been amended."

The findings of the trial court sustained these averments, and found further that the True survey as originally made disregarded the lines of occupation of the lots, and "ran through buildings then in the actual use and occupancy of the claimants of land and cut off approximately four feet from the north end of buildings there standing and in actual use and occupation of *bona fide* claimants."

A decree was passed dismissing the suit, which was affirmed by the Supreme Court. 13 Idaho, 417.

All of the parties, as we have said, derived their rights and titles under § 2387 of the Revised Statutes, providing for the reservation and sale of townsites on the public lands. That section is as follows:

"(Entry of town authorities in trust for occupants.) Whenever any portion of the public lands have been or may be settled upon and occupied as a townsite, not subject to entry

under the agricultural preëmption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

We have not recited, nor do we think that it is necessary to recite, all of the facts found by the lower courts. We may add to those which we have stated that the city of Lewiston was incorporated under the laws of the Territory of Washington, it then being within that Territory, and was reincorporated by an act of the legislature of Idaho in 1866, it then being within Idaho. The act defined the boundaries of the city. Levi Ankeny was mayor of the city in 1871, and on November 21 of that year he filed his declaratory statement No. 39 in the United States land office at Lewiston, proposing to enter the lands included within the borders of the city as incorporated, in trust for its inhabitants, claiming settlement in 1861. Cash entry was made for the lands June 6, 1874, by Henry W. Stainton, mayor, in trust for the inhabitants. "The legislature of the Territory, [we quote from the opinion of the Supreme Court of the State, 13 Idaho, p. 428] by an act approved January 8, 1873 (7th Sess. Laws, p. 16), provided for the survey, platting and disposal of the land in the city of Lewiston pursuant to the United States statutes in regard to such matters. Said act provides that the mayor-trustee shall cause to be made and filed in his office by a competent person a plat of the land within said city, divided into blocks and lots, and 'to make and deliver to the *bona fide* occupants of such portions of said lands described in said patent from the Government of

the United States who may be entitled thereto, good and sufficient deeds of conveyance in fee simple according to their respective rights.'

"Under the provisions of said laws one E. B. True was employed to survey and plat the lands in said town, and was commanded to adjust said plat so as to conform to the conditions of the improvements and the use and occupation of such lands by the settler, and the mayor was required to make and deliver to the *bona fide* occupants of such lands good and sufficient deeds of conveyance in fee simple, according to their respective interests, under the provisions of said law.

"It appears from the evidence in the case that said True made a plat of said town, including block 24, in which block are the lots involved in this case, so as to make the lots about forty-six feet long, north and south, when, as a matter of fact, most, if not all of the lots in that block were fifty feet long, north and south, as indicated by the buildings and other improvements thereon."

The Supreme Court said, 13 Idaho, p. 429:

"The question is fairly presented as to whether said True had any authority whatever to make said plat so as to interfere with and cut off a part of the buildings and improvements of the occupants of such lots. In other words whether under the law a surveyor, who is employed to plat such a townsite after its entry by the proper officer, can widen a street, and in doing so cut off a portion of the buildings and improvements of the lot owners bordering on such street."

The question was answered in the negative, and the judgment of the trial court, which was adverse to plaintiff, was affirmed. In some aspects the answer may be said to have been put upon the statute of the State of January 8, 1873, providing for the survey, platting and disposal of the land. The court observed that there was no dispute that the evidence established that the defendants claimed and occupied their lots to the extent they had claimed for many years prior and subsequently to the survey, and that it was not shown or

claimed that part of the lots was used as a street, nor that the city ever claimed any part of them as a street. And it was said (p. 433): "The city surveyor cannot make any portion of said lots a street by simply making a plat and indicating on such plat that said lots were only forty-five or forty-six feet in length." The claim by defendants was of fifty feet. The court further said (p. 433): "The mayor-trustee, had no judicial power in this matter—neither had the surveyor. The surveyor and mayor cannot dedicate to the public as a street parts of lots occupied and possessed by individuals." This, it may be contended, is a mere construction of the statute of the State of Idaho, and nothing more, in other words, a decision that under the statute there was no power given to make a survey or plat which did not conform to the lines of occupation. The contention of plaintiffs, however, is that "the laws of Congress authorize an official ascertainment" of the boundaries of the city, and "that the equitable right under the said laws of Congress vests upon a condition subsequent, which is that the owner of the equity must within a reasonable time have his right confirmed by the trustee upon an official survey ascertaining and settling its boundaries and nature, and that the laws of Congress require each townsite occupant to see to it that the official ascertainment is true and correct and satisfactory before accepting confirmation of his equitable rights from the mayor, trustee." It is hence insisted that a construction of the laws of Congress is involved. This contention, we think, is the basis of plaintiff's bill of complaint, and it seems also to have been passed on by the Supreme Court of the State. The court said (p. 433): "The appellant [plaintiff in error here] rests his case here on the making and approval of said plat," (that is, the plat made by True,) and the contention was discussed. We think, therefore, the motion to dismiss should be overruled.

But a little more discussion is necessary to pass on its merits. Section 2387 constitutes the grant of title, and it is very explicit as to grantees, to the matter granted, and for whose use

it is granted. The grant is of lands occupied as a townsite, the grantees are the corporate authorities thereof, or the judge of the county court where the town is situated, "in trust for the several use and benefit of the occupants thereof, according to their respective interests." And the legislation of Idaho, enacted in pursuance of § 2387, provides, as we have seen, that the mayor shall cause to be made and filed in his office a plat of the land divided into lots and blocks, but it is also provided that he is required, as trustee, "to make and deliver to the *bona fide* occupants of such portions of said lands described in said patent from the Government of the United States, who may be entitled thereto, good and sufficient deeds of conveyance in fee simple, according to their respective rights." The object of the state legislation, therefore, was to consummate the grant of the Government to the occupants of the land, not to alter or diminish it. The grant was through the mayor to the occupants of the lands. The extent of their occupation was the extent of their rights; determined, therefore, the relation of their lots to the streets and alleys; fixed the location of the streets and alleys. Or, as it is epigrammatically expressed by the Supreme Court of the State, "It must be kept in mind that Lewiston existed prior to the True survey. The settlers did not acquire their right under the plat nor by virtue of it. The survey and plat was made for them; they were not made for the survey and plat." But we need not make a universal application of this. It is enough for the present case that the Supreme Court so construed the power of the mayor and the surveyor under the Idaho statute. It may well be contended, however, that the Supreme Court expressed a principle that has broader application, expressed as well the meaning of the act of Congress. In *Ashby* v. *Hall*, 119 U. S. 526, this court said (p. 529), speaking by Mr. Justice Field, "That the power vested in the legislature of the Territory (Montana) in the execution of the trust (under § 2387), upon which the entry was made, was confined to regulations for the disposal of the lots and the proceeds of the sales. These regulations might

extend to provisions for the ascertainment of the nature and extent of the occupancy of different claimants of lots, and the execution and delivery to those found to be occupants in good faith of some official recognition of title, in the nature of a conveyance. But they could not authorize any diminution of the rights of the occupants when the extent of their occupancy was established. The entry was in trust for them, and nothing more was necessary than an official recognition of the extent of their occupancy. Under the authority conferred by the townsite act the legislature could not change or close the streets, alleys and blocks of a town by a new survey. Whatever power it may have had over them did not come from the act, but, if it existed at all, from the general grant of legislative power under the organic act of the Territory." See also *Stringfellow* v. *Cain*, 99 U. S. 610; *Cofield* v. *McClelland*, 16 Wall. 331; *Hussey* v. *Smith*, 99 U. S. 20. Many state cases are to the same effect, and may be found in the notes to § 2387 in the United States Federal Statutes Annotated, vol. 6, page 344 *et seq.*

Further discussion is unnecessary. Plaintiff's other contentions are either disposed of by the facts found by the state courts or do not present Federal questions.

Judgment affirmed.

RUMFORD CHEMICAL WORKS *v.* HYGIENIC CHEMICAL COMPANY OF NEW JERSEY.

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

HYGIENIC CHEMICAL COMPANY OF NEW YORK *v.* RUMFORD CHEMICAL WORKS.

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

Nos. 9, 121. Argued November 1, 1909.—Decided November 29, 1909.

Although in subsequent cases a party may have proved his facts, the question when here must be decided on the evidence below in the particular case.

Although one not a party may have contributed to the expenses of a former suit by reason of business or indirect interest, if it is not shown he had any right to participate in the conduct of the case he is not bound as a privy.

Where the Circuit Court and Circuit Court of Appeals of the same circuit agree on certain facts this court will not reverse the finding in a case coming from that circuit notwithstanding the same fact may not have been found by the courts of another circuit.

154 Fed. Rep. 65, affirmed; 157 Fed. Rep. 436, reversed.

THE facts are stated in the opinion.

Mr. Philip Mauro, with whom *Mr. C. A. L. Massie* was on the brief, for Rumford Chemical Works:

A *prima facie* case against both Hygienic companies is made out by the admissions without the aid of other proof regardless of the Clotworthy deposition. *Hutter* v. *Stopper Co.,* 128 Fed. Rep. 283; *United Shirt & Collar Co.* v. *Beattie,* 149 Fed. Rep. 736, 742.

There was no denial or explanation by either infringing company: cases *supra* and *Signal Co.* v. *Electric Co.,* 97 Fed. Rep. 810; aff'd 107 Fed. Rep. 284; *Hemolin* v. *Dyewood Co.,*

131 Fed. Rep. 483; aff'd 138 Fed. Rep. 54; certiorari denied, 199 U. S. 608.

The Clotworthy deposition should have been received. A court may take judicial cognizance of its own records in a former litigation, especially one in which present parties were privies. *Butler* v. *Eaton*, 141 U. S. 240; *Aspen Mining Co.* v. *Billings*, 150 U. S. 31, 38; *Crœmer* v. *Washington*, 168 U. S. 124, 129; *Re Boardman*, 169 U. S. 39, 44; *Bresnahan* v. *Tripp Co.*, 72 Fed. Rep. 920; *Cushman Box Co.* v. *Goddard*, 97 Fed. Rep. 664; *Des Moines Nav. Co.* v. *Homestead Co.*, 123 U. S. 552; *United States* v. *Des Moines Nav. Co.*, 142 U. S. 510; *National Co.* v. *Dayton Co.*, 95 Fed. Rep. 991, 996. Both the Hygienic companies were "parties" to the test suit. 3 Robinson on Patents, § 1176; *Robbins* v. *Chicago*, 4 Wall. 657; *Penfield* v. *Potts*, 126 Fed. Rep. 475, 480; *Cromwell* v. *Sac County*, 94 U. S. 351.

Mr. Edwin T. Rice, with whom *Mr. Willard Parker Butler* was on the brief, for the Hygienic Chemical Companies:

Privity was not shown between either of the Hygienic companies and the defendant on the test suit. Privity must be affirmatively shown. *Johnson* v. *Powers*, 139 U. S. 156; *Litchfield* v. *Goodnow*, 123 U. S. 549; *Theller* v. *Hershey*, 89 Fed. Rep. 575; *Felting Co.* v. *Asbestos Co.*, 4 Fed. Rep. 816; *Telephone Co.* v. *Telephone Co.*, 27 Fed. Rep. 663; *Miller* v. *Tobacco Co.*, 7 Fed. Rep. 91; *Eagle Co.* v. *Bradley Co.*, 50 Fed. Rep. 193; *S. C.*, 57 Fed. Rep. 980; *Box Co.* v. *Paper Co.*, 95 Fed. Rep. 991; *Lane* v. *Wells*, 99 Fed. Rep. 286.

The Circuit Court of Appeals of the Second Court erred in taking judicial notice of matters outside the record. *Stanley* v. *McElrath*, 86 California, 449; *Downing* v. *Howlett*, 6 Colo. App. 291; *Adler* v. *Lang*, 26 Mo. App. 226; *Grace* v. *Ballou*, 4 S. D. 333; *Re Manderson*, 51 Fed. Rep. 501; *Streeter* v. *Streeter* 43 Illinois, 155; *Taylor* v. *Adams*, 115 Illinois, 570; *Loomis* v. *Griffin*, 78 Iowa, 482; *Granger* v. *Griffin*, 78 Iowa, 759; *Banks* v. *Burnam*, 61 Missouri, 76; *Spurlock* v. *Mo. Pac. Ry.*,

76 Missouri, 67; *Daniel* v. *Bellany*, 91 N. C. 78; *People* v. *De La Guerra*, 24 California, 73; *State* v. *Edwards*, 19 Missouri, 674; *Baker* v. *Mygatt*, 14 Iowa, 131; *Allison* v. *Insurance Co.*, 104 N. W. Rep. 753; *Re Osborne*, 115 Fed. Rep. 1; *Bank* v. *Taylor*, 86 Ill. App. 388; *Ralphs* v. *Hensler*, 97 California, 296; *McCormick* v. *Herndon*, 67 Wisconsin, 648; *Enix* v. *Miller*, 54 Iowa, 551; *Eyster* v. *Gaff*, 91 U. S. 521; *State* v. *Wilson*, 39 Mo. App. 114; *Water Co.* v. *Cowles*, 31 California, 215; 1 Wharton on Evidence, § 326.

The chemical company failed to make out a *prima facie* case. *Bates* v. *Coe*, 98 U. S. 31, 49; *Royer* v. *Chicago Mfg. Co.*, 20 Fed. Rep. 853.

The extract from the Clotworthy deposition was inadmissible as against the Hygienic companies. *Street Railway Co.* v. *Gumby*, 99 Fed. Rep. 192; Chase's Stephen's Evidence, 2d ed., Art. 32; Greenleaf on Evidence, § 163; *Insurance Co.* v. *Commissioners*, 117 Fed. Rep. 82.

Mr. Justice Holmes delivered the opinion of the court.

These are two suits in equity brought by the Rumford Chemical Company for the infringement of a patent for baking powders; one, No. 9, brought in the Third Circuit, New Jersey, against the Hygienic Chemical Company, a corporation of that State; the other, No. 121, brought in the Second Circuit, New York, against a New York corporation of the same name. The two cases were tried on substantially the same record and evidence, with the result that in New Jersey the bill was dismissed by the Circuit Court of Appeals, 154 Fed. Rep. 65; 83 C. C. A. 177, but in New York the bill was sustained. 159 Fed. Rep. 436; 86 C. C. A. 416. Writs of certiorari were granted by this court.

The defendants rested on the plaintiff's evidence, and the question in both suits was whether a *prima facie* case had been made out. It did not appear that the defendants made or sold baking powders as such, but the New Jersey Company did make acid phosphates for baking powders and other pur-

poses, and the New York Company sold the great part of its products. The plaintiff contended that this acid phosphate had the characteristics described in its patent, and was made and sold for use in baking powders, and that the manufacture and sale were an infringement of its rights. A previous decision, *Rumford Chemical Works* v. *New York Baking Powder Co.*, 134 Fed. Rep. 385; 67 C. C. A. 367, establishing the patent, was relied upon as a test case by which the defendants were bound, but, except the final decree, entered after the beginning of the present suits, the record was not put in. It would seem, from a late case, that the plaintiff was correct in point of fact, *Provident Chemical Works* v. *Hygienic Chemical Co.*, 170 Fed. Rep. 523, but the question here must be discussed, of course, on the evidence before the court below. The question is material as bearing upon the admissibility of the evidence of one Clotworthy, since dead, given in the suit against the New York Baking Powder Company, upon which the plaintiff relied.

Clotworthy was the president and general manager of the Clotworthy Chemical Company and was a manufacturer of baking powder. He testified to the purchase from the Hygienic Company of New York of a barrel of granular acid phosphate, shown to be similar to that described in the plaintiff's patent. A bill from the New Jersey Company and a receipt from the New York Company also were produced and put in. The courts in both circuits rightly regarded this as the most important, if not the only evidence to make out the infringement alleged. Therefore it was necessary that the plaintiff should prove that the defendants were privy to the New York Baking Powder Company's case.

To prove privity Heller, the president of the defendant companies, was called and asked as to his testimony on the former occasion. He admitted that he then had testified that "we are manufacturers of granulated acid phosphate and are selling to the trade in the same way as" the former defendants; also that he had testified that "we have [undertaken to assist in bearing the burdens of this defence and have contributed to

the defence] financially and otherwise." By the natural interpretation of the word in the connection in which it was used 'we' embraced the New Jersey company, and fairly may be argued to have meant both. Heller swore that these answers were true, but with the qualification that he did not think that the New Jersey corporation contributed financially, and that he did not remember whether it did otherwise. All the courts agree that the privity of the New Jersey corporation was not made out. Probably all, and at least the Circuit Court of Appeals and the Circuit Court for the Third Circuit, 148 Fed. Rep. 862, agree that if Clotworthy's testimony is excluded infringement is not proved. We should not revise this finding of both courts on the facts, and therefore it follows that the New Jersey decree must be affirmed. The evidence on both sides is discussed in 148 Fed. Rep. 862.

It appears that the New York company contributed to the expenses of the former case. But that fact alone is not enough to warrant a different result. The agreement disclosed in 170 Fed. Rep. 523, was not before the court. We may reject as extravagant the suggestion that the contribution may have been made from charitable motives, and assume that it was induced by reasons of business and indirect interest, but it was not shown that as between the present and former defendants either Hygienic company had the right to intermeddle in any way in the conduct of the case. The Hygienic Companies would have been glad to see the Rumford patent declared void and were willing to pay something to that end. That was all and that did not make them privies, and therefore the Clotworthy deposition was not admissible against them. *Litchfield* v. *Goodnow*, 123 U. S. 549, 550. Whether if it had been admitted, infringement could have been inferred from the sale of a barrel of granular acid phosphate to a manufacturer of baking powder need not be considered. There was other evidence in the case.

Decree in No. 9 affirmed.
Decree in No. 121 reversed.

STEWARD v. AMERICAN LAVA COMPANY.

MORITZ KIRCHBERGER v. AMERICAN LAVA COMPANY.

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

Nos. 27, 28. Argued November 10, 11, 1909.—Decided November 29, 1909.

A patent cannot be sustained when the theory and method are introduced for the first time in unverified amended specifications.

The patent for a tip for acetylene gas burners, and for the process of burning acetylene gas, held to be void by the court below and by this court because the tip was not new, the description too indefinite, the amended specifications, which were unverified, brought in new matter and the claims for processes so called were only claims for the functions of the described tip.

155 Fed. Rep. 731, and 155 Fed. Rep. 740, affirmed.

THE facts are stated in the opinion.

Mr. Charles Neave, with whom *Mr. F. P. Fish* and *Mr. William G. McKnight* were on the brief, for petitioners.

Mr. Louis C. Raegener for respondents.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are bills in equity brought by the petitioners to restrain the infringement of Letters Patent No. 589342, issued to the assignee of Edward J. Dolan, and dated August 31, 1897. The patent was held invalid by the Circuit Court of Appeals for the Sixth Circuit. *American Lava Co.* v. *Steward*, 155 Fed. Rep. 731 and 740; *S. C.*, 84 C. C. A. 157 and 166. It had been sustained by the Circuit Court of Appeals for the Second Circuit, *Kirchberger* v. *American Acetylene Burner Co.*, 128 Fed. Rep. 599; *S. C.*, 64 C. C. A. 107, and a writ of certiorari was granted by this court to the first-mentioned Circuit Court of Appeals.

The patent, so far as it comes in question here, is for a tip for acetylene gas burners and for the process of burning acety-

lene gas in the mode set forth. The court below held that the tip was not new, that the description was too indefinite, that the amended specifications brought in entirely new matter not sworn to, and that the claims for processes so called were only claims for the functions of the tip described.

A few words as to the conditions and knowledge at the time of the alleged invention will help to make the discussion plain. Acetylene gas began to be produced on a large scale for commercial purposes about 1895. It is very rich in carbon, and therefore has great illuminating power, but for the same reason coupled with the relatively low heat at which it dissociates and sets carbon free, it deposited soot or unconsumed carbon and soon clogged the burners then in use. It was possible to secure a complete consumption of carbon by means of the well-known Bunsen burner. This consists of a tube or cylinder pierced on the sides with holes for the admission of the air, into one end of which a fine stream of gas is projected through a minute aperture and from the other end of which it escapes and then is burned. A high pressure is necessary for the gas in order to prevent its burning back. The ordinary use of the Bunsen burner is to develop heat and to that end a complete combustion of course is desired. But with an immediately complete combustion there is little light. The yellow light of candles and gas jets is due to free particles of carbon at a red heat, but not yet combined with oxygen, or, as we commonly say, consumed. On the appearance of acetylene gas inventors at once sought to apply the principle of the Bunsen burner with such modifications as would produce this result. In doing so they found it best to use duplex burners, that is, burners the outlets of which were inclined toward each other so that the meeting of the two streams of gas formed a flat flame, and to let in less air.

In this state of things Dolan filed his application on February 18, 1897. The object was said to be "to provide a burner the use of which will result in perfect combustion of the gas and the production of a flame which will afford the greatest

possible degree of light from a given amount of gas consumed." A duplex burner on the Bunsen plan was described, but with no indication of any patentable device. The drawings were merely diagrams, and, with reference to what is to follow, we may mention that two of them show two sets of air holes, one above the other, and that the specification even now expressly allows 'two or more' sets. The claims were rejected on April 6, 1897, and in the same month Dolan changed his attorney. On May 20 a new specification and new claims were filed by the new attorney, but not sworn to by Dolan, and on these, with no material change, the patent was granted. In this specification, as in the former, though in different words, it is said that "in order to prevent the deposit of carbon within the burner or at the burner top and thereby insure a perfect combustion and a smokeless flame at the point where the same is formed, I provide a series of inclined air passages, *a*, *a*, which lead into the enlarged passage, E, above the point at which the contracted opening, C, is provided,"[1] The inclined air

[1] The following are copies of Dolan's Fig. 1, and Fig. 2.

Fig. 1.

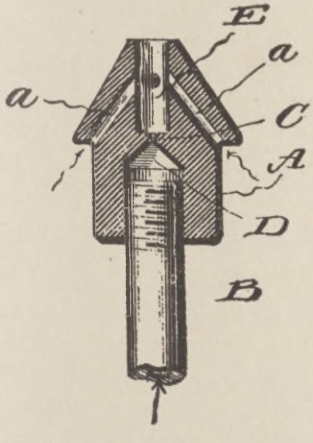
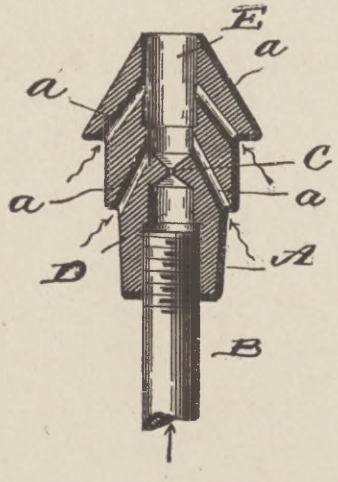


Fig. 2.



passages are the holes in the sides of the Bunsen burner, E is the cylinder, or tube, and the contracted opening, C, is the point at which the gas enters the tube. This device, and nothing else, is pointed out as the means for preventing the clogging of the tips. A preference is stated for a burner in duplex form.

In the new specification, however, it was said that the operation 'seems to be' that the gas draws in on all sides an envelope of air through the openings *a*, &c., so far stating the Bunsen principle, but adding that "the result of this arrangement seems to be to so cool the outside of the flame as to prevent any deposit of carbon at the point of egress." And another paragraph was as follows: "The structure of my burner is such that if all of the burner were cut off in a horizontal plane immediately above the outlet C [the point where the gas enters the upper chamber] the general shape and condition of the flame would not be modified, but in this case an immediate combustion would occur at the outlet. Under the conditions of this burner the point where the gas reaches its kindling temperature is carried upward, but the general shape of the escaping gas body is not materially modified." It was stated earlier that "the result here accomplished would not be accomplished in an ordinary air-mixing burner in which the air was mingled generally with the body of the gas," and that "in my burner an absolutely unobstructed passage is provided for the escape of the original jet of gas formed by the constricted opening C. By reason of this fact it is substantially necessary to have two jets if a flame of considerable candle power is desired."

The claims allowed and in controversy here are as follows:

"1. The process of burning acetylene gas, which consists in projecting a small cylinder of gas, in surrounding the same with an envelop of air insufficient to cause combustion of all the gas, and in finally supplying the gas with an additional amount of oxygen by allowing the stream of gas to expand

above the burner-tip into contact with the air, thereby burning the same, substantially as described.

"2. The process of burning acetylene gas, which consists in projecting toward each other two cylinders of acetylene gas, in surrounding the same with envelops of air insufficient to produce combustion of all the gas, and in finally causing the cylinders of gas to impinge upon each other and produce a flat flame, substantially as described.

"3. The combination in an acetylene-burner of the block A having the minute opening C, the cylindrical opening E, opening without obstruction to the atmosphere, and the air-passages *a*, substantially as described."

The ground upon which these claims are maintained is the theory indicated in one of the passages that we have quoted, to the effect that the gas emerges to the air surrounded by a mainly unmixed flow of air carried with it from the cylinder containing the holes *a*, *a*, and that this so cools the outside of the flame as to prevent a deposit of carbon. If this theory is not true and if all there is to the Dolan tip or burner is to provide for a mixture of air with the gas in the cylinder sufficient to secure complete combustion of all that is burned near the point of emergence, but insufficient to burn all the gas, the patent must fail. For this latter contrivance was well known, and if the shortness of the Dolan tip, which we are about to mention, has no other effect than to diminish the amount of air received it does nothing new. Moreover, unless the theory of the cooling envelop so dominates the specification as to explain what is doubtful and ambiguous in it, the claim would not be for what now is said to be the characteristic of the Dolan tip. The characteristic of the Dolan tip now is said to lie in the fact that the cylinder is very short, as, it is said, it must be for it to be true that the shape of the flame would not be modified by cutting it off. The shortness of the cylinder is supposed to prevent the mixing of the air and to produce the result desired.

But this theory of cooling not only is disputed in the testi-

mony and treated as speculative and highly doubtful by the courts below, but is discredited by the patent itself. The fourth claim is for a combination in an acetylene burner of two "air-mixing" burners. The theory was not that upon which Dolan was working, or in which he even now believes. He was a witness in the case and testified that it was his lawyer's contrivance, and while of course a mechanical device may be patentable although the true theory of it is not understood, here the words relied upon to show that the cylinder was to have this characteristic shortness also were the insertion of the lawyer, and would have had little importance apart from that newly adopted point of view. We should regret to be compelled to decide a case by the acceptance or rejection of a theoretic explanation upon which it still is possible that authorities in science disagree. But the uncertainty indicated even by the language of the patent is important in determining whether it describes a new invention in terms sufficiently precise to be upheld.

As we have said, the only passage indicating, even by indirection, the length of the cylinder, if that does, is the paragraph stating that if the burner were cut off the general shape and condition of the flame would be the same, which is thought to reproduce more exactly a suggestion in Dolan's specification as to a funnel shaped flame, said by him to result from the issue of gas with pressure through a small opening. But if the relative shortness of the cylinder had been understood to be an essential thing the patent naturally would have said so. It is suggested that the shortness is implied by the word tip in the patent, but the patent equally is said to relate to an improvement in burners, and the length of burners depends on the principle involved. In fact, all that directly bears upon length is the statement, which we have not yet mentioned, that the contracted opening for the gas into the cylinder is at or near the longitudinal center of the block constituting the tip. As the block may be longer or shorter, with no limits fixed, while the cylinder extends from the longitudinal center to the outlet

where the gas is burned, obviously the length of the cylinder, or one-half the block, may be greater or less, so far as we are informed by this portion of the patent. And when this is taken with the language as to mixing in the fourth claim; with the allowance of two or more sets of air holes, one above another; with the uncertain statement of the theory ('the operation seems to be,' 'the result seems to be';) and with the statement of the air holes alone as the feature that prevents the deposit, it seems to us impossible to say that sufficient instructions are given on the supposed vital point. Again, no proportions are indicated; the number, size and position of the air holes, except that they enter the cylinder above the gas, are left at large, and if the plaintiffs' theory is the true one, the public are told little more than to try experiments until they find a burner that works. The plaintiffs say that a burner with a distance of four-fifths of an inch or over between gas and discharge orifice is a Bunsen burner, and that for the burner to be effective for illuminating purposes the distance should be only a few millimeters. But if experiment had proved the contrary we cannot doubt that they equally would have claimed the successful burner as the one Dolan had contrived.

If, as now is said, a rat-tail flame is the mark of Dolan's burner, the words "funnel shaped" in the original application were not apt to describe it, and did not purport to indicate a test. They were used merely to show how the perfect combustion was achieved which is the declared object throughout. The cause assigned was not peculiar to Dolan's tip. The amendment, in the passage as to the unaltered shape of the flame when the burner is cut off, goes on to say that 'of course' the shape, though cylindrical as it issues from the round hole, increases in diameter, 'approximating in some degree to the form of an inverted cone.' This of itself almost excludes the notion that the rat-tail shape is the test, and no reader would draw that or any similar notion from the specification as a whole.

We appreciate the difficulties that would beset an attempt to make the directions more precise, but it certainly was possible to indicate with greater clearness the specific object to be attained, and that in any ordinary burner the tip must be very short. Vacillation in theory led to uncertainty of phrase. If, however, we are wrong, then it appears to us plain that Dolan's attorney introduced not merely the theory but the mode of applying it, for the first time, in the amended specification, or, in other words, then for the first time pointed to an invention, the essence of which was to have so short a chamber or cylinder as to prevent the mixing of the air taken into it and to emit the current of gas surrounded by the greater part of such air as an envelope or film. Of course, Dolan desired to produce the result which the patented article is said to produce, but beyond that desire his specification did not give a hint of the means by which it now is said to be achieved. It spoke, it is true, as we have said, of producing a hollow-shaped funnel flame by reason of the gas being forced through contracted openings at very great pressure. But this did not disclose the invention and was dropped in the amendment. He made no claim for a process and disclosed no invention of a device. This being so, the amendment required an oath that Dolan might have found it difficult to take, and for want of it the patent is void. Rev. Stat., § 4892. *Railway Co.* v. *Sayles*, 97 U. S. 554. *Eagleton Manufacturing Co.* v. *West, Bradley & Carey Manufacturing Co.*, 111 U. S. 490. *Kennedy* v. *Hazelton*, 128 U. S. 667. *De La Vergne Refrigerating Machine Co.* v. *Featherstone*, 147 U. S. 209, 229.

The patent was held void below on the further ground that it had been anticipated. We turn to this last because the question is complicated with the theory that we have mentioned. If the Dolan patent had unreservedly committed itself to the notion of a cooling envelope with a contrivance made very short for the purpose of securing that result, the argument in defense of it would be that the leading earlier patents proceeded upon the opposite theory of mixture and admitted, if

they did not contemplate, a longer tube, however similar otherwise they might be. They, at least, exhibit the state of the art at the date of the supposed invention, and show within what narrow and precise limits Dolan had to move if he was to produce anything new. So much may be said to be undisputed, and we have mentioned some of the facts that cannot be denied. But on the view that we have taken of Dolan's specification, they anticipate all that he can be said to have disclosed to the public. We think it unnecessary to go over much of the disputed ground and shall mention but two of the patents put in evidence. The most important of these is one issued in France to Bullier. This also was for a tip (*bec*) for acetylene gas. This tip was structurally similar to Dolan's, admitting the gas through a very small orifice and having the same slanting air passages entering the cylinder above and around the gas, and, in one drawing at least, entering it very near its upper end. Bullier definitely adopted the theory of mixture and stated the proportions—40 per cent of air to 60 per cent of gas—and, after stating his preference for a duplex burner, he added that in this manner the illuminating portion of the flames is relatively far from the orifice by reason of the air introduced, and that for the same reason the combustion of the carbon is complete between the orifice and the point where the flame flattens, the flame as it issues from the orifices being blue and not illuminating. In this way, he said, he avoided any deposit of carbon. The degree of mixture is affected by the length of the cylinder or tube, and when mixture is desired naturally a longer tube would be employed than when it is to be prevented. The drawings, which are admitted to be only diagrams, indicate a longer cylinder than Dolan's, and although Bullier does not state the length it will be perceived without more that if the plaintiffs' theory and construction of their patent were adopted the distinction insisted upon by them might be held to exist. Otherwise the anticipation is complete. It is significant that some of the plaintiffs manufacture under a Bullier license in France.

The other patent to be mentioned is another French one, to Letang. He also states, as means to prevent clogging, the removal of the outlet opening sufficiently far from the point of ignition and the cooling of the burner by a current of air. This current was produced by separate plates above the gas nozzle so arranged that a certain quantity of air would be carried along by the gas. It would seem from the diagram that the distance intended to exist between the nozzle and the flame was very short. We do not dwell upon the earlier patents in more detail, because we believe that we have said enough to show that the plaintiffs' cannot be sustained.

Decrees affirmed.

MR. JUSTICE MCKENNA dissents.

LOUISIANA *ex rel.* HUBERT, RECEIVER, *v.* MAYOR AND COUNCIL OF THE CITY OF NEW ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 11. Argued November 1, 2, 1909.—Decided November 29, 1909.

This court has not jurisdiction to review the judgment of a state court based on the contract clause of the Constitution unless the alleged impairment was by subsequent legislation which has been upheld or given effect by the judgment sought to be reviewed. *Bacon* v. *Texas*, 163 U. S. 207.

A power to tax to fulfill contract obligations continues until the obligation is discharged.

The power of taxation conferred by law enters into the obligation of a contract, and subsequent legislation withdrawing or lessening such power and which leaves the creditors without adequate means of satisfaction impairs the obligation of their contracts.

Where a municipality has power to contract and tax to meet the obligation, the proper remedy of the creditor is by mandamus to the authorities of the municipality either to pay over taxes already collected for their debt or to levy and collect therefor.

The legislature of a State cannot take away rights created by former legislation for the security of debts owing by a municipality of the State or postpone indefinitely the payment of lawful claims until such time as the municipality is ready to pay them.

Act of November 5, of 1870 of State of Louisiana providing for registration and collection of judgments against the city of New Orleans so far as it delays the payment, or collection of taxes for the payment, of contract claims existing before the passage of the act is void as impairing the obligation of contracts within the meaning of the Federal Constitution.

119 Louisiana 623, reversed.

THE facts are stated in the opinion.

Mr. Charles Louque, and *Mr. J. D. Rouse*, with whom *Mr. William Grant* were on the brief, for plaintiff in error.

Mr. Frank B. Thomas for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

This case presents the question of the right of the relator, as receiver of the Board of Metropolitan Police of the Metropolitan Police District, consisting of the parishes of Orleans, Jefferson and St. Bernard and including the city of New Orleans, in the State of Louisiana, to compel an assessment, by mandamus, of taxes to pay a certain judgment recovered by the relator in his capacity as receiver, against the city of New Orleans, in the sum of $123,475.57, with interest from April 4, 1904.

On September 14, 1868, the general assembly of the State of Louisiana passed an act establishing a Metropolitan Police District, constituting the same of the parishes of Orleans, Jefferson and St. Bernard (including the city of New Orleans). Section 29 of that act provides:

"SEC. 29. Be it further enacted, etc., That the common councils of the cities of New Orleans, Jefferson City and Carrollton, and the police juries of the towns of Algiers and Gretna, and of the parishes of Orleans, Jefferson and St. Ber-

nard are hereby respectively empowered and directed annually to order and caused to be raised and collected by the tax upon the estates, real and personal, subject to taxation according to law, within the said cities and towns, the sums of money as aforesaid, annually estimated and apportioned as the share of such cities or parishes of the said total expenses of the Metropolitan Police District."

This act was supplemented by various statutes, and its provisions were in force until March 31, 1877, when it and various other acts relating to the Metropolitan Police District were repealed, and the city of New Orleans was authorized and empowered, through the mayor and board of administrators, to establish, organize and maintain a proper and sufficient police force.

On January 22, 1900, Louis A. Hubert was duly qualified as receiver of the Board of Metropolitan Police. On April 6, 1904, Hubert, as such receiver, began an action in the Civil District Court of the parish of Orleans, in which he averred that the city was indebted to him, as such receiver, in the sum of $411,884.89, with interest from April 3, 1880, and averred that, for various years, from 1869 to 1877 inclusive, the city of New Orleans had received and collected taxes for the maintenance of the Board of Metropolitan Police and the payment of its expenses, which amounts, although collected by the city, were never paid over to the Board of Metropolitan Police or its representatives. The petition averred that the Board of Metropolitan Police owed large amounts of money; that the whole of the indebtedness thus due from the city was necessary to pay the same. Upon issue made and trial had a judgment was rendered in favor of the receiver on May 18, 1905. The record of this judgment was made part of the record herein, and it appears therein that the Civil District Court took an account of the taxes collected for the years 1869 to 1877 inclusive, and not paid over for account of the Board of Metropolitan Police, and found the same to be the sum of $136,082.62, for which judgment was rendered

against the city of New Orleans. This judgment was modified by the Supreme Court of Louisiana on March 12, 1906, and affirmed after deducting the sum of $12,607.05, leaving a judgment in force for $123,475.57, with interest. *Hubert* v. *City of New Orleans*, 116 Louisiana, 507.

On April 23, 1906, a petition for mandamus was filed, in the present case, in the Civil District Court for the parish of Orleans. In that case the relator set up the recovery of the judgment in the state court; that under Act No. 5 of 1870 (to be noticed hereafter) no writ of *fieri facias* could be issued; that the city had no money or property liable to seizure, if such a writ could be issued; that the judgment had been registered under said act in the office of the city comptroller on March 26, 1906; that the basis upon which the said judgment was rendered was a contractual and statutory obligation imposed upon the city of New Orleans to levy, collect and pay to the Board of Metropolitan Police the sums apportioned to it under the act of 1868 creating the board and the acts amendatory thereto. The petition averred that the maximum rate of taxation for the years 1869–1877 inclusive had not been levied, and prayed a writ of mandamus requiring the city of New Orleans, through its mayor and council, to levy and pay over to the relator as receiver a tax of one mill on property within the city of New Orleans, or so much thereof as might be necessary to satisfy the judgment. The city appeared and answered, and claimed the benefit of Act No. 5 of the extra session of 1870, and that under § 29 of the act of 1868, above set forth, the city had levied the tax apportioned to the Board of Metropolitan Police, and that the city's power of taxation in the premises had been fully exercised and exhausted.

On November 12, 1906, the Civil District Court rendered a judgment dismissing the relator's petition for mandamus. Upon appeal the Supreme Court of Louisiana affirmed this judgment. *State* v. *Mayor &c. of New Orleans*, 119 Louisiana, 623. The present writ of error brings this judgment here for review.

In the opinion of the Supreme Court of Louisiana it appears that the basis of the judgment upon which the relator sued was held not to be contractual in its nature, and, further, that the State, having abolished the Metropolitan Police Board, the only standing of the relator for the purposes of this suit was as the representative of third persons who may have made contracts with the board which were dependent upon taxes receivable from the city for their fulfillment. The learned court then pointed out an apparent inconsistency between the petition for mandamus in this case and the petition on which the original judgment was awarded, and said, on p. 630:

"In the brief presented on behalf of relator, for the purposes of the present application, his counsel say: 'This is not a proceeding to compel the city of New Orleans to levy a special police tax. The city has actually levied and collected the tax. The tax levy having been made, in compliance with the statute, and having been collected by the city, gave rise to a cause of action in favor of the receiver to enforce its payment to the Board of Metropolitan Police. This cause of action, therefore, could not have arisen until the city had levied and collected the tax and refused to pay over the proceeds.'

"Assuming that the position that the relator now wishes to occupy is correctly stated in the foregoing excerpt, we take it to be conceded that the city has levied and collected all the taxes authorized or required by the metropolitan police legislation; and, further assuming that the relator represents the holders of the indebtedness (of the police board) referred to in the petition upon which he obtained his judgment (though it is not so alleged in the application now being considered), the question still remains: Does he disclose and make out a case which entitles him to a writ of mandamus to compel the city to levy and collect an additional tax in order to make good its failure to pay over the tax already levied and collected?"

The court, therefore, treated the petition for mandamus

as one based upon a judgment to recover taxes which the city had collected and not paid over. Considering the case in this aspect, the learned court held that the power to levy taxes for the various years for Metropolitan Police District purposes had been exhausted, and that there was no power to relevy such tax; and, further, that as to liabilities incurred after the passage of Act No. 5 of 1870, that act was a defense to the action; and the court reached the conclusion that the application for mandamus must fail, as it was an attempt to require the city to exert powers of taxation already exhausted, and which no longer existed.

In order to review in this court the judgment of a state court because of the provision of the Federal Constitution against state legislation impairing the obligation of a contract, the impairment must be by some subsequent legislation of the State which has been upheld or given effect in the judgment of the state court sought to be reviewed. *Bacon* v. *Texas*, 163 U. S. 207. While this is true, this court is not limited to the consideration of the mere language of the opinion, but will examine the substance and effect of the decision. *McCullough* v. *Virginia*, 172 U. S. 102, 116.

It appears from the documents attached to and made part of the record that the indebtedness represented by the receiver in this case was for outstanding debts of the Metropolitan Police Board in the years 1869–1877 inclusive, a considerable part of it being for salaries of policemen, and the Supreme Court of Louisiana has held that the taxes of several years, from 1869 to 1876 inclusive, constitute one fund out of which the warrants of the defunct Metropolitan Police Board are payable. *Brittin* v. *The City of New Orleans*, 106 Louisiana, 469.

A number of decisions in this court have settled the law to be that where a municipal corporation is authorized to contract, and to exercise the power of local taxation to meet its contractual engagements, this power must continue until the contracts are satisfied, and that it is an impairment of an ob-

ligation of the contract to destroy or lessen the means by which it can be enforced. In the case of *Wolff* v. *New Orleans*, 103 U. S. 358, the subject was given full consideration, and the doctrine thus summarized by Mr. Justice Field, speaking for the court (p. 365):

"It is true that the power of taxation belongs exclusively to the legislative department, and that the legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States, and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the Constitution, and must be disregarded—treated as if never enacted—by all courts recognizing the Constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. . . (p. 367). The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the State, and to those of its agents acting under its authority, as well as to contracts between individuals. And that obligation is impaired, in the sense of the Constitution, when the means by which a contract at the time of its execution could be enforced, that is, by which the parties could be *obliged* to perform it, are rendered less efficacious by legislation operating directly upon those means."

In *Ralls County Court* v. *United States*, 105 U. S. 733, it was

held that, after a debt was created upon certain bonds, laws passed depriving the county court of the power to levy the tax which it possessed when the bonds were issued were invalid. In that case the suit was brought upon certain coupons, and it was held that the coupons were merged in the judgment, but nevertheless carried with them into the judgment all the remedies which in law formed a part of their contract obligation, and that those remedies might still be enforced, notwithstanding the changes in the form of the debt.

In dealing with the feature important to be considered in this case the court, speaking by Mr. Chief Justice Waite, said (p. 738):

"It follows from this that all laws of the State which have been passed since the bonds in question were issued, purporting to take away from the county courts the power to levy taxes necessary to meet the payments, are invalid, and that, under the well-settled rule of decision in this court, the Circuit Court had authority by mandamus to require the county court to do all the law, when the bonds were issued, required it to do to raise the means to pay the judgment, or something substantially equivalent. The fact that money has once been raised by taxation to meet the payment, which has been lost, is no defense to this suit. The claim of the bondholders continues until payment is actually made to them. If the funds are lost after collection, and before they are paid over, the loss falls on the county and not the creditors. The writ as issued was properly in the alternative to pay from the money already raised, or levy a tax to raise more. It will be time enough to consider whether the command of the writ that the court *cause the tax to be collected* is in excess of the requirements of the law, when the justices of the court are called on to show why they have not obeyed the order."

We think the doctrine of the *Ralls County case* when applied to the facts in the case at bar is decisive of this feature of it. The city levied and afterwards collected taxes for the benefit of the Metropolitan Police Board. The Police Board

had issued its outstanding warrants for salaries, etc., upon the faith of the exercise of the taxing power for their payment. The contract creditors of the Police Board were entitled to rely upon the benefit of the laws imposing taxation to make their obligations effectual. They could not, constitutionally, be deprived of such benefit. While it is true that the Police Board made the contracts, the only means of keeping them was through the exercise of the power of taxation conferred by law upon the city. The city exerted its power, as required by law, levied and collected the taxes, but applied them to other purposes, and has failed to turn them over upon demand. We think the power to levy these taxes still exists. As to the creditor, deprived thereof by the action of the city, it is as though such power had never been exercised. The city still has the power to levy these taxes for the benefit of the persons for whom they were intended, and who had a contract right to the exertion of the remedies for the satisfaction of their claims by the levy and collection of taxes existing when their debts accrued, which right could not be taken away from them by subsequent legislation. The power of taxation conferred by law entered into the obligation of the contracts, and any subsequent legislation withdrawing or lessening such power, leaving the creditors without adequate means of satisfaction, impaired the obligation of their contracts within the meaning of the Constitution. *Memphis* v. *United States*, 97 U. S. 293; *Van Hoffman* v. *City of Quincy*, 4 Wall. 535; *Seibert* v. *Lewis*, 122 U. S. 284; *Mobile* v. *Watson*, 116 U. S. 289; *Scotland County Court* v. *Hill*, 140 U. S. 41.

We come now to the question: Can Act No. 5 of 1870 be constitutionally applied so as to preclude the remedy sought in behalf of the receiver in this case? This act has been at least twice before this court. In the case of *Louisiana* v. *New Orleans*, 102 U. S. 203, 205, the provisions of the act were summarized by Mr Justice Field, speaking for the court, as follows:

"That act divests the courts of the State of authority to

allow any summary process or mandamus against the officers of the city of New Orleans to compel the issue and delivery of any order or warrant for the payment of money, or to enforce the payment of money claimed to be due from it to any person or corporation; and requires proceedings for the recovery of money claimed to be owing by the city to be conducted in the ordinary form of action against the corporation, and not against any department, branch, or officer thereof. The act also provides that no writ of execution or *fieri facias* shall issue against the city, but that a final judgment against it, which has become executory, shall have the effect of fixing the amount of the plaintiff's demand, and that he may cause a certified copy of it, with his petition and the defendant's answer and the clerk's certificate that it has become executory, to be filed in the office of the controller, and that thereupon it shall be the duty of the controller or auditing officer to cause the same to be registered, and to issue a warrant upon the treasurer or disbursing officer of the corporation for the amount due thereon, without any specific appropriation therefor, provided there be sufficient money in the treasury specially designated and set apart for that purpose in the annual budget or detailed statement of items of liability and expenditures pursuant to the existing or a subsequent law.

"The act further provides that in case the amount of money designated in the annual budget for the payment of judgments against the city of New Orleans shall have been exhausted, the common council shall have power, if they deem it proper, to appropriate from the money set apart in the budget or annual estimate for contingent expenses, a sufficient sum to pay the same; but if no such appropriation be made, then that all judgments shall be paid in the order in which they shall be filed and registered in the office of the controller of the city from the first money next annually set apart for that purpose."

In that case it was held that, in so far as the act requires registration of a judgment, it did not impair existing remedies

for its collection, and must be complied with, Mr. Justice Field saying (p. 206):

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb, *Qui cito dat bis dat*—,he who gives quickly gives twice,—has its counterpart in a maxim equally sound—,*Qui serius solvit, minus solvit,*—he who pays too late pays less. Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition. If, therefore, we could see that such would be the effect of the provision of the act of the State, No. 5 of 1870, requiring judgments to be registered with the controller before they are paid, we should not hesitate to declare the provision to be invalid. But we are not able to see anything in the requirement which impedes the collection of the relator's judgments, or prevents his resort to other remedies, if their payment be not obtained. The registry is a convenient means of informing the city authorities of the extent of the judgments, and that they have become executory, to the end that proper steps may be taken for their payment. It does not impair existing remedies."

The act was again before this court in the case of *Wolff* v. *New Orleans*, 103 U. S. 358. In that case the act was fully analyzed, and it was pointed out that the payment of judgments thereunder was extremely uncertain and depended entirely upon the discretion of the council, after providing for other municipal purposes and expenses, and was in direct violation of powers of taxation which existed at the time the debt sued for in that case was created, and could not be constitutionally enforced as against such claim.

Applying the principles thus announced to the case at bar,

we think Act No. 5 of 1870, postponing indefinitely the payment of relator's judgment, if given effect, would deprive the receiver, as the representative of the interested creditors, of the benefit of the right of taxation for the payment of their claims which existed before the passage of the act of 1870. By § 29 of the act of September 14, 1868, above quoted, the common council of the city of New Orleans and others were empowered and directed annually to order and caused to be raised and collected by a tax upon the estates, real and personal, subject to taxation within said city, the sums of money annually estimated and apportioned as the share of such city for the total expense of the Metropolitan Police District. This act was followed by other supplementary and amendatory acts to make the purpose more effectual, and was not repealed until the act of March 31, 1877, which abolished the Metropolitan Police Board. This repeal could not take away the right of the creditors of the Metropolitan Police Board to have taxation for their benefit. Nor could the act of 1870 constitutionally take away the rights created by former legislation for the security of their debts and postpone indefinitely the payment of their claims until such time as the city was ready and willing to pay them.

We are of opinion that the writ of mandamus should have been awarded in favor of the relator, requiring the city to pay over the taxes for which the judgment was rendered, or to levy and collect a tax therefor for the benefit of the relator as receiver. The judgment of the Supreme Court of Louisiana is reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

CALIGA *v.* INTER OCEAN NEWSPAPER COMPANY.

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

No. 22. Argued November 5, 1909.—Decided November 29, 1909.

Statutory copyright is not to be confounded with the exclusive property of the author in his manuscript at common law.

In enacting the copyright statute Congress did not sanction an existing right but created a new one dependent on compliance with the statute.

Under existing copyright law of the United States there is no provision for filing amendments to the first application; and, the matter being wholly subject to statutory regulation, copyright on a second application cannot be sustained.

The statutory limit of copyright cannot be extended by new applications.

157 Fed. Rep. 186, affirmed.

THE facts are stated in the opinion.

Mr. Otto Raymond Barnett, with whom *Mr. Clarence T. Morse* was on the brief, for plaintiff in error:

Copyright exists at common law as an incident to ownership. It may be lost by publication. The copyright statutes specify what steps must be taken to avoid such loss upon publication. *Myers* v. *Callaghan*, 5 Fed. Rep. 726; *Wheaton* v. *Peters*, 8 Peters, 591; *Board of Trade* v. *Commission Co.*, 103 Fed. Rep. 902; *Millar* v. *Taylor*, 4 Burr. 2303; *Donaldson* v. *Becket*, 4 Burr. 2408.

Copyright law is to be construed liberally and beneficially. Nothing but a general publication or an express surrender of his rights will affect a proprietor's common-law copyright property. *Allan* v. *Black*, 56 Fed. Rep. 754; *Myers* v. *Callaghan*, 128 U. S. 617.

A general publication is one which gives an express or implied right to copy the thing published.

An exhibition of a painting under conditions which do not

give to the public a right to copy does not amount to a general publication. *Ladd* v. *Oxnard*, 75 Fed. Rep. 730; *Werckmeister* v. *American Lithographic Co.*, 134 Fed. Rep. 321.

A deposit of a photograph in the Library of Congress in compliance with the copyright statutes merely serves to identify the thing to be copyrighted and, not giving any express or implied right to copy, does not amount to a publication.

Under the statute the only condition which will prevent obtaining a copyright is prior publication. Rev. Stat., §§ 4952, 4956. A copyright registration may be abandoned by failure to publish within a reasonable time after such registration. In such event the common-law right never ceases. *Boucicault* v. *Hart*, Fed. Cas. No. 1,692; *Carillo* v. *Shook*, Fed. Cas. No. 2,407.

If, therefore, a registration may be abandoned by failure to publish within a reasonable time, it may also be abandoned by a subsequent re-registration in the absence of any intermediate publication. *Osgood* v. *Aloe Inst. Co.*, 69 Fed. Rep. 291.

Common law copyright and statutory copyright cannot coexist, the first only terminates upon a general publication, the second only begins upon a general publication. Prior to such publication, common-law copyright remains unimpaired notwithstanding any registration which may have been made with the Librarian of Congress for the purpose of obtaining the protection of statutory copyright. *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 347; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105; *Boucicault* v. *Hart*, Fed. Cas. No. 1,692; *Carillo* v. *Shook*, Fed. Cas. No. 2,407.

The title of a copyrighted publication must correspond with the title filed for purpose of copyright with the Librarian of Congress. *Mifflin* v. *White*, 190 U. S. 260.

The copyright statute providing a penalty for infringement is in form penal, but is remedial in intent. *Dwight* v. *Appleton*, Fed. Cas. No. 4215.

Plaintiff's only legal remedy for copyright infringement is

under Rev. Stat., § 4965, for the penalty there provided. *Walker* v. *Globe Newspaper Co.*, 130 Fed. Rep. 594.

Publication by a licensee of a copyrighted work without marking such reproduction "copyrighted," etc., does not invalidate the copyright. *Press Assn.* v. *Daily Story Co.*, 120 Fed. Rep. 766.

Any unauthorized reproduction of a copyrighted painting, or of the substance thereof, whether by a newspaper cut or otherwise, is an infringement of the copyright. *Werckmeister* v. *P. & B. Mfg. Co.*, 63 Fed. Rep. 445, 449; *Schumacher* v. *Schroenke*, 30 Fed. Rep. 690; *Falk* v. *Donaldson*, 57 Fed. Rep. 32; *Springer Co.* v. *Falk*, 59 Fed. Rep. 707; *Sanborn Co.* v. *Dakin Co.*, 39 Fed. Rep. 266.

The variance between the date of copyright registration pleaded under a *videlicet*, and the dates proven was not fatal, even if the registration of November, 1901, were a nullity. Greenleaf on Evidence, § 61; Stephen on Pleading, 292; Rawle's Bouvier, 1195; 1 Chitty Pl. 257; *Allen* v. *Black*, 56 Fed. Rep. 754; *Myers* v. *Callaghan*, 128 U. S. 617; *Salt Lake City* v. *Smith*, 104 Fed. Rep. 467; *Wheeler* v. *Read*, 36 Illinois, 85; *Beaver* v. *Slanker*, 94 Illinois, 175, 185; *Reinback* v. *Crabtree*, 77 Illinois, 188; *Long* v. *Conklin*, 75 Illinois, 33; *United States* v. *Le Baron*, 4 Wall. 648; *Taylor* v. *Bank of Alexandria*, 5 Leigh (Va.), 512; *Martin* v. *Miller*, 3 Missouri, 99; *Henry* v. *Tilson*, 17 Vermont, 479.

Mr. James J. Barbour, with whom *Mr. Clarence A. Knight* was on the brief for defendant in error:

Where two copyrights of the same painting are procured by the painter thereof, the second copyright is void. *Mifflin* v. *Dutton*, 112 Fed. Rep. 1004; *Lawrence* v. *Dana*, 15 Fed. Cas. No. 8,136; *Black* v. *Murray*, 9 Sc. Sess. Cas., 3d Ser., 341; *Thomas* v. *Turner*, 33 Ch. Div. 292; Scrutton, Law of Copyright, 119; Drone on Copyright, 146; Macgillivray on Copyrights, 27.

A patentee cannot have two patents for the same inven-

tion. 22 Am. & Eng. Ency. 314; *Miller* v. *Eagle Mfg. Co.*, 151 U. S. 186; *Suffolk Co.* v. *Hayden*, 3 Wall. 315; *James* v. *Campbell*, 104 U. S. 356; *Mosler Safe Co.* v. *Mosler*, 127 U. S. 354; *McCreary* v. *Pa. Canal Co.*, 141 U. S. 459; *Underwood* v. *Gerber*, 149 U. S. 224.

The reasons are that the power to create a monopoly is exhausted by the first grant, and a new patent for the same invention would operate to extend the monopoly beyond the period allowed by law. *Odiorne* v. *Amesbury Nail Factory*, 2 Mason, 28; *Miller* v. *Eagle Mfg. Co.*, 151 U. S. 186.

Whatever rights are possessed by the proprietor of a copyright are derived from the copyright act and not from the common law. *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1; *S. C.*, 147 Fed. Rep. 226; *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339; *S. C.*, 147 Fed. Rep. 15; *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356; *Wheaton* v. *Peters*, 8 Pet. 591; *Stevens* v. *Glading*, 17 How. 447; *Banks* v. *Manchester*, 128 U. S. 244; *Thomas* v. *Hubbard*, 131 U. S. 123; *Holmes* v. *Hurst*, 174 U. S. 82; *Palmer* v. *DeWitt*, 47 N. Y. 532.

The painting was published prior to the date of the application for the copyright of November 7. The procurement of a copyright is a publication within the meaning of the statute, and vitiates a later copyright. *Jewelers' Agency* v. *Jewelers Pub. Co.*, 155 N. Y. 241; *Bobbs-Merrill Co.* v. *Straus*, 147 Fed. Rep. 15.

The selling or offering for sale of photographs of a painting is a publication of the painting. *Am. Tobacco Co.* v. *Werckmeister*, 146 Fed. Rep. 375.

Compliance with the statutory requirement that the notice of copyright shall be placed upon all copies sold must be pleaded and proved as a prerequisite to an action for recovery of penalties for an infringement of the copyright. *Ford* v. *Blaney Amusement Co.*, 148 Fed. Rep. 642; *Falk* v. *Gast Lith. & Eng. Co.*, 40 Fed. Rep. 168; *Mifflin* v. *Dutton*, 190 U. S. 265; *Higgins* v. *Keuffel*, 140 U. S. 428; *Thompson* v. *Hubbard*, 131 U. S. 123.

Where a painter by repainting a copyrighted picture effects a substantial change, the original copyright does not protect the picture as repainted. Rev. Stat., § 4959, and see Fed. Stat. Ann.; *Lawrence* v. *Dana*, 15 Fed. Cas. No. 8,136; Drone on Copyrights, 146; 9 Cyc. 924.

In an action to recover for an infringement of a copyright it must be shown that the publication complained of is a copy of or copied from the copyrighted painting. Reproduction of a copyrighted photograph of a painting is not an infringement of the copyright on the painting. *Champney* v. *Haag*, 121 Fed. Rep. 944.

The insertion or impression of a copyright notice upon a painting before applying for a copyright is prohibited. Rev. Stat., § 4963, and see Fed. Stat. Ann.

A variance can only be where there is a clear discrepancy between averment and proof. 29 Am. & Eng. Ency. 580; *Walford* v. *Anthony*, 21 E. C. L. 75.

A brief by *Mr. E. L. Coburn* and *Mr. Josiah M. McRoberts* was filed by leave of the court for the Tribune Company as *amicus curiæ* to which a reply brief was filed by the counsel for plaintiff in error.

Mr. Justice Day delivered the opinion of the court.

The plaintiff in error, also plaintiff below, brought an action in the Circuit Court of the United States for the Northern District of Illinois to recover damages under § 4965 of the Revised Statutes of the United States, because of the publication by the defendant of more than one thousand copies of a newspaper containing a picture of a painting, copyrighted by the plaintiff. The plaintiff alleged that he had in all respects complied with the Revised Statutes of the United States by causing to be deposited, on or about the fifth day of November, 1901, a photograph and a description of the painting for the purpose of having it copyrighted, which deposit was before

publication of the same in the United States or in any foreign country. By reason of the premises and the compliance with the statutes of the United States the plaintiff claimed to be entitled to a copyright for the painting for the term of twenty-eight years from and after the recording of the title thereof by the Librarian of Congress on November 7, 1901.

There were other allegations, and proofs tending to show a publication of a copy of the photograph in the newspaper of the defendant company. In the course of the trial it appeared that the plaintiff had deposited a description and photograph of the same painting with the Librarian of Congress on October 7, 1901, for the purpose of securing a copyright. The trial court charged the jury, as a matter of law, that the plaintiff had brought his suit upon the wrong copyright, and therefore directed a verdict in favor of the defendant. Upon writ of error the Circuit Court of Appeals for the Seventh Circuit affirmed this judgment. *Caliga* v. *Inter Ocean Newspaper Co.*, 157 Fed. Rep. 186. The case is now here for review.

The photographs filed upon the two applications for a copyright are identical. Nor is any substantial change in the painting shown; the copyrights undertaken to be secured were, therefore, upon the same painting. The difference is that in the copyright sued upon, that of November 7, 1901, the title and description are, "The Guardian Angel. Portrait of a young girl sitting, hair arranged smoothly over the ears, hair parted in the middle. Her guardian angel stands behind her, one hand resting on her left shoulder, the other on her right arm." The description accompanying the application for the copyright of October 7, 1901, is, "Maidenhood; A Young Girl seated beside a Window; An Angel stands behind her."

The question in this case is: Is the second attempt to copyright valid and effectual, or was the court right in charging in substance that it was void and of no effect?

We have had such recent and frequent occasions to consider the nature and extent of the copyright laws of the United States, as the same were before the recent revision, which took

effect July 1, 1909, that it is unnecessary to enter into any extended discussion of the subject now. *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339; *White-Smith Music Pub. Co.* v. *Apollo Company*, 209 U. S. 1; *American Tobacco Company* v. *Werckmeister*, 207 U. S. 284; *Bong* v. *Campbell Art Co.*, 214 U. S. 236. In these cases the previous cases in this court were cited and reviewed.

As a result of the decisions of this court certain general propositions may be affirmed. Statutory copyright is not to be confounded with the common-law right. At common-law the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner's common-law right was lost. At common-law an author had a property in his manuscript, and might have an action against any one who undertook to publish it without authority. The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period. This statutory right is obtained in a certain way and by the performance of certain acts which the statute points out. That is, the author having complied with the statute and given up his common-law right of exclusive duplication prior to general publication, obtained by the method pointed out in the statute an exclusive right to multiply copies and publish the same for the term of years named in the statute. Congress did not sanction an existing right; it created a new one. *Wheaton* v. *Peters*, 8 Pet. 591, 661. Those violating the statutory rights of the author or proprietor are subject to certain penalties, and to the payment of certain damages, as is provided in the statute.

Section 4952 of the Revised Statutes as amended in 1891 (3 Comp. Stat., § 3406), provides that the proprietor of any painting, upon compliance with the provisions of the copyright act, has the sole right of publishing, copying and vending the same. By § 4953 we find that this right exists for the period of twenty-eight years from the recording of the title of the copyright, with a right to certain extensions after the ex-

piration of the twenty-eight years, as provided in § 4954. In § 4956 we find that a copyright is secured by depositing, on or before the day of publication, in this or any foreign country, in case of a painting, a photograph of the painting, accompanied by a description thereof. There is absolutely no provision in the statutes for a second filing of the photograph or description, nor is there any provision as to filing any amendments thereto, and as the matter is wholly the subject of statutory regulation, we are at a loss to perceive by what authority any second application for the same painting, with a view to securing a copyright thereon, can be sustained. If it could be, we see no reason why the proprietor might not thus extend the limit of copyright fixed in the statute by an indefinite number of new applications and filings with the Librarian.

The argument of the plaintiff in error is that, inasmuch as the statutory copyright is not complete before a publication of the subject-matter thereof, and no publication being shown prior to the second application, it was within his power, while his rights were thus inchoate, to make the second application for the copyright, that of November 7, 1901. Assuming that these premises are correct and that publication was requisite to complete the right to be secured by the statute, it by no means follows that a second copyright is warranted by the statute. On the other hand, as we have already stated, the statute is barren of any provisions to that end. There is no provision, as there is in the patent law, for an amended application, and under the patent law it has been held that there is no authority for double patenting. *Miller* v. *Eagle Manufacturing Company*, 151 U. S. 186. This is so because the first patent exhausts the statutory right secured by the act of Congress.

In this case the plaintiff had complied with all the terms of the statute on October 7, 1901. He then attempts to take out a new copyright under the same statute on November 5, 1901, for the same painting, by depositing a new description of the painting and the same photograph. It is true there is a change

in the title of the painting, and a slight change in the description, but these matters are immaterial and cannot enlarge the right of the plaintiff. We think the same principle, in this aspect, controls, as in the case of a patent. The plaintiff had already exhausted his statutory right and the second attempt availed him nothing.

These views render it unnecessary to consider whether the record shows a publication of the painting prior to November 5, 1901. For the reasons stated, we are of opinion that the Circuit Court of Appeals was right in holding that the attempted duplication of the copyright was void and of no effect.

Affirmed.

UNITED STATES *v.* STEVENSON

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 292. Argued October 14, 15, 1909.—Decided November 29, 1909.

On writ of error taken by the United States under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, where the indictment was dismissed as not sustained by the statute and also as bad on principles of general law, this court can only review the decision so far as it is based on the invalidity or construction of the statute; it cannot consider questions of general law. *United States* v. *Keitel*, 211 U. S. 370.

In determining whether a special remedy created by a statute for enforcing a prescribed penalty excludes all other remedies, the intention of Congress may be found in the history of the legislation, and, in the absence of clear and specific language, Congress will not be presumed to have excluded the Government from a well-recognized method of enforcing its statutes.

The fact that a penal statute provides for enforcing the prescribed penalty of fine and forfeiture by civil suit does not necessarily exclude enforcing by indictment; and so held in regard to penalty for assisting the immigration of contract laborers prescribed by §§ 4 and 5 of the Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898.

Although the term misdemeanor has at times been used in the statutes

of the United States without strict regard to its common-law meaning a misdemeanor at all times, has been a crime, and a change in a statute by which that which before was merely unlawful is made a misdemeanor will not be presumed to be meaningless.

When the Government prosecutes by indictment for a penalty that it might sue for in a civil action the person proceeded against is entitled to all constitutional protection as to production of witnesses against him and a verdict cannot be directed against him as might be the case in a civil action.

THE facts are stated in the opinion.

The *Solicitor General* for the United States:

On the construction of the statute: This court has jurisdiction to review the action of the District Court in sustaining the demurrer to the second count of the indictment, which charged defendants with assisting contract laborers to migrate from Canada into the United States in violation of § 4 of the Immigration Act.

The Criminal Appeals Act, in allowing immediate appeal when the particular questions of law enumerated in the act have been decided against the Government, intends unquestionably to rid the Government of the obstruction of criminal justice through mistakes of the inferior courts on such questions of law. There is nothing in this act which forbids the idea that in such case as the present the Government can have a review by this court, either of the question of statutory construction alone, or of both that question and the other question on which the lower court rested its judgment; nor does the act limit this court's consideration to the single question which gives the right of appeal.

In cases where the question which gives the right of appeal requires determination, but the actual decision of another point by the lower court equally led to the judgment below—so that this court's decision of the question which gives the right of appeal must be supplemented by decision of the other question by the lower court in order to ascertain what conse-

quences upon the judgment below this court must attach to its own decision of the question which gives the right of appeal—each question made by the lower court a basis of its judgment is involved in the appeal. Under the circumstances of this case, the court ought to pass upon both questions actually decided below.

When this court finds the lower court right upon the point which made direct appeal to this court allowable, it can at once affirm the judgment of the lower court without considering any other question raised or decided in the lower court. *United States* v. *McDonald*, 207 U. S. 120; *United States* v. *Mason*, 213 U. S. 120. And when this court finds the lower court wrong upon the point which made appeal allowable, it can at once reverse the judgment of the lower court without considering any other questions raised in the lower court but not actually decided by it. *United States* v. *Bitty*, 208 U. S. 393; *United States* v. *Keitel*, 211 U. S. 370.

Indictment is an allowable mode of prosecution for violating § 4 of the Immigration Act of 1907; and the action of debt allowed by § 5 is not exclusive. The wording of § 5 as to action of debt is merely permissive and does not prohibit indictment; and no intention to deny the Government the ordinary remedies of indictment or information for prosecution for a penalty will be inferred. *Savings Bank* v. *United States*, 19 Wall. 227, 238, 239; *Crofton's Case*, 1 Mod. 34; *United States* v. *Stocking*, 87 Fed. Rep. 857.

Either indictment or information will lie under a statute creating an offense punishable by penalty and which prescribes no remedy or allows some special remedy not intended to be exclusive; because they are ordinary and approved methods of prosecution for an offense not above a misdemeanor.

As to indictment: 2 Hawk. P. C., ch. 25, § 4; 1 Chitty Crim. Law (Am. Ed., 1847), *162; Harris's Crim. Law (London, 101), p. 333; *United States* v. *Chouteau*, 102 U. S. 603, 610.

As to information: 2 Hawk. P. C., ch. 26, §§ 1, 2; 1 Chitty's Crim. Law, *844, 845; 4 Bl. Com. 309, 310; Harris's Crim.

Law, p. 343; *United States* v. *Buzzo,* 18 Wall. 125; *Ex parte Wilson,* 114 U. S. 417, 424, 425.

Mr. Herbert Parker, Mr. Charles C. Milton and *Mr. Henry H. Fuller,* for defendants in error, submitted:

On the construction of the statute: A violation of § 4 of the Immigration Act cannot be prosecuted by indictment. While made a misdemeanor no penalty is prescribed in this section, and the next section provides for recovery of a money penalty by suit. This constitutes a debt which is recoverable only by civil action.

It is a universal rule of statutory interpretation that, where a statute prescribes a particular mode of procedure for the enforcement of a penalty for an offense therein created, that mode of procedure must be followed. The word "may" in the statute is applicable to the parties who are permitted to maintain the civil action, any one of whom may so proceed. 1 Wharton's Crim. Law, § 25; *United States* v. *Moore,* 11 Fed. Rep. 248; *United States* v. *Howard,* 17 Fed. Rep. 638; *United States* v. *Craft,* 43 Fed. Rep. 374.

We have, therefore, the case of an act described as a misdemeanor in which there is no provision whatsoever for punishment, except by a penalty to be recovered by civil action. There is no alternative punishment or procedure mentioned in this statute, nor is there any general statute providing for a penalty for misdemeanor.

It follows, therefore, that the provisions of the statute providing a civil process to enforce the penalties for violation of § 4 are exclusive, and no indictment will lie. *United States* v. *McElroy,* 115 Fed. Rep. 252; *Moller* v. *United States,* 57 Fed. Rep. 490, 495.

It is obvious from the history of § 4 that Congress may have intended to change the character of the offense set forth by said section from the civil to the criminal side, for § 4 of the Immigration Act of March 3, 1903, characterizes the offense as "unlawful," and, in the present section, which is, in effect, a

reënactment of the act of 1903, a change is made by substituting the words "a misdemeanor" for the word "unlawful," and it is submitted that the mere characterization of an act as a misdemeanor, without some accompaniment rendering such offense punishable by criminal process, cannot avail to alter the technical and true character of such offense, or create by implication an indictable crime.

The nature of the statute is essentially penal, and no loose construction is permissible. The forfeiture for the offense and the method by which such forfeiture may be secured to the United States are prescribed in the same section of the statute, and it is submitted that the procedure therein set forth must be followed.

Unless a criminal procedure is provided in terms, none such can be called to the assistance of an intent, however manifest it may be made to appear. A crime can be created only by express declaration of a statute. It cannot take form, through colorable suggestions of intent, nor can it rest upon implications, especially where such are in conflict with the express provision of the statute.

MR. JUSTICE DAY delivered the opinion of the court.

This case comes to this court under the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, providing for writs of error on behalf of the United States in certain criminal cases. The defendants in error were indicted for the violation of the Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898, and charged with unlawfully assisting certain alien contract laborers to migrate from Canada to the United States, in violation of the statute. The District Court, upon demurrer to the indictment, held the second count thereof to be invalid, because the sole remedy for a violation of the statute was in a civil action for the recovery of a penalty under § 5 of the act. The court also held the second count bad because it did not sufficiently specify the acts of assistance constituting

the alleged offense. Rulings were made concerning the first count not involved in this proceeding.

From this statement it is apparent that the court below proceeded upon two grounds, one of which concerned the construction of the statute, the other of which decided the invalidity of the indictment upon general principles of criminal law. We are therefore met at the threshold of the case with the question whether a writ of error will lie in such a case as the one under consideration, under the provisions of the Criminal Appeals Act of 1907.

This statute was before the court in the case of *United States* v. *Keitel*, 211 U. S. 370, and is given in full in the margin of the report of that case. In that case it was held that the purpose of the statute being to permit a review in this court of decisions based upon the invalidity or construction of the criminal statutes of the United States, the decisions of the lower courts were intended to be reviewed only upon such questions, and the whole case could not be brought here for review. In the *Keitel case* it was insisted that this court should consider the validity of the indictment upon questions of general law not decided in the court below. We are here confronted with a case in which a decision of the court below sustaining a demurrer to an indictment involves not only the construction of a Federal statute, but another ground upon which the decision was also rested, which involves the sufficiency of the indictment on general principles.

The object of the criminal appeals statute was to permit the United States to have a review of questions of statutory construction in cases where indictments had been quashed, or set aside, or demurrers thereto sustained, with a view to prosecuting offenses under such acts when this court should be of opinion that the statute, properly construed, did in fact embrace an indictable offense. Inasmuch as the United States could not bring such a case here after final judgment, it was intended to permit a review of such decisions as are embraced within the statute, at the instance of the Government, in order to have a

final and determinative construction of the act and to prevent a miscarriage of justice if the construction of the statute in the court below was unwarranted.

In the *Keitel case* this court said (211 U. S. 398):

"That act [of March 2, 1907], we think, plainly shows that in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides."

As the question of general law involved in the decision of the court below is not within either of the classes named in the statute, giving a right of review in this court, we must decline to consider it upon this writ of error.

We come now to consider the construction of the statute and the validity of the indictment in that respect. Sections 4 and 5 of the Immigration Act under consideration are given in the margin.[1]

[1] SEC. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this act.

SEC. 5. That for every violation of any of the provisions of section four of this act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

A reading of these sections makes it apparent that the act makes it a misdemeanor to assist or encourage the importation of contract laborers, and that violations thereof may be punished with forfeiture and payment of $1,000 for each offense, which, it is provided, may be sued for and recovered by the United States, or by any person bringing the action, as debts of like amounts are recovered in the courts of the United States; and it is made the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

The contention of the defendants in error is that the action for a penalty is exclusive of all other means of enforcing the act, and that an indictment will not lie as for an alleged offense within the terms of the act. The general principle is invoked that where a statute creates a right and prescribes a particular remedy that remedy, and none other, can be resorted to. An illustration of this doctrine is found in *Globe Newspaper Company* v. *Walker*, 210 U. S. 356, in which it was held that in the copyright statutes then in force Congress had provided a system of rights and remedies complete and exclusive in their character. This was held because, after a review of the history of the legislation, such, it was concluded, was the intention of Congress.

The rule which excludes other remedies where a statute creates a right and provides a special remedy for its enforcement rests upon the presumed prohibition of all other remedies. If such prohibition is intended to reach the Government in the use of known rights and remedies, the language must be clear and specific to that effect. *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 238, 239. In the present case, if it could be gathered from the terms of the statute, read in the light of the history of its enactment, that Congress has here provided an exclusive remedy intended to take from the Government the right to proceed by indictment, and leaving to it only an action for the penalty, civil in its nature, then no indictment will lie, and the court below was correct in its conclusion.

It is undoubtedly true that a penalty of this character, in the absence of statutory provisions to the contrary, may be enforced by criminal proceedings under an indictment. The doctrine was stated as early as *Adams* v. *Woods*, 2 Cranch, 336, 340, wherein Mr. Chief Justice Marshall said:

"Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information. . . . In this particular case, the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie."

In *Lees* v. *United States*, 150 U. S. 476, 479, the doctrine was laid down that a penalty may be recovered by indictment or information in a criminal action, or by a civil action in the form of an action for debt. It is to be noted that this statute (§ 5 of the Immigration Act) does not in terms undertake to make an action for the penalty an exclusive means of enforcing it, and only provides that it may be thus sued for and recovered. There is nothing in the terms of the act specifically undertaking to restrict the Government to this method of enforcing the law. It is not to be presumed, in the absence of language clearly indicating the contrary intention, that it was the purpose of Congress to take from the Government the well-recognized method of enforcing such a statute by indictment and criminal proceedings.

When we look to the history of the act we think it becomes manifest that Congress did not so intend. The Immigration Act of March 3, 1903, c. 1012, 32 Stat. 1213, was amended by the act of February 20, 1907, c. 1134, 34 Stat. 898, now under consideration. The original act made it unlawful to assist or encourage the importation or migration of certain aliens into the United States. The amended act declares that such assistance, etc., shall be a misdemeanor. It is not to be presumed that this change is meaningless, and that Congress had no purpose in making it. Nor can we perceive any purpose in making the change except to manifest the intention of Con-

gress to make it clear that the acts denounced should constitute a crime which would carry with it the right of the Government to prosecute as for a crime. This term "misdemeanor" has been generally understood to mean the lower grade of criminal offense as distinguished from a felony. It is true that the term has often been used in the statutes of the United States without strict regard to its common-law meaning, and sometimes to describe offenses of a high grade, which have been declared in the statutes to be misdemeanors. In the statutes of the States the term has generally been defined as embracing crimes not punishable by death or imprisonment in the penitentiary. And we may note that the new penal code of the United States which will go into effect on January 1, 1910 (§ 335, c. 321, 35 Stat. 1088), provides that all offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be termed felonies; all other offenses shall be termed misdemeanors. But at all times a misdemeanor has been a crime. *Commonwealth of Kentucky* v. *Dennison*, 24 How. 66, 69.

Congress having declared the acts in question to constitute a misdemeanor, and having provided that an action for a penalty may be prosecuted, we think there is nothing in the terms of the statute which will cut down the right of the Government to prosecute by indictment if it shall choose to resort to that method of seeking to punish an alleged offender against the statute. Nor does this conclusion take away any of the substantial rights of the citizen. He is entitled to the constitutional protection which requires the Government to produce the witnesses against him, and no verdict against him can be directed, as might be the case in a civil action for the penalty. *Hepner* v. *United States*, 213 U. S. 103.

We therefore reach the conclusion that the court erred in sustaining the demurrer to the second count of the indictment, so far as that ruling is based upon the construction of the statute in question. The judgment is reversed and the case

remanded to the District Court of the United States for the District of Massachusetts for further proceedings in conformity with this opinion.

Reversed.

UNITED STATES *v.* STEVENSON (NO. 2).

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 293. Argued October 14, 15, 1909.—Decided November 29, 1909.

Where Congress has made an act a crime and indictable it follows that if two or more conspire to commit the act they conspire to commit an offense against the United States within the meaning of § 5440, Rev. Stat.; and so held in regard to conspiring to assist immigration of contract laborers in violation of § 4 of the Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898.

It is within the power of Congress to regulate the punishment of crimes and it may make the punishment for conspiring to commit a crime greater than that for committing the crime itself.

THE facts are stated in the opinion.

The Solicitor General for the United States:

Even if indictment will not lie for a violation of § 4 of the Immigration Act of 1907, Congress has made that offense an express misdemeanor; and such statutory classification of the crime brings a conspiracy to commit it unmistakably within § 5440, Rev. Stat. *Kentucky* v. *Dennison*, 24 How. 66, 99; *United States* v. *Van Schaick*, 134 Fed. Rep. 592; *Cohen* v. *United States*, 157 Fed. Rep. 651; *United States* v. *Tsokas*, 163 Fed. Rep. 129.

It is enough in any case to make an "offense against the United States" within the meaning of § 5440, Rev. Stat., that the offense which the conspiracy contemplates is a crime, in the fundamental sense of a prohibited public wrong, visited with personal punishment. Neither the mode of prosecution nor the severity of the punishment for the offense is material.

Moore v. *Illinois*, 14 How. 13, 19; *Lees* v. *United States*, 150 U. S. 476; *Boyd* v. *United States*, 116 U. S. 616; *United States* v. *Britton*, 108 U. S. 199, distinguished.

As to the form of proceeding by which a violation of § 4 is to be prosecuted, it is enough to say that § 5440 looks solely to the nature of the act which the conspiracy contemplates, and not to the nature of the remedy given for that act. It is enough that the object of the conspiracy is an act criminal in its own quality. *United States* v. *Chouteau*, 102 U. S. 603.

The operation of § 5440 does not depend upon the amount or extent of punishment imposed for the "offense against the United States." Death, imprisonment, fine, forfeiture—each suffices, if the wrongful act is public in nature and therefore a crime. *Clune* v. *United States*, 159 U. S. 590.

For cases of conspiracy under § 5440 to commit offenses under the statutes regulating railroads, where only a money penalty attached to the offense, see *Thomas* v. *United States*, 156 Fed. Rep. 897; *United States* v. *Clark*, 164 Fed. Rep. 75; *Evans* v. *United States*, 153 U. S. 584, 587; *Coffin* v. *United States*, 156 U. S. 432, 448.

Assisting or encouraging the importation or migration of alien contract laborers is naturally and usually a course of action rather than a single act, and is therefore closely analogous to engaging in a business or occupation, which may be averred generally without details.

In an indictment for aiding and abetting a crime it is enough to say that the defendants aided and abetted, without particularizing the acts of aiding or abetting. Cases *supra* and *United States* v. *Simmons*, 96 U. S. 360, 363; *United States* v. *Mills*, 7 Pet. 138, 141.

Mr. Herbert Parker, *Mr. Charles C. Milton* and *Mr. Henry H. Fuller*, for defendant in error, submitted:

The demurrer to the second count was properly sustained. Section 4 of the Immigration Act of 1907 will not support an indictment for conspiracy under § 5440, Rev. Stat.

An offense against the United States which may be the basis for an indictment for conspiracy under § 5440 must be such an offense as will itself support an indictment. *United States* v. *Britton*, 108 U. S. 199; *United States* v. *Watson*, 17 Fed. Rep. 145, 148; *United States* v. *Payne*, 22 Fed. Rep. 426, 427.

Although § 4 has attempted to define a crime, there has been provided no punishment for such offense within the language of the act itself, other than the penalty recoverable by a judgment in a civil suit. As to the effect of this, see, and also distinguish, *United States* v. *Tsokas*, 163 Fed. Rep. 129, 131; *United States* v. *Van Schaick*, 134 Fed. Rep. 602; *United States* v. *Kellam*, 7 Fed. Rep. 843. The determination of the case of *United States* v. *Stevenson*, No. 292, simultaneously argued, must determine this case also, and, if it shall be held that § 4 of the Immigration Act of 1907 sets forth no offense for which an indictment will lie, then the demurrer to the second count must be sustained.

Mr. Justice Day delivered the opinion of the court.

This case was argued and submitted with No. 292, just decided. The indictment herein in its second count charges a conspiracy, under § 5440 of the Revised Statutes of the United States, to commit the offense of assisting alien contract laborers to migrate into the United States, in violation of the statutes of the United States. Inasmuch as the court below had already reached the conclusion, in considering the former case (No. 292, *ante*), that assisting alien contract laborers was not punishable as a crime by indictment under the Immigration Act, it held that it followed that to conspire to assist such migration was not an offense against the United States within the meaning of § 5440 of the Revised Statutes of the United States. That section provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of

such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

Inasmuch as we have already held that Congress, in making the assistance of contract laborers into the United States a misdemeanor, has made the same a crime indictable as such under the Immigration Act of 1907, it must necessarily follow that if two or more persons, as is charged in the indictment under consideration, conspire to assist such importation, they do conspire to commit an offense against the United States within the terms of § 5440 of the Revised Statutes of the United States. In this view, applying the principles laid down in the opinion in case No. 292, *ante*, we think that the court below erred in sustaining the demurrer to the second count of the indictment. Nor does it make any difference that Congress has seen fit to affix a greater punishment to the conspiracy to commit the offense than is denounced against the offense itself; that is a matter to be determined by the legislative body having power to regulate the matter. *Clune* v. *United States*, 159 U. S. 590.

Judgment reversed.

EVERETT *v.* EVERETT.

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

No. 1. Argued October 22, 1909.—Decided November 29, 1909.

Where the fundamental fact in issue in a suit by a wife for separate maintenance is whether there was a marriage, and the court having jurisdiction finds that the wife's petition should not be granted but should be dismissed, the courts of another State must, under the full faith and credit clause of the Constitution, regard such decree as determining that there was no marriage even though the husband may have asserted other defenses; nor can the wife, in a suit depending solely on the issue of whether there was a marriage, prove by oral

testimony, in the absence of a bill of exceptions, that the decree may have rested on any of the other defenses asserted by the husband. 180 N. Y. 452, affirmed.

THIS is a writ of error to review a judgment of the Supreme Court of New York upon the ground that the final order of that court, entered pursuant to the mandate of the Court of Appeals of New York in this case, failed to give full faith and credit to the judicial proceedings in a certain action determined in the Probate Court of Suffolk County, Massachusetts.

The facts out of which this question arose may be thus summarized:

The present plaintiff in error, Georgia L. Everett, on or about April 1st, 1897, brought this action in the Supreme Court of Kings County, New York, against the defendant in error, Edward Everett, alleging that she and the defendant were lawfully intermarried in that county before a Justice of the Peace, on the thirtieth day of October, 1884; that under the false pretense that that marriage would never be recognized by his family, and that a ceremonial marriage would have to take place before a Minister of the Gospel, the defendant, on or about December 17th, 1887, fraudulently instituted an action in the same court to have the above marriage annulled; that the plaintiff had a valid defense to such action, but in consequence of fraudulent representations to her by the defendant she made no defense therein, by reason whereof a decree was rendered on or about April 9th, 1888, declaring that the alleged marriage between her and the defendant was null and void; and that they had lived and cohabited together as husband and wife from the date of said marriage down to and including June 1st, 1891.

The specific relief asked in this case, brought in 1897, was a judgment that the decree of April 9th, 1888, in the case brought in 1887, be vacated and set aside, and that it be adjudged that the marriage between the plaintiff and the defendant was binding and in full force and effect.

The defendant, by answer, controverted all the material

facts alleged in this case relating to the obtaining of the above decree of April 9th, 1888. He set forth various grounds of defense, but none of them raised any question of a Federal nature. He made, however, a separate, special defense herein based upon the record of certain proceedings in the Probate Court of Suffolk County, Massachusetts.

The allegations of the answer as to those proceedings were substantially these: That on or about February 21st, 1895, the present plaintiff, Georgia L. Everett, brought an action against him in the Probate Court of Suffolk County Massachusetts, claiming to be, as was the defendant, a resident of Boston, and also claiming to be his lawful wife; that he had failed, without just cause, to furnish suitable support for her and had deserted her; that she was living apart from him for justifiable cause; that she prayed that such order be made for her support as the court deemed expedient; that process was duly issued out of the said court and served on this defendant and he duly appeared; that on or about March 21st, 1895, on motion of this defendant, the court ordered the plaintiff to file in that case full specifications as to *how, when and where she became the lawful wife of the defendant;* that pursuant to that order, on or about April 1st, 1895, the plaintiff filed in the said Probate Court her specifications, wherein she stated that she was married to this defendant on or about October 31st, 1884, in Brooklyn, New York, by John Courtney, Esq., Justice of the Peace, and further that a legal marriage according to the laws of the State of New York was entered into in that State between her and this defendant on or about April 15th, 1888, by mutual consent, consummation, acknowledgment and cohabitation in that State, and that such consent, acknowledgment and cohabitation continued in New York, and also in Massachusetts, from April 15th, 1888 to May 30th, 1891, at which time, she alleged, this defendant deserted her. She also stated in her petition in the Probate Court "that her marriage with this defendant was still—to wit, on April 1, 1895—of legal force and effect. Yet defendant deserted her on or

about May 30, 1891, and had contributed nothing to her support since that time." "Thereafter," the answer alleged, "this defendant, according to the course and practice of the said court, duly answered the said petition, and admitted that he and the said petitioner were married on or about October 30, 1884, in Brooklyn, by John Courtney, Esq., Justice of the Peace, and alleged that the said marriage had been duly adjudged to be null and void by this court by its judgment rendered April 9th, 1888, in the suit brought by this defendant against the plaintiff herein for the purpose of having the said marriage annulled, which is the same judgment hereinbefore in this answer, and also in the amended complaint herein referred to. In respect to the supposed marriage between this defendant and the plaintiff herein—alleged in the said specifications filed by the plaintiff in her said suit in the Probate Court to have taken place on or about April 15, 1888—this defendant answered that at the time of the said marriage performed on or about October 30, 1884, by John Courtney, Justice of the Peace, and both at the time of the alleged marriage stated in the specifications, filed by the said plaintiff, to have taken place April 15, 1888, and at all other times subsequent to, as well as long before October 30, 1884, the said plaintiff was the wife of one William G. Morrison, and that by reason thereof the said supposed marriages between this defendant and the said plaintiff by her alleged were, and each of them was, null and void. Thereafter such proceedings were duly had that the said cause came on to be heard and was heard by the said Probate Court upon the issues raised as aforesaid upon this defendant's said answer to the plaintiff's said petition, and the said court found the said issues for this defendant, and thereupon made its decree March 25, 1897, whereby the court found and decided that the prayer of the plaintiff's said petition *should not be granted* and adjudged that the said petition be *dismissed;* and that the said judgment remains of record, and in full force and effect."

In her reply the plaintiff, admitting that she had instituted

in the Massachusetts court the action above referred to, alleged that her petition in that case was one "for separate maintenance and that the issues involved in the present action were in nowise considered in that action . . . that said petition was dismissed upon the understanding that in case the relationship of husband and wife should be established between the plaintiff and the defendant by said Supreme Court, and upon the proceedings pending therein, the petition for separate support was to be renewed, and said judgment of said Probate Court, the County of Suffolk, Commonwealth of Massachusetts, entered on or about the twenty-fifth day of March, 1897, did not determine the questions at issue in the present proceedings, and was entered with leave to renew the said proceedings, as hereinbefore set forth."

There was a finding of facts in the present case by the Supreme Court of New York, one of which was that the plaintiff and the defendant were duly married before the Justice of the Peace as above stated, and that after such marriage they lived and cohabited together as husband and wife up to June 1st, 1891, and that she was never married to any person other than the present defendant. The court, by its final decree, set aside and vacated the decree of April 9th, 1888, annulling the marriage before the Justice of the Peace, and adjudged that the contract of marriage thus evidenced was in full force and effect. But that decree was affirmed by the Appellate Division. It is stated in the opinion of the Court of Appeals that there were several trials and appeals in this case to the Appellate Division. *Everett* v. *Everett*, 48 App. Div. 475; 75 App. Div. 369; 89 App. Div. 619.

Finally, the case was carried to the Court of Appeals of New York, where the judgment was reversed February 21st, 1905, 180 N. Y. 452, but, for reasons stated in the opinion of that court, the reversal was with directions to dismiss her complaint upon the merits. That decree is now here for review.

It appears from its opinion that the Court of Appeals of

New York adjudged the decision in the Probate Court of Massachusetts to be conclusive, as between the parties, as to the question whether the plaintiff was the wife of the defendant, entitled to be regarded as holding that relation to him. The Court of Appeals of New York said (p. 459): "The Massachusetts judgment was based upon the petition of the wife and it was founded upon the allegation that she was the defendant's wife; that he had deserted her and had failed to contribute to her support. These allegations of fact were put in issue by the defendant and must have been determined by the court. An exemplification of the judgment record in the action which annulled the marriage was presented to the Probate Court and admitted in evidence. The court had jurisdiction of the parties and the subject-matter of the controversy, and its judicial power extended to every material question in the proceeding. The determination of the court that the plaintiff was not entitled to the relief demanded in her petition must be deemed to have included the question as to the validity of her marriage. In other words, the court must have determined the question whether the petitioner was in fact the defendant's wife, and this involved an inquiry with respect to the question whether at the time of her marriage before the Justice of the Peace at Brooklyn she had another husband living. There was evidence before the court on that question, since the record of the judgment annulling the marriage in this State was before it. That judgment of a sister State was entitled in the present action to full faith and credit under the Constitution of the United States, any statute, rule or procedure or even any constitutional provision in any State, to the contrary notwithstanding. The provision of the Federal Constitution with respect to the force and effect to be given to the judgments of other States, and the act of Congress passed in pursuance thereof, is the supreme law of the land, and any statute or rule of practice in this State that would tend to detract or take from such a judgment the force and effect that it is entitled to under the Federal Constitution

and in the State where rendered must be deemed to be inoperative. So we think that that judgment was conclusive upon the parties to this action with respect to all the questions which were involved in the proceedings and decided by the court, and clearly one of those questions was the status of the present plaintiff. She alleged that she was the defendant's wife, and this allegation must be deemed to have been negatived by the decision in the proceeding."

The court, in addition, considered and disposed of some questions of a non-Federal nature in respect to which the trial court was held to have erred. But it thus concluded its opinion (p. 464): "There are many other questions in this case which have been discussed at length upon the argument and are to be found in the briefs of the respective counsel, but it is unnecessary to consider them. We think that the judgment must be reversed, and as there appears to be at least one conclusive obstacle to the plaintiff's success, a new trial would be useless, and so the complaint should be dismissed upon the merits." The one conclusive obstacle thus found to be in the plaintiff's way was the judgment of the Massachusetts court in the action brought by the plaintiff in error against the defendant in error.

Mr. Frank H. Stewart, for plaintiff in error, submitted:

The dismissal of the complaint by the state court was upon the ground that the action of the probate court in Massachusetts was a "conclusive obstacle" to the plaintiff's success. This involved the determination of the effect in Massachusetts of the action of said probate court, in accordance with § 1, Art. IV, of the Constitution and of § 905, Rev. Stat. See *Mills* v. *Duryee,* 7 Cranch, 481; *McElmoyle* v. *Cohen,* 13 Pet. 312, 326; *Crapo* v. *Kelly,* 16 Wall. 610, 619.

The determination by the courts of one State of the effect to be given to the judicial proceedings of a sister State is open to review by this court upon writ of error. *Huntington* v. *Attrill,* 146 U. S. 657.

Particularly when the highest court of a State has decided against the effect which it was claimed proceedings in another State had by the law and usage of that State. *Green* v. *Van Buskirk*, 7 Wall. 145. See also *Andrews* v. *Andrews*, 188 U. S. 28; *Crapo* v. *Kelly*, 16 Wall. 621; *Gt. West. Tel. Co.* v. *Purdy*, 162 U. S. 335; *Huntington* v. *Attrill*, 146 U. S. 684; *Harding* v. *Harding*, 198 U. S. 325.

That in the present case the New York court has given too great effect to the Massachusetts proceedings, instead of too little, does not render its decision any the less reviewable by this court. *Board of Pub. Works* v. *Columbia College*, 17 Wall. 521, 529; *Wood* v. *Watkinson*, 17 Connecticut, 500, 505; *Suydam* v. *Barber et al.*, 18 N. Y. 468, 472; *Warrington* v. *Ball*, 90 Fed. Rep. 464.

The state court erred in determining that the effect of the judicial proceedings in the probate court of Massachusetts was to render *res judicata* the issue raised by the complainant in this case.

The issue in this case is one which the probate court of Massachusetts did not and could not pass upon by actual decree, or affect by the legislative part of that decree. See Statutes of Massachusetts, chap. 153, § 33.

The issue in this case was not rendered *res judicata* by the judicial proceedings in Massachusetts.

It was not a fact which was, or could have been, litigated or decided in Massachusetts. See *Kerr* v. *Kerr*, 41 N. Y. 272.

The issue of this case was not a matter necessary to be determined by the Massachusetts probate court in the action taken by it.

The petition was simply dismissed. The ground for dismissal may have been any one of the grounds set up. There is nothing in the record to show that the Massachusetts court did not reach its result on some ground other than that which, it is contended, renders that result *res judicata*.

It cannot therefore be held, upon the face of the record, that there was identity of issues and resulting *res judicata*. *Umlauf*

v. *Umlauf*, 117 Illinois, 584; and see *Harding* v. *Harding*, 198 U. S. 337, 338.

It is clearly the law of Massachusetts, of New York, and the general law that, when a general result may have been reached by the determination of any undeterminate one of several facts, no particular fact is conclusively determined. *Stannard* v. *Hubbell*, 123 N. Y. 520; *House* v. *Lockwood*, 137 N. Y. 259; *Stokes* v. *Foote*, 172 N. Y. 327, 342; *Burlen* v. *Shannon*, 99 Massachusetts, 200; *Lea* v. *Lea*, 99 Massachusetts, 493; *Foye* v. *Patch*, 132 Massachusetts, 105, 111; *Stone* v. *Addy*, 168 Massachusetts, 26.

The issue of this case was not in fact a matter determined by the Massachusetts probate court.

The burden of proof was upon the husband, for it is the defendant who sets up the estoppel. *Vaughn* v. *O'Brien*, 57 Barb. 491, 495; *Foye* v. *Patch*, 132 Massachusetts, 105, 111; *Cromwell* v. *Sack*, 94 U. S. 351.

The issue in this case was not rendered *res judicata* because the alleged decree in Massachusetts did not import a decree on the merits.

The entry in the Massachusetts probate court, "Petition Dismissed" does not necessarily import a decree on the merits. And a consideration of the extrinsic evidence shows that there was a voluntary dismissal on the part of the wife at a time when she had a perfect right to dismiss her petition, which dismissal was acquiesced in by the husband and permitted by the court. The mere fact that the court did not see fit to grant her request that the decree should contain the customary technical words "without prejudice" is not conclusive upon her rights. *Lanphier* v. *Desmond*, 187 Illinois, 382; *Haldeman* v. *United States*, 91 U. S. 584.

And, since the decree purported only to deny to the wife affirmative relief, it did not bar a new application on her part for separate maintenance. *Buckman* v. *Phelps*, 6 Massachusetts, 448; *Pettee* v. *Wilmarth*, 5 Allen, 144.

For the Court of Appeals to hold the contrary was to deny

to the Massachusetts decree the effect which the wife claimed it had by law and usage in Massachusetts.

The issue in the present case arises on a different state of facts from the facts upon which the Massachusetts proceedings were predicated.

Mr. George Zabriskie for defendant in error:

In a suit of this character it is necessary in New York, as well as in the Federal courts, and elsewhere to allege and prove two distinct things: first, that the party complaining had a good defense on the merits to the claim upon which the judgment impeached was rendered; and second, that he was prevented from availing himself of that defense by the fraud of the other party. 2 Story, Equity, § 885*a*; *Blank* v. *Blank*, 107 N. Y. 91; *Whittlesey* v. *Delaney*, 73 N. Y. 571; *Kimberly* v. *Arms*, 40 Fed. Rep. 548; *White* v. *Crow*, 110 U. S. 183; *Ableman* v. *Roth*, 12 Wisconsin, 81; *Dobbs* v. *St. Joseph Fire Ins. Co.*, 72 Missouri, 189; *Williams* v. *Nolan*, 58 Texas, 708.

The judgment of the Court of Appeals proceeded upon two grounds, of which at least one presents no Federal question.

The judgment of the Court of Appeals rests quite as much upon their determination of the issue of fraud, which involves no Federal question.

In such a case this court will not assume jurisdiction. *Allen* v. *Arguimbau*, 198 U. S. 149; *Dibble* v. *Bellingham Bay Land Co.*, 163 U. S. 63; *Johnson* v. *Risk*, 137 U. S. 300; *Klinger* v. *Missouri*, 13 Wall. 257.

No Federal question is involved.

A right, privilege or immunity claimed under the Constitution must, under clause 3 of § 709 of the Revised Statutes of the United States, be claimed in the court below by the party seeking the advantage of it. *Johnson* v. *N. Y. Life Ins. Co.*, 187 U. S. 491, 495; *Eastern Building & Loan Assn.* v. *Williamson*, 189 U. S. 122; *Glenn* v. *Garth*, 147 U. S. 360; *Lloyd* v. *Matthews*, 155 U. S. 222.

Where the plaintiff in error claims merely that the state

court erroneously construed the judgment of a court of another State, without denying that the state court gave to the judgment the effect which such construction warrants, there is no question of faith and credit involved which this court has jurisdiction to review. *Allen* v. *Alleghany Company,* 192 U. S. 458; *Finney* v. *Guy,* 189 U. S. 335; *Johnson* v. *N. Y. Life Ins. Co.,* 187 U. S. 491; *Banholzer* v. *N. Y. Life Ins. Co.,* 178 U. S. 402; *Lloyd* v. *Matthews,* 155 U. S. 222; *Glenn* v. *Garth,* 147 U. S. 360.

If upon any ground this court have jurisdiction, the judgment of the state court upon the plea of *res judicata* is right.

A final decree of a court of competent jurisdiction, upon the merits of the cause, is conclusive between the parties upon the material matters thereby necessarily determined. *Embury* v. *Connor,* 3 N. Y. 511, 552; *Dobson* v. *Pearce,* 12 N. Y. 156; *Prey* v. *Hegeman,* 98 N. Y. 351; *Griffin* v. *Long Island R. R. Co.,* 102 N. Y. 449.

Such being the ordinary rule of law there is no evidence in the record to indicate that in Massachusetts the decree of the probate court would be accorded any other or different faith or credit.

In ascertaining what credit is given to judicial proceedings in the State where they took place, this court is limited to the evidence on that subject before the court whose judgment is under review. *Tilt* v. *Kelsey,* 207 U. S. 43, 57.

The conclusiveness of the decree is not impaired by the fact that the cause of action in the suit in which the judgment was rendered is different from the cause of action in the suit at bar. *Doty* v. *Brown,* 4 N. Y. 71; *Lythgoe* v. *Lythgoe,* 75 Hun, 147; *S. C.,* 145 N. Y. 641.

In such instances the judgment is conclusive as to those matters in issue upon the determination of which the finding or verdict was actually rendered. *Cromwell* v. *County of Sac,* 94 U. S. 351, 352, 353; *Southern Pacific R. R. Co.* v. *United States,* 168 U. S. 1, 48, 49; *Bell* v. *Merrifield,* 109 N. Y. 202, 211.

The form of the proceeding does not effect the conclusive-

ness of the decree. The efficacy of the judicial determination attaches no less to summary, special or statutory proceedings, than to actions. *Culross* v. *Gibbons*, 130 N. Y. 447; *Reich* v. *Cochran*, 151 N. Y. 122; *Smith* v. *Zalinski*, 94 N. Y. 519; *Matter of Livingston*, 34 N. Y. 555.

The sufficiency of the proof upon which the court acted is not open to consideration where the judgment is pleaded as a bar or is relied on as evidence; otherwise the judgment would not be conclusive, and there could be no such thing as *res judicata*. *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141, 159; *Deposit Bank* v. *Frankfort*, 191 U. S. 449, 510; *Grignon's Lessee* v. *Astor*, 2 How. 319, 339; *Comstock* v. *Crawford*, 3 Wall. 396, 406.

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

We have no concern about the disposition made by the state court of questions of mere local law, and have only to inquire whether, as required by the Constitution of the United States, it gave full faith and credit to the proceedings had in the Probate Court in Massachusetts. Const., Art. IV, § 1. If it did, the judgment must be affirmed; otherwise, reversed. That the proceedings in the latter court were judicial in their nature, and that the New York court intended to give them full faith and credit, cannot be doubted. The Probate Court is a court of record, established by the General Court of Massachusetts under the authority of the constitution of that Commonwealth. Const. Mass. 1822; Pub. Stat. Mass. 1882, p. 871, c. 156. It has jurisdiction when a wife for justifiable cause is actually living apart from her husband to make such order as it deems expedient concerning her support. *Ibid.* And when it has jurisdiction of the parties and subject-matter its decree, until reversed or modified, is as conclusive in Massachusetts as the judgments of other courts there. *Watts* v. *Watts*, 160 Massachusetts, 464; *Langhton* v. *Atkins*, 1 Pick. 535; *Dublin* v. *Chabourn*, 16 Massachusetts, 433.

In the suit in Massachusetts the fundamental fact was put in issue as to whether the plaintiff was the wife of the defendant and entitled, as such, to sue for support while living apart from her alleged husband. The New York court adjudged that, as between the parties, and, so far as the question before us is concerned, that fact had been determined by the Massachusetts court adversely to the plaintiff; for, the latter court ruled, after hearing the parties, that the relief asked from it should not be granted and dismissed the plaintiff's petition. So reads the record of the Massachusetts court.

It is said, however, that for aught that appears from the record of the Probate Court, as produced herein, that court *may* have declined to grant the relief asked by the alleged wife without considering at all the fact of her marriage, but only on the ground that she was living apart from the defendant without justifiable cause. But the answer to this contention is that the question whether the plaintiff was the lawful wife of the defendant, as well as the question whether she was entitled to separate maintenance while living apart from her alleged husband, were in issue in the Probate Court, and if, in order to prove that the court below gave undue faith and credit to the Massachusetts judgment, the plaintiff was entitled to show by oral testimony that there was really no dispute in the Probate Court as to the fact of her being the wife of the defendant, and that the only actual dispute at the hearing was whether she had justifiable cause for living apart from him, no such proof appears to have been made by her. No bill of exceptions as to the evidence in the Probate Court seems to have been taken, and we have before us only a record showing that the plaintiff, claiming to be the wife of the defendant herein, sued for separate maintenance and support, alleging that she was living apart from him for justifiable cause, and that the relief asked was denied and her petition dismissed without any statement of the specific grounds on which the court proceeded and without any qualifying words indicating that the decree was otherwise than upon the merits

as to the issues made. We concur with the Court of Appeals of New York in holding that as the Probate Court had jurisdiction of the parties and the subject-matter, its judgment, rendered after hearing, that the plaintiff was not entitled to the relief demanded by her and that her petition be dismissed, it must be taken, upon the record of this case, that the latter court determined against the plaintiff the fact of her being the wife of the defendant at the time she sought separate maintenance and support.

It is doubtful whether the plaintiff, in her pleadings or otherwise, sufficiently asserted any right belonging to her under the Constitution of the United States. But if it were assumed that she did, the result, even upon that hypothesis, is that, upon the present showing by the plaintiff, there is no substantial ground to contend that the court below did not give such faith and credit to the judgment of the Probate Court of Massachusetts as were required by the Constitution, and, therefore, this court has no authority to review the final judgment of the New York court. The writ of error must be dismissed.

It is so ordered.

BALTIMORE AND OHIO RAILROAD COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

ON CERTIFICATE FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

No. 339. Argued October 15, 18, 1909.—Decided December 6, 1909.

Only distinct points of law that can be distinctly answered without regard to other issues can be certified to this court on division of opinion: the whole case cannot be certified even when its decision turns upon matter of law only.

Appellate jurisdiction implies the determination of the case by an inferior court, and the transfer of the case to the appellate court without such determination amounts to giving the appellate court original jurisdiction.

Congress cannot extend the original jurisdiction of this court beyond that prescribed by the Constitution; and an act providing for certifying questions of law will not be construed as permitting certification of the entire case before any judgment has been rendered below.

Under § 1 of the expediting act of February 11, 1903, c. 544, 32 Stat. 823, the case, although turning only on a point of law cannot be certified to this court, in absence of any judgment, opinion, decision, or order determinative of the case below.

THIS was a bill in equity filed by the Baltimore and Ohio Railroad Company in the Circuit Court of the United States for the District of Maryland against the Interstate Commerce Commission, July 20, 1908, which prayed for a preliminary injunction and a final decree enjoining, annulling and suspending a certain order of the commission served June 24, 1908, in a proceeding before the commission entitled "Rail and River Coal Company *vs.* Baltimore and Ohio Railroad Company."

On July 27, 1908, the Attorney-General, in compliance with § 16 of the act to regulate commerce, as amended by the act of June 29, 1906, filed in the court the certificate of general public importance under the expedition act of February 11, 1903. In accordance with the provisions of the act of February 11, 1903, the two Circuit Judges, by order filed August 26, 1908, designated the Honorable Thomas J. Morris, District Judge for the District of Maryland, to sit with them on the hearing and disposition of the case.

The application for the preliminary injunction was set for hearing September 22, 1908. Defendant's answer was filed September 19, 1908. By order entered September 23, 1908, the application for the preliminary injunction was denied.

Replication was filed and testimony taken, and, there being no substantial dispute as to the facts, Mr. Arthur Hale, complainant's general superintendent of transportation, and also chairman of the car efficiency committee of the American Railway Association, was able to testify as to all matters

that counsel deemed necessary to bring to the court's attention, and was the only witness.

December 14, 1908, the cause came on for final hearing, and was argued before the two Circuit Judges and the District Judge designated by them. No final decree or judgment was entered, but the presiding judge entered the following order:

"This cause came on this day to be further heard, and was argued by counsel, and the court having fully considered the bill, answer, deposition and other papers filed herein, the judges sitting finding themselves divided in opinion as to the decree that should be entered herein,

"It is now ordered, that in accordance with the act of Congress applicable hereto, that this case be certified for review to the Supreme Court of the United States.

"December 14, 1908."

The cause was docketed in this court and the transcript of record filed January 25, 1909, as "On a certificate from the Circuit Court of the United States for the District of Maryland."

The act of Congress of February 11, 1903, c. 544, 32 Stat. 823, contains two sections, as follows:

"(1) That in any suit in equity pending or hereafter brought in any Circuit Court of the United States under the act entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that hereafter may be enacted wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited,

and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.

"SEC. 2. That in every suit in equity pending or hereafter brought in any Circuit Court of the United States under any of said acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the Circuit Court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of the Circuit Court to the Circuit Court of Appeals before this act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law."

Section 16 of the Hepburn Act, so called, of June 29, 1906, c. 3591, 34 Stat. 584, 592, provides:

"The venue of suits brought in any of the Circuit Courts of the United States against the commission to enjoin, set aside, annul, or suspend any order or requirement of the commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated.

* * * * * * * *

"The provisions of 'An act to expedite the hearing and determination of suits in equity, and so forth,' approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to

enforce any order or requirement of the commission, or any of the provisions of the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney-General in every such case to file the certificate provided for in said expediting act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes. . . . An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: *Provided further*, That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes."

Mr. W. Irvine Cross and *Mr. Hugh L. Bond, Jr.*, with whom *Mr. W. Ainsworth Parker* was on the brief, for the Baltimore and Ohio Railroad Company.

Mr. Wade H. Ellis, Assistant to the Attorney-General, with whom *Mr. Luther M. Walter* and *Mr. Orla E. Harrison*, Special Assistants to the Attorney-General, were on the brief, for the Interstate Commerce Commission.

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

By the Judiciary Act of March 3, 1891, a review by certificate is limited to the certificate or its equivalent by the Circuit Courts, made after final judgment, of the question, when raised, of their jurisdiction as courts of the United States,

and to the certificate by the Circuit Courts of Appeal of questions of law in relation to which the advice of this court is sought as therein provided, which certificates are governed by the same rules as were formerly applied to certificates of division. *United States* v. *Rider,* 163 U. S. 132; *The Paquete Habana,* 175 U. S. 677, 684; *Chicago, Burlington & Quincy Railway Company* v. *Williams,* 205 U. S. 444. And it has been established by repeated decisions that questions certified to this court upon a division of opinion must be distinct points of law clearly stated so that they can be distinctly answered without regard to other issues of law or of fact; and not questions of fact or of mixed law and fact involving inferences of fact from particular facts stated in the certificates; nor yet the whole case even if divided into several points. *Jewell* v. *Knight,* 123 U. S. 426, 433.

And finally it has been settled that the whole case, even when its decision turns upon matter of law only, cannot be sent here by certificate of division.

In *White* v. *Turk,* 12 Pet. 238, it was said: "The certificate of the judges, in this case, leaves no doubt that the whole cause was submitted to the Circuit Court, by the motion to set aside the judgment on the bond. And, had the court agreed in opinion, and rendered a judgment upon the points submitted; it would have been conclusive of the whole matter in controversy between the parties. This certificate, therefore, brings the whole cause before this Court; and, if we were to decide the questions presented, it would, in effect, be the exercise of original, rather than appellate jurisdiction." This practice was declared irregular by Chief Justice Taney in *Webster* v. *Cooper,* 10 How. 54, and the Chief Justice added that it "would, if sanctioned, convert this court into one of original jurisdiction in questions of law, instead of being, as the Constitution intended it to be, an appellate court to revise the decisions of inferior tribunals." So Mr. Justice Miller, in *United States* v. *Perrin,* 131 U. S. 55, 58, said:

"But it never was designed that, because a case is a trouble-

some one, or is a new one, and because the judges trying the case may not be perfectly satisfied as regards all the points raised in the course of the trial, the whole matter shall be referred to this court for its decision in advance of the regular trial, or that, in any event the whole case shall be thus brought before this court.

"Such a system converts the Supreme Court into a *nisi prius* trial court; whereas, even in cases which come here for review in the ordinary course of judicial proceeding, we are always and only an appellate court, except in the limited class of cases where the court has original jurisdiction."

Without discussing the evolution of the use of certificates reference to the legislation given below may be profitable.[1]

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[1] Section 6 of the "Act to amend the judicial system of the United States," April 29, 1802, c. 31, 2 Stat. 156, 159, provided:

"That whenever any question shall occur before a Circuit Court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party, or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court, at their next session to be held thereafter; and shall, by the said court, be finally decided. And the decision of the Supreme Court, and their order in the premises, shall be remitted to the Circuit Court, and be there entered of record, and shall have effect according to the nature of the said judgment and order: *Provided*, That nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits. . . ."

This act was superseded by that of June 1, 1872, c. 255, 17 Stat. 196, which provided:

"That whenever, in any suit or proceeding in a Circuit Court of the United States, being held by a justice of the Supreme Court and the circuit judge or a district judge, or by the circuit judge and a district judge, there shall occur any difference of opinion between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or the presiding judge shall prevail, and be considered the opinion of the court for the time being; but when a final judgment, decree, or order in such suit or proceeding shall be entered, if said judges shall certify, as it shall be

In the present case no final judgment or decree or order determinative of the merits was rendered, but the court ordered "that this case be certified for review to the Supreme Court of the United States," and that "a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme Court of the United States; and the same is transmitted accordingly."

The act of Congress of February 11, 1903, provided in its first section that on the certificate of the Attorney-General the case should be assigned for hearing before not less than

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their duty to do if such be the fact, that they differed in opinion as to any question which, under the act of Congress of April twenty-ninth, eighteen hundred and two, might have been reviewed by the Supreme Court on certificate of difference of opinion, then either party may remove said final judgment, decree, or order to the Supreme Court, on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error or appeals in regard to bail and supersedeas."

That was carried forward in 1874, by §§ 650, 652, 654, 693 and 697 of the Revised Statutes. Section 6 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 828, provided:

"SEC. 6. . . . Excepting that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

"And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

"And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it it had been carried by appeal or writ of error to the Supreme Court."

three judges, and that "in the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided." The order of the Circuit Court pursues the language of this provision and attempts to send up the whole case to be determined by this court. This invokes the exercise of original jurisdiction, and cannot be sustained.

In a note to *United States* v. *Ferreira*, 13 How. 40, 52, which was inserted by order of the court, the Chief Justice states the substance of the case of the *United States* v. *Yale Todd*, which was decided in February, 1794, but not printed, as there was at that time no official reporter. This note thus concludes:

"In the early days of the Government, the right of Congress to give original jurisdiction to the Supreme Court, in cases not enumerated in the Constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided *Todd's case*. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the Constitution, and that Congress cannot enlarge it. In all other cases its power must be appellate."

Such is the settled rule, and it is inadmissible to suppose that it was the intention of Congress to run counter to it.

Ordinarily in the Federal courts, in the absence of express statutory authority, no appeal can be taken or writ of error brought except from a final decree or to a final judgment. *McLish* v. *Roff*, 141 U. S. 661, 665; *Forgay* v. *Conrad*, 6 How. 201, 205. There is no final judgment or decree in this case, nor any judicial determination from which an appeal would lie. *The Alicia*, 7 Wall. 571, is in point. In that case it appeared that on the ninth day of January, 1863, a decree of

condemnation had been entered in the District Court against the Alicia and her cargo for violation of the blockade. From this decree an appeal was allowed and taken to the Circuit Court; and on the eighteenth of May, 1867, an order was made in that court on the application of the parties in interest—there being at this time, in the Circuit Court, no order, judgment or decree in the case—for the transfer of the cause to this court under the thirteenth section of the act of June 30, 1864, which enacted that prize causes, depending in the Circuit Court, might be so transferred. This court held that the cause was removed to the Circuit Court by the appeal from the decree of the District Court and that that decree was vacated by the appeal, and that the Circuit Court acquired full jurisdiction of the cause and was fully authorized to proceed to final hearing and decree. And Chief Justice Chase said (p. 573): "Nor can it be doubted that, under the Constitution, this court can exercise, in prize causes, appellate jurisdiction only. An appellate jurisdiction necessarily implies some judicial determination, some judgment, decree, or order of an inferior tribunal, from which an appeal has been taken. But in this case there had been no such order, judgment, or decree in the Circuit Court; and there was no subsisting decree in the District Court, from which an appeal could be taken. We are obliged to conclude that, in the provision for transfer, an attempt was inadvertently made to give to this court a jurisdiction withheld by the Constitution, and, consequently, that the order of transfer was without effect. The cause is still depending in the Circuit Court."

The result is that the order must be set aside and the case remanded to the Circuit Court with directions to proceed in conformity with law.

Ordered accordingly.

SOUTHERN PACIFIC COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

CERTIFICATE OF THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 275. Argued October 12, 13, 1909.—Decided December 6, 1909.

On authority of preceding case *held* that under § 1 of the expediting act of February 11, 1903, c. 544, 32 Stat. 823, the case, although turning only on a point of law, cannot be certified to this court, in absence of any judgment, opinion, decision, or order determinative of the case below.

THE facts are stated in the opinion.

Mr. Maxwell Evarts, with whom *Mr. F. C. Dillard*, *Mr. W. W. Cotton*, *Mr. P. F. Dunne* and *Mr. Robert S. Lovett* were on the brief, for the Southern Pacific Company.

Mr. Wade H. Ellis, Assistant to the Attorney-General, with whom *Mr. Luther M. Walter* and *Mr. Edwin P. Grosvenor*, Special Assistants to the Attorney-General, were on the brief, for the Interstate Commerce Commission.

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

This case comes here upon a certificate of the three judges of the Circuit Court for the Northern District of California under § 1 of the expediting act of February 11, 1903, c. 544, 32 Stat. 823, as construed by them.

The suit was brought by the railroad companies in the Circuit Court to restrain the enforcement of an order of the Interstate Commerce Commission, which established a maxi-

mum rate for the transportation of rough green fir lumber from points in the Willamette Valley, Oregon, to San Francisco. The case came on for argument before the three Circuit Judges upon the demurrer of the commission to the amended bill of complaint, to which was attached the opinion and order of the commission.

The Circuit Judges certified the whole case, and it comes here without opinion, decision or assignment of errors.

Upon the grounds stated in No. 339, *Baltimore & Ohio Railroad Company* v. *Interstate Commerce Commission*, *ante*, p. 216, the certificate is dismissed and the case remanded to the Circuit Court with directions to proceed therein in conformity with law.

Ordered accordingly.

YORDI *v.* NOLTE, UNITED STATES MARSHAL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 382. Submitted October 22, 1909.—Decided December 6, 1909.

In foreign extradition proceedings the complaint is sufficient to authorize the commissioner to act if it so clearly and explicitly states a treaty crime that the accused knows exactly what the charge is; nor need the record and depositions from the demanding country be actually fastened to the complaint.

In this case *held* that depositions in the possession of the officer of the demanding country making the complaint, which showed actual grounds for the prosecution and of which the commissioner had knowledge, from their use in a former proceeding, were admissible on the hearing before the commissioner and were also admissible for the purpose of vesting jurisdiction in him to issue the warrant.

166 Fed. Rep. 921, affirmed.

PABLO YORDI, being detained in custody by the United States marshal of the Western District of Texas, obtained from the District Court for that district a writ of *habeas corpus* to secure his release. He was charged in the republic of Mexico with the crime of "fraud and forgery of documents," and a warrant for his arrest was duly issued by the criminal judge of the city of Guadalajara. He avoided arrest in Mexico and fled to El Paso, Texas, where he was detained in prison, under an order of the United States commissioner, awaiting the issue by the proper authorities of an order for his extradition.

At the hearing on the *habeas corpus* it was stipulated that the crimes in the complaint made before the United States commissioner were extraditable offenses under the existing treaty between the United States and Mexico; that at the time of the hearing before the commissioner the complaint in the case made by A. V. Lomeli, consul of Mexico, was solely upon information and belief; that he had no actual or personal knowledge of the commission of any offense, but at the time of making the complaint the said Mexican consul had before him the record and depositions of the witnesses of the republic of Mexico in the proceedings before the criminal judge of Guadalajara.

There were three complaints made against Yordi. The first, made by the assistant United States attorney, was dismissed. The second and third were made by the Mexican consul.

Upon the hearing under the first complaint the record and evidence contained in the proceedings in Mexico were introduced in evidence before the commissioner, as they were also on the hearing on the second complaint. The commissioner found that there was probable cause to believe Yordi guilty of the offense of uttering a forged instrument in the State of Jalisco, United States of Mexico, on or about the twenty-sixth day of May, 1908, and that there was also probable cause to believe Yordi had committed the offense

of obtaining money by means of false device in the Mexican state mentioned. The commissioner therefore ordered Yordi to be held for extradition to the republic of Mexico on the charges alleged in the third and fourth counts of the complaint, and that he be committed to the county jail of El Paso County, Texas, to await the action of the proper authorities in the city of Washington, upon demand for his extradition to the republic of Mexico.

The case was heard before Maxey, District Judge, who discharged the writ of *habeas corpus*, and required the marshal to hold the petitioner in custody until a warrant of extradition was duly issued. From this final order this appeal was taken. Judge Maxey's opinion is reported in 166 Fed. Rep. 921, *Ex parte Yordi*.

Mr. Waters Davis for appellant.

Mr. Assistant Attorney-General Russell for appellee.

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

The contention of appellant's counsel is that, although the Mexican consul had possession of the record from Mexico and the depositions of the witnesses therein contained, which embodied the proceedings had before the judge at Guadalajara, Mexico, including the testimony of witnesses, which appeared to the judge amply sufficient to justify an order for the apprehension of the accused, nevertheless there was still necessary, in order for the commissioner to take jurisdiction to hear the application that either the record from Mexico should be attached to the complaint or that the complaint should disclose upon its face the sources of the consul's information. This record from Mexico was not only before the Mexican consul when he made the complaint against Yordi, now under consideration, but the commissioner was

thoroughly familiar with it, as it had been introduced in evidence before him upon the hearing of the first complaint.

Judge Maxey was of opinion that as depositions from a foreign country were admissible in evidence upon the hearing before the commissioner, they were also to be admitted for the purpose of vesting jurisdiction in the commissioner to issue the warrant, and as in this case the depositions were in themselves sufficient to satisfy the commissioner that the prosecution against the accused was based upon real grounds and not upon mere suspicion of guilt, it was not indispensable to the jurisdiction of the commissioner that the record and depositions from Mexico should be actually fastened to the complaint when they were in the custody and keeping of the consul, and the commissioner was already in possession of the information which they contained. We concur in these views.

The general doctrine in respect of extradition complaints is well stated by Judge Coxe in *Ex parte Sternaman*, 77 Fed. Rep. 595, 597, as follows:

"The complaint should set forth clearly and briefly the offense charged. It need not be drawn with the formal precision of an indictment. If it be sufficiently explicit to inform the accused person of the precise nature of the charge against him it is sufficient. The extreme technicality with which these proceedings were formerly conducted has given place to a more liberal practice, the object being to reach a correct decision upon the main question—is there reasonable cause to believe that a crime has been committed? The complaint may, in some instances, be upon information and belief. The exigencies may be such that the criminal may escape punishment unless he is promptly apprehended by the representatives of the country whose law he has violated. From the very nature of the case it may often happen that such representative can have no personal knowledge of the crime. If the offense be one of the treaty crimes, and if it be stated clearly and explicitly so that the accused knows

exactly what the charge is, the complaint is sufficient to authorize the commissioner to act. The foregoing propositions are, it is thought, sustained by the following authorities: *In re Farez*, 7 Blatchf. 345, Fed. Cas. No. 4,645; *In re Roth*, 15 Fed. Rep. 506; *In re Henrich*, 5 Blatchf. 414, Fed. Cas. No. 6,369; *Ex parte Van Hoven*, 4 Dill. 415, Fed. Cas. No. 16,859; *In re Breen*, 73 Fed. Rep. 458; *Ex parte Lane*, 6 Fed. Rep. 34; *In re Herres*, 33 Fed. Rep. 165; *Castro* v. *De Uriarte*, 16 Fed. Rep. 93; *In re Macdonnell*, 11 Blatchf. 79, Fed. Cas. No. 8,771."

It was argued that this court had held otherwise, particularly in *Rice* v. *Ames*, 180 U. S. 371, where Mr. Justice Brown, delivering the opinion, declared that several counts of the complaint were obviously insufficient, "since the charges were made solely upon information and belief, and no attempt was made even to set forth the sources of information, or the grounds of affiant's belief." But Mr. Justice Brown further said (p. 375):

"We do not wish, however, to be understood as holding that, in extradition proceedings, the complaint must be sworn to by persons having actual knowledge of the offense charged. This would defeat the whole object of the treaty, as we are bound to assume that no foreign government possesses greater power than our own to order its citizens to go to another country to institute legal proceedings. This is obviously impossible. The ordinary course is to send an officer or agent of the Government for that purpose, and Rev. Stat., § 5271 makes special provisions 'that in every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions,

warrants or other papers, shall, if authenticated according to the law of such foreign country, be in like manner received as evidence,' of which authentication the certificate of the diplomatic or consular officer of the United States shall be sufficient. This obviates the necessity which might otherwise exist of confronting the accused with the witnesses against him. Now, it would obviously be inconsistent to hold that depositions, which are admissible upon the hearing, should not also be admitted for the purpose of vesting jurisdiction in the commissioner to issue the warrant. Indeed, the words of the statute, 'in every case of *complaint*,' seem to contemplate this very use of them. If the officer of the foreign government has no personal knowledge of the facts, he may with entire propriety make the complaint upon information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding, which may have been found in the foreign country, or a copy of the depositions of witnesses having actual knowledge of the facts, taken under the treaty and act of Congress. This will afford ample authority to the commissioner for issuing the warrant."

The same learned judge said in *Grin* v. *Shine*, 187 U. S. 181, 193:

"All that is required by § 5270 is that a complaint shall be made under oath. It may be made by any person acting under the authority of the foreign government having knowledge of the facts, or in the absence of such person, by the official representative of a foreign government based upon depositions in his possession."

We think the evidence produced at the hearing justified the detention of the accused and corrected any irregularity in the complaint. As this court said in *Nashimura Ekiu* v. *United States*, 142 U. S. 651, 662:

"A writ of *habeas corpus* is not like an action to recover damages for an unlawful arrest or commitment, but its ob-

ject is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the Government is shown, he is not to be discharged for defects in the original arrest or commitment. *Ex parte Bollman & Swartwout*, 4 Cranch, 75, 114, 125; *Coleman* v. *Tennessee*, 97 U. S. 509, 519; *United States* v. *McBratney*, 104 U. S. 621, 624; *Kelly* v. *Thomas*, 15 Gray, 192; *The King* v. *Marks*, 3 East, 157; *Shuttleworth's Case*, 9 Q. B. 651."

The District Judge was right, and his final order discharging the writ of *habeas corpus* is

Affirmed.

UNITED STATES *v.* CORBETT.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

No. 236. Argued October 14, 1909.—Decided December 6, 1909.

Whether the person deceived by false entries is the person intended by the statute, and whether the averments as to the deceit are sufficient to sustain the indictment, are questions which involve the construction of the statute on which an indictment for making false entries in violation of § 5209, Rev. Stat., is based, and this court has jurisdiction to review under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246.

The construction of a statute in a particular, in regard to which no question was raised, will not prevent the determination as an original question of how the statute should be construed in that particular when controverted in a subsequent case.

The rule of strict construction of penal statutes does not require a narrow technical meaning to be given to words in disregard of their context and so as to frustrate the obvious legislative intent.

Notwithstanding the rule of strict construction the offense of deceiving an agent by doing a specified act may include deception of the officer appointing the agent where the statute is clearly aimed at the deception; and under § 5209, Rev. Stat., the making of false

entries with the intent to deceive any agent appointed to examine the affairs of a national bank, includes an attempt to deceive the Comptroller of the Currency by false entries made in a report directly to him under § 5311, Rev. Stat.

Where intent is an essential ingredient of a crime it may be charged in general terms and its existence becomes a question for the jury, excepting only where the criminal intent could not as a matter of law have existed under any possible circumstances.

Under Rev. Stat. § 5209, false entries as to the condition of a national bank may be made with intent to injure the bank even though they show the bank to be in a more favorable condition than it actually is, and the question of intent to injure is one for the jury.

Fed. Rep. , reversed.

THE facts, which involve the construction of § 5209, Rev. Stat., are stated in the opinion.

The Solicitor General for the United States:

The allegation in each count of the indictment that the false entry in the report to the Comptroller of the Currency was made "with intent thereby to injure and defraud the bank" is sufficient to sustain the indictment. The natural result of false entries in such a report is an injury to the association; and the officer making such false entries, and those aiding and abetting him in making them, are conclusively presumed to intend such result. As to the proper rule with reference to proof of criminal intent under § 5209, Rev. Stat., see *United States* v. *Harper*, 33 Fed. Rep. 481, 482.

All national banks are under the supervision and control of the Comptroller of the Currency, with the approval of the Secretary of the Treasury. The Comptroller may cause examinations of national banks to be made as often as he may deem necessary to keep himself informed as to their exact condition (§ 5240, Rev. Stat.); and if at any time he shall find that a national bank is in an insolvent condition or that the law has been knowingly violated by its officers or agents, he shall have it placed in the hands of a receiver and its assets distributed (§ 5239, Rev. Stat.) Act June 30, 1876, 19 Stat. 63.

National bank examiners are but agents of the Comptroller, and their acts are his in contemplation of law. The Comptroller, while not required by statute to make personal examination of an association's books, is necessarily vested with the right so to do, and is in fact an agent appointed to examine the affairs of every national bank. Since the object of every examination is to give information to the Comptroller, who alone has power to act, the purpose of every false entry in a report must be primarily to deceive the Comptroller, though the deception be practiced through an examiner appointed by him.

The Comptroller, therefore, being an agent appointed to examine the affairs of national banks, the allegation in each count that the entry was made with intent "to deceive an agent appointed to examine the affairs of such associations, to-wit, the Comptroller of the Currency of the United States," is sufficient.

The clause in § 5209, which declares it to be an offense to make false entries in a report has been liberally construed by the courts. *United States* v. *Hughitt*, 45 Fed. Rep. 47; *United States* v. *Booker*, 80 Fed. Rep. 376; *Bacon* v. *United States*, 97 Fed. Rep. 35.

Mr. T. J. Connor for defendant in error:

This court has not jurisdiction to review under the act of March 2, 1907. The indictment was dismissed below because the charge of intent was not sufficiently stated. The construction of the statute was not involved. *United States* v. *Keitel*, 211 U. S. 370. This appears by the opinion which as part of the record is conclusive here. *Jacks* v. *Helena*, 115 U. S. 288; *Keiger* v. *Railroad Co.*, 125 U. S. 39.

The decision below was right. The statute though defining the offense as a misdemeanor in fact makes it a felony, *United States* v. *Cadwalader*, 59 Fed. Rep. 677,—an infamous crime, *Fulsom* v. *United States*, 160 U. S. 122,—and the severity of the punishment negatives the idea that mere

technical violations are to be punished. The statute being highly penal must be strictly construed. *United States* v. *Potter*, 56 Fed. Rep. 97.

The Comptroller of the Currency is not "an agent" within the strict construction of the statute. As to the construction of § 5209, Rev. Stat., see *Clement* v. *United States*, 149 Fed. Rep. 305; *United States* v. *Barton*, 10 Fed. Rep. 874.

A false report such as is charged in the indictment and which makes the bank appear in better shape than it really is, is not made with intent to *injure* the bank.

Even though a report be false, if it makes the bank appear stronger than it really is there is no intent to injure it.

MR. JUSTICE WHITE delivered the opinion of the court.

The trial court quashed portions of each count of the indictment and sustained a demurrer to the remainder. This direct review is sought because of the contention that the rulings in question were based on a construction of Rev. Stat., § 5209.

Each of the six counts charged Corbett, one of the defendants, who was cashier of the Bank of Ladysmith, a national banking association, with making a false entry as to the condition of the bank in a report made to the Comptroller of the Currency. The charge was that the false entry was made with the intent to injure and defraud said association and to deceive an agent appointed to examine the affairs of such association, to wit, the Comptroller of the Currency of the United States. Newman and McGill, the other defendants, who were directors and respectively president and vice-president of the bank, were charged in each count with having with like intent aided, abetted, etc., Corbett in the making of the false entry. The motion to quash was directed against that portion of each count which charged that the alleged acts were done with intent to deceive an agent appointed to

examine, etc. The demurrer challenged generally the sufficiency of the averments of each count.

It is insisted that there is no jurisdiction to review, because the decision below was not based upon the invalidity or construction of any statute. We think that, within the ruling in *United States* v. *Keitel*, 211 U. S. 370, the construction of Rev. Stat., § 5209 was involved. The suggestion of want of jurisdiction is, therefore, without merit.

In disposing of the merits we shall consider separately the rulings on the motion to quash and upon the demurrer.

1. *The motion to quash.*

The motion was sustained upon the theory that no offense was stated by the charge of making a false entry in the report to the Comptroller of the Currency with the intent to deceive an agent appointed to examine the affairs of the bank, viz., the Comptroller of the Currency, because that official was not such an agent. While this was the only question actually decided, nevertheless the reasoning which led the court to the conclusion by it applied went further and caused the court to declare that the statute in the particular mentioned was in effect inoperative. This because not alone was the intent to deceive the Comptroller of the Currency not embraced, but also the intent to deceive an agent appointed to examine was excluded so far as a report made to the Comptroller was concerned, as such agent would be required to examine the books and papers of the bank and not a report made to the Comptroller.

We are thus called upon to construe Rev. Stat., § 5209. The material portion of that section is as follows:

"Every president, director, cashier, teller, clerk, or agent of any association . . . who makes any false entry in any book, report, or statement of the association, with intent . . . to injure or defraud the association, . . . or to deceive . . . any agent appointed to examine the affairs of any such association, and every person who with like intent aids or abets any officer, clerk, or agent in any

violation of this section, shall be deemed guilty of a misdemeanor. . . ."

Before analyzing its text we briefly refer to authorities relied upon on one side or the other as affirming or denying the correctness of the construction affixed to the section by the court below.

In *United States* v. *Bartow*, 10 Fed. Rep. 874, Benedict, District Judge, sustained a motion to quash certain counts of an indictment, which charged the making of a false entry in a report to the Comptroller of the Currency, with the intent to deceive that officer, and held in a brief opinion that the Comptroller was not an agent appointed to examine the affairs of a national banking association within the meaning of the statute.

In *Cochran* v. *United States*, 157 U. S. 286, which involved a review of convictions under indictments for making false entries in reports made to the Comptroller of the Currency, in violation of Rev. Stat., § 5209, passing on the objection that no one, except he who verified reports made to the Comptroller, could be convicted under the indictments, the court, among other things, said (p. 294):

"If the statements of Thomas be taken as true, he, although verifying the reports as cashier, could not be held criminally liable for their falsity, since he took and believed the statements of Cochran and Sayre as to the truth and correctness of such reports. If this be true, there was lacking on his part that intent to defraud the association, or to deceive the Comptroller of the Currency, which is made, by § 5209, a material element of the offense."

On page 298 the court considered a refusal to give an instruction, which, in the course of defining a false entry, said:

"The intention to deceive is essential to constitute a violation of the statute, and you must be satisfied beyond a reasonable doubt from the evidence, first, that the defendants or one of them made a false entry in said report; and, second, that it was made with the intention of misleading or deceiv-

ing the Comptroller of the Currency, or some other person or persons alleged in the said indictment."

It was held that the refused instruction was substantially embodied in the charge as given, wherein, among other things, the trial court said (p. 298):

"The intent must have been, as laid in the indictment, to mislead and deceive one of these parties, either some of the officers of the bank or the officer of the Government appointed to examine into the affairs of the bank. . . . So that you must find, not only the fact that there was an omission to make the proper entry, but that with it was an intent to conceal the fact from somebody who was concerned in the bank, or concerned in overseeing it, and supervising its operations and the conduct of its business."

Since the decision of the *Cochran case*, and without citing that case on that subject, in *Clement* v. *United States*, 149 Fed. Rep. 305, the Circuit Court of Appeals for the Eighth Circuit, considering an objection that an allegation in a count was immaterial which charged that a false entry was made in a report to the Comptroller of the Currency, with intent to deceive that official and any agent who might be appointed to examine the affairs of a bank, said (p. 316):

"That is quite correct so far as the allegation concerning the intent to deceive the Comptroller is concerned. Such intent is not one of those requisite under § 5209 to constitute an offense. But the contention is not correct in so far as the allegation relates to the intent to deceive an agent who might be appointed to examine the affairs of the bank."

Irrespective of the direct conflict between the statement just quoted and the reasoning of the court below in the case at bar, it is apparent that neither the *Bartow* nor the *Clement case*, in view of the *Cochran case*, can be considered as persuasive. The *Cochran case*, however, it is urged should not be treated as authority, because it does not appear that any question was raised concerning the construction of the statute in the particular now controverted, but that the meaning

of the statute was taken for granted, and hence the mere assumption which was indulged in when deciding the *Cochran case* should not now prevent a determination of the significance of the language of the statute. As the report of the *Cochran case* indicates that the premise relied on is true, we come to consider the meaning of the section as an original question.

The report to the Comptroller, in which the entries were charged to have been false, and to have been made with the intent to deceive that officer as an agent appointed to examine, etc., was clearly one made under the provisions of Rev. Stat., § 5211, which reads as follows:

"Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business of any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him."

The authority conferred by this section upon the Comptroller is but one among the comprehensive powers with which he is endowed by the statute for the purpose of examining and supervising the operations of national banks, preventing and detecting violations of law on their part, appointing receivers in case of necessity, etc. From the nature of these powers it would seem clear that the Comptroller is an officer or agent of the United States, expressly as well as impliedly clothed with authority to examine into the affairs of national banking associations, and therefore a false entry made in a report to him is directly embraced in the provision of Rev. Stat., § 5209. But it is argued while this may be abstractly true, it is not so when the provision of Rev. Stat., § 5240 is considered, conferring power upon the

Comptroller, with the approval of the Secretary of the Treasury, to appoint suitable agents to make an examination of the affairs of every national banking association. Because of this power the contention is that the words "any agent appointed to examine the affairs of any such bank" should be construed as embracing only the subordinate agents whom the Comptroller is authorized to appoint. But to so hold, we think, would do violence to the text of § 5209, and conflict with its context, and would, besides, frustrate the plain purpose which the section as a whole was intended to accomplish, especially if it be considered in the light of cognate provisions of the statute. We say the first, because the particular words of the text relied upon, "any agent appointed to examine," etc., are all-embracing, and cannot reasonably be held to exclude the Comptroller, the principal agent endowed by the statute with the power to examine national banks. Indeed, the words "any agent" would seem to have been used in the broadest sense for the express purpose of excluding the possibility of the contention now made. Nor does the fact that the section of the Revised Statutes empowering the Comptroller to call for reports from national banks is contained in a section subsequent to the one which embodies the provision authorizing the Comptroller to appoint agents to examine, give force to the contention that the Comptroller cannot be embraced by the words "any agent." The provision in question was originally contained in the act of 1864, which moreover forbade certain acts in the transaction of the affairs of national banks, empowered the Comptroller of the Currency to exercise supervisory power, to call for reports from the associations and to bring into play other authority substantially as found in the law as now existing. This was followed by the provision giving to the Comptroller the right to appoint subordinate examiners, the whole being concluded by a section containing provisions which are now substantially embodied in Rev. Stat., § 5209. It is apparent that such provisions embraced acts

forbidden and matters regulated by previous sections, including the reports to be made by the associations to the Comptroller and the examination of books and papers by the agents appointed by the Comptroller. The intention cannot be reasonably imputed of punishing an intent to deceive a subordinate of the Comptroller by means of false entries in a report required to be made directly to the Comptroller and for his information and guidance, and yet at the same time not to punish the intent to deceive the very officer to whom the report was to be made. Including the reports to be made to the Comptroller in the comprehensive grouping of the section excludes the conception that such officer was not considered as embraced in the words "any officer appointed," etc. But the argument is that, however cogent may be the considerations just stated, they are here inapplicable, because the statute is a criminal one, requiring to be strictly construed. The principle is elementary, but the application here sought to be made is a mistaken one. The rule of strict construction does not require that the narrowest technical meaning be given to the words employed in a criminal statute in disregard of their context and in frustration of the obvious legislative intent. *United States* v. *Hartwell*, 6 Wall. 385. In that case, answering the contention that penal laws are to be construed strictly, the court said (p. 395):

"The object in construing penal, as well as other statutes, is to ascertain the legislative intent. . . . The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. . . . The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

It is to be observed that the rule thus stated affords no ground for extending a penal statute beyond its plain meaning. But it inculcates that a meaning which is within the text and within its clear intent is not to be departed from because, by resorting to a narrow and technical interpretation of particular words, the plain meaning may be distorted and the obvious purpose of the law be frustrated. *Bolles* v. *Outing Co.*, 175 U. S. 262, 265, and especially *United States* v. *Union Supply Company*, decided this term, *ante*, p. 50.

Indeed, the aptness of the application of the principle just stated to the case in hand is well illustrated by the following considerations. If by distorting the rule of strict construction we were to construe the words of the statute, "any agent appointed to examine," so as to exclude the Comptroller of the Currency, the principal agent appointed for such purpose, by the same method we should be compelled to adopt the reasoning of the court below and to narrow the statute so as to exclude the intent to deceive by false entries in the report, an agent to whom the report was not to be made and who might not be called upon to examine the same, thus, in effect, as to intent to deceive any agent, destroying the statute. And this impossible conclusion at once serves to point out the correctness of the interpretation of the statute assumed in the *Cochran case*, that the intent to deceive, for which the statute provides, is an intent to deceive the official agents concerned in overseeing the bank and supervising its operation and the conduct of its business, including, of necessity, the Comptroller of the Currency and the subordinate agents or examiners whom the statute authorized him to appoint.

2. *The demurrer.*

Where intent is an essential ingredient of a crime it is settled that such intent may be charged in general terms and that the existence of the intent becomes, therefore, a question to be determined by the jury upon a consideration of all the facts and circumstances of the case. *Evans* v. *United*

States, 153 U. S. 584. It is, of course, to be conceded that where the facts charged to have been done with criminal intent are of such a nature that on the face of the indictment it must result as a matter of law that the criminal intent could not under any possible circumstances have existed, the charge of such intent, in general terms, would raise no issue of fact proper to go to a jury. It was upon the conception that the facts alleged in the indictment under consideration excluded the possibility under any circumstances of the existence of the particular criminal intent charged, that the court below was led to sustain the demurrer. The court said:

"The indictment also charges that the entries were made with intent to injure and defraud the bank itself, but how this could be does not appear. It is barely possible that some harm might indirectly have come to the bank by the publication of the false report in the vicinity of the place where the bank was located, but this possibility is not sufficient to show the definite intent shown by the statute. The report must have been made with the purpose on the part of those signing it to injure and defraud the bank. The report could not possibly change the actual condition of the bank, and a false report showing a better condition than in fact existed might as readily be a benefit to the bank as a detriment. At all events, the detriment would be merely speculative, insufficient to afford proof of a positive intent to injure and defraud the bank."

But to these views we cannot give our assent. Because the false entries in the report showed the bank to be in a more favorable condition than it was in truth did not justify the conclusion that the entries in the report could under no circumstances have been made with the intent to injure the bank, unless it be true to say that it must follow, as a matter of law, that to falsely state in an official report a bank to be in a better condition than it really is, under every and all circumstances is to benefit and not to injure the bank. But

this view would do violence to the statute, which exacts truthful reports upon the conception that the knowledge by the officials of the Government of the true condition of the bank is conducive to the safeguarding of its interests and its protection from injury and wrong. It was undoubtedly within the power of the Comptroller of the Currency, if the bank was out of line, or if its affairs were in a disordered or precarious condition, or if its officers had embarked in transactions calculated to injuriously affect the financial condition of the bank, to apply a corrective, and thus save the bank from injury and future loss. Certainly, as a matter of law, it cannot be held, although such transactions were concealed in a report made to the Comptroller by false statements exhibiting a more favorable condition of the bank than would have appeared if the truth had been stated, that no intent to injure the bank could possibly be imputed, even although the necessary effect of the false statement was to prevent the Comptroller from exerting the powers conferred upon him by law for the protection of the bank from injury. And these considerations also effectually dispose of the theory that the acts charged to have been falsely reported, in and of themselves, were of such a character as to exclude the possibility of a criminal intent to injure the bank. The counts charged false entries as to the amount of bad debts due the bank, as to the suspended paper held by the bank, as to the amount due the bank by its president as indorser, guarantor or otherwise, and as to the assets of the bank, by reporting that it owned various pieces of real estate which it really only held as security. We are of opinion that the alleged false statements did not so exclude the possibility of an intention to injure the bank as to justify so declaring as a matter of law, and that the case should have been submitted to a jury to determine the question of intent in the light of all the facts and circumstances existing at the time of the making of the alleged false entries.

Reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE DAY do not think the Comptroller is within the words "any agent," and dissent from that ruling. In other respects they concur.

LATHROP, SHEA & HENWOOD COMPANY *v.* INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

No. 2. Argued October 22, 1909.—Decided December 6, 1909.

Where plaintiff in good faith insists on the joint liability of all the defendants until the close of the trial, the dismissal of the complaint on the merits as to the defendants who are citizens of plaintiff's State does not operate to make the cause then removable as to non-resident defendants and to prevent the plaintiff from taking a verdict against the defendants who might have removed the cause had they been sued alone, or if there had originally been a separable controversy as to them.

THE facts, which involve the validity of the removal of a cause to the Federal court, are stated in the opinion.

Mr. Clarence M. Bushnell for plaintiff in error.

Mr. C. Walter Artz for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The parties were respectively plaintiff and defendant in the court below, and we shall so designate them.

The plaintiff brought suit against the defendant and the Pittsburg, Shawmont and Northern Railroad Company in the Supreme Court of Erie County, New York, for the sum

of $43,038.88, upon a contract entered into between the defendant, the Interior Construction and Improvement Company, and the plaintiff, by which the Construction Company agreed to construct certain portions in Pennsylvania and New York of the line of the railroad company, and for materials and the use of certain articles by the railroad. It is alleged in the petition of the plaintiff that the railroad company was organized by the consolidation of other railroad companies, and for the purpose of carrying out the plans of such consolidation undertook the construction of a railroad from certain points in Pennsylvania to the village of Angelica in the State of New York. That in pursuance of this purpose the railroad company entered into a contract with the Construction Company, and in payment for the construction of the railroad agreed to issue and did issue to the company its stocks and bonds, which were largely in excess of cost of construction. That the Construction Company was organized solely for the purpose of building the railroad and to secure to the promoters and organizers thereof the profits to be made by the construction of the railroad and the manipulation of securities. That the officers, directors and owners of the majority of the capital stock of the railroad had like relation to the Construction Company and the management of the latter was controlled by them. And it is averred that the Construction Company was the agent and representative of the railroad company, and that the latter became and is responsible and liable for the acts and obligations of the Construction Company. Due performance by plaintiff of its contract is alleged.

It is further alleged that the railroad company is a New York corporation and the Construction Company is a New Jersey corporation.

There was personal service of the summons on the railroad company on the twenty-fourth of October, 1904. That company appeared and answered. The service upon the Construction Company was made on the sixteenth of November, 1904, by serving the summons on the secretary of state

of the State of New York. The Construction Company made a motion to set aside the service of summons on the ground that it was irregular and void. The company made no other appearance. The motion was denied, and appeal was taken to the Appellate Division of the court. That court affirmed the ruling, and denied leave to appeal to the Court of Appeals. The Construction Company's time to answer was extended to February 6, 1905, and, upon motion of the company, the case was removed to the United States Circuit Court on the ground of a separable controversy, but was subsequently remanded upon motion of the plaintiff. The motion to set aside the service of summons was denied. *Lathrop, Shea & Henwood Co.* v. *Interior Construction & Improvement Co.*, 135 Fed. Rep. 619. Upon the return of the case to the state court, a motion was made by the Construction Company to extend its time to appear and answer in the action until twenty days after the determination of the motion then pending, made in behalf of the railroad company, to compel the plaintiff to elect which defendant it would proceed against, to the exclusion of the other. The motion was denied, also that made by the railroad company. The referee to whom the issues raised by the railroad company had been referred, to hear and determine, reported dismissing the complaint as to that company, and judgment thereon was entered on the twenty-sixth of October, 1905. The judgment was affirmed by the Appellate Division of the Supreme Court. But, pending the appeal, upon motion of the Construction Company the case was removed to the Circuit Court, but that court remanded the case, saying that "until the determination of the appeal by the co-defendant, in the absence of fraud or improper joinder of defendants for the purpose of interfering with or obstructing the Construction Company's right of removal, it is not thought that a separable controversy exists." *Lathrop, Shea & Henwood Co.* v. *Interior Construction & Improvement Co.*, 143 Fed. Rep. 687.

On the twenty-third of September, 1905, an affidavit of the

default of the Construction Company having been filed, an order was made in the Supreme Court, reciting the fact, and the facts showing such default, and appointing a referee "to take proofs of the cause of action set forth in the plaintiff's complaint." The referee reported that there was due plaintiff the sum of $47,323.91. The report was confirmed and judgment entered for that amount.

Subsequently, the Appellate Division having sustained the judgment dismissing the action as to the railroad company, the case was again, on the motion of the company, removed to the Circuit Court and a motion made in that court to set aside the service of summons on the Construction Company and to vacate the judgment. Concurrently with that motion plaintiff moved to remand the case to the state court. The motion of the Construction Company was granted and the action dismissed for want of jurisdiction over the company. *Lathrop, Shea & Henwood Co.* v. *Interior Construction & Improvement Co.*, 150 Fed. Rep. 666.

The motion was granted on the ground that the facts showed that the company had ceased to do business in the State and held no property therein.

It will be seen that a question of jurisdiction alone is presented, the Circuit Court certifying "that no evidence was introduced upon the hearing of the motion, the issues being:

"I. Whether this court had obtained jurisdiction over this defendant by the service of a summons upon the secretary of state of the State of New York as provided by section 16 of the General Corporation Law of said State of New York.

"II. Whether the proceedings in and the decisions of the courts of the State of New York construing said corporation law were controlling upon this court.

"III. Whether the proceedings taken by said defendant in said state court are *res adjudicata* upon defendant."

But there is a question of jurisdiction paramount to that passed on by the Circuit Court. It will be observed that the action against the railroad company was not dismissed by

plaintiff, but, against its contention, by the Supreme Court of the State, whose judgment was affirmed, also against its contention, by the Appellate Division of that court. This did not take jurisdiction from the state court to proceed against the Construction Company nor make the judgment against it invalid.

It was held in *Powers* v. *C. & O. Ry.*, 169 U. S. 92, that a case may become removable after the time prescribed by statute, upon the ground of a separate controversy upon the subsequent discontinuance of the action by the plaintiff against the defendants, citizens of the same State with the plaintiff. In *Whitcomb* v. *Smithson*, 175 U. S. 635, 637, the *Powers case* was commented on, and a different effect was ascribed to a ruling of the court dismissing the action as to one of the defendants than to a discontinuance by the voluntary act of the plaintiff. The action was against Whitcomb and another who were receivers of the Wisconsin Central Company and the Chicago Great Western Railway Company for personal injuries received by Smithson while serving the Chicago Great Western Railway Company as a locomotive fireman in a collision between the locomotive on which he was at work and another locomotive operated by the receivers appointed by United States Circuit Court. The case came to trial, and at the close of the testimony counsel for the Chicago Great Western Railway Company moved that the jury be "instructed to return a verdict in behalf of that defendant," which motion the court granted. An application was then made by the receivers to remove the case to the Circuit Court of the United States, which was denied. The court instructed the jury to return a verdict for the railway company, which was done, and thereupon the case went to the jury, who returned a verdict against the receivers, upon which judgment was entered. The judgment was affirmed by the Supreme Court of Minnesota, to which a writ of error was issued from this court. Passing on motions to dismiss or affirm and answering the contention of the receivers that they

acquired the right of removal as though they were the sole defendants, when the court directed a verdict in favor of the railway company, this court said by the Chief Justice: "This might have been so if when the cause was called for trial in the state court, plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all of the defendants. *Powers* v. *Chesapeake & Ohio Railway,* 169 U. S. 92. But that is not this case. The joint liability was insisted on here to the close of the trial, and the non-liability of the railway company was ruled *in invitum.* . . . This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable, and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them."

The *Whitcomb case* and the *Powers case* are commented on and impliedly approved in *Chesapeake & Ohio Ry. Co.* v. *Dixon,* 179 U. S. 131, 138. And again in *Kansas City Suburban Belt Ry. Co.* v. *Herman,* 187 U. S. 63; *Fritzlen* v. *Boatmen's Bank,* 212 U. S. 364, 372. See also *Alabama Great Southern Ry.* v. *Thompson,* 200 U. S. 206.

It follows from these views that the order of the Circuit Court setting aside the service of the summons on the Construction Company and vacating the judgment against it and dismissing the action must be

Reversed and the cause remanded, with directions to grant the motion of plaintiff to remand the case to the Supreme Court of the State of New York. So ordered.

VIRGINIA-CAROLINA CHEMICAL COMPANY *v.* KIRVEN.

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

No. 18. Argued November 2, 1909.—Decided December 6, 1909.

The claim of plaintiff in error that proper and full credit was not given to a judgment in the Federal court, if seasonably made, raises a Federal question and if the decision of the state court is in effect against such claim this court has jurisdiction.

While the bar of a judgment in another action for the same claim or demand between the same parties extends to not only what was, but what might have been, pleaded or litigated in the first action, if the second action is upon a different claim or demand the bar of the first judgment is limited to that which was actually litigated.

Under § 914, Rev. Stat., requiring the practice in the Federal courts to conform as near as may be to the practice in the state courts, the defendant in an action in the United States Circuit Court in South Carolina is not required to plead all counterclaims and offsets as the state courts have not so construed the provisions of §§ 170, 171 of the Code of Procedure of that State.

When the question is the effect which should have been given by the state court to a judgment of the United States Circuit Court, this court is not concerned with the extent to which the state court may have subsequently modified its view if it has not questioned the correctness of its decision in the case at bar.

77 So. Car. 493, affirmed.

THE facts are stated in the opinion.

Mr. P. A. Willcox and *Mr. Frederic D. McKenney*, with whom *Mr. F. L. Willcox* and *Mr. Henry E. Davis* were on the brief, for plaintiff in error:

The question litigated in the present suit was rendered *res judicata* by the judgment in the Federal court as it was matter that should have been set up as counterclaim. Such is the rule in South Carolina, §§ 170, 171, Code of Procedure, and under § 914, Rev. Stat., the practice of the Federal

courts must conform thereto. See Simonton, Fed. Courts, §§ 106, 152, 157; *Haygood* v. *Boney*, 43 S. Car. 63; *Schunk* v. *Moline*, 147 U. S. 500; *Pickham* v. *Manufacturing Co.*, 77 Fed. Rep. 663; *Turner* v. *Association*, 101 Fed. Rep. 308; *Partridge* v. *Insurance Co.*, 15 Wall. 573; 1 Van Fleet on Former Adjudication, §§ 168, 172; 23 Cyc. 1202; Black on Judgments, § 767.

Where a party has an opportunity to litigate an issue in defense and fails to do so the judgment shuts off that defense, and if the same issues are being litigated in two courts the first final judgment will render the issues *res judicata* in the other court. *Boatmen's Bank* v. *Fritzlein*, 135 Fed. Rep. 650; 24 Am. & Eng. Ency., 2d ed., 833; 17 Ency. of P. & P. 265.

In determining the question of *res judicata* of an issue by judgment in the Federal court this court will be governed by its own decisions and not by those of the courts of the State. The right given by a judgment in the Federal court is one arising under the Constitution and cannot be taken away by the State, and this court has jurisdiction. *Crescent City Co.* v. *Butchers' Union*, 120 U. S. 141; *Pittsburg R. R. Co.* v. *Long Island Trust Co.*, 172 U. S. 493; *Dowell* v. *Applegate*, 152 U. S. 327; *Werlein* v. *New Orleans*, 177 U. S. 390; *National Foundry* v. *Supply Co.*, 183 U. S. 216; *Cromwell* v. *Sac County*, 94 U. S. 351.

The estoppel resulting from the thing adjudged does not depend on whether there is the same demand but on whether the second demand has been previously concluded by judgment between the same parties. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396; *Supply Co.* v. *Mobile*, 186 U. S. 212, 217; *Bank* v. *Frankfort*, 191 U. S. 499; *Fayerweather* v. *Ritch*, 195 U. S. 276, 301; *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 290; *United States* v. *California & Oregon Land Co.*, 192 U. S. 355; *Northern Pac. Ry. Co.* v. *Slaght*, 205 U. S. 122; *Stockton* v. *Ford*, 18 How. 418; *Northern Pacific Ry. Co.* v. *United States*, 168 U. S. 1; and see also *Price* v. *Dewey*, 11

Fed. Rep. 104; *Nemetty* v. *Naylor*, 100 N. Y. 562; *Reichert* v. *Krass*, 41 N. E. Rep. 835; *Blair* v. *Bartlett*, 75 N. Y. 150; *Dunham* v. *Bower*, 77 N. Y. 76; *Gibson* v. *Bingham*, 43 Vermont, 410; *Rew* v. *School District*, 106 Am. St. Rep. 282.

In reaching its judgment upholding the validity of the note the Federal court necessarily determined there was no failure of consideration, and that is the foundation of the action in the state court; prior to this case the decisions of the state court supported the principle contended for. *Willoughby* v. *Railroad Co.*, 52 S. Car. 175; *Ryan* v. *Association*, 50 S. Car. 187.

This action cannot be sustained without depriving plaintiff in error of the benefit of a judgment of the Federal court.

In further support of the contentions of plaintiff in error see *Mooklar* v. *Lewis*, 40 Indiana, 1; *Shepherd* v. *Temple*, 3 N. H. 455, and the decision of the Supreme Court of South Carolina rendered since this case was decided. *Greenwood Drug Co.* v. *Bromonia Co.*, 81 S. Car. 516.

Mr. Charles A. Douglas, with whom *Mr. W. F. Stevenson* and *Mr. E. O. Woods* were on the brief, for defendant in error:

This court is without jurisdiction. The point that full faith and credit was not given to the judgment of the Federal court does not appear in the record and a general statement is not sufficient, and questions other than Federal are involved.

The first judgment is not *res judicata* in regard to the question in the second suit. The rule requiring a party to assert all defenses does not apply to defendant's claims against plaintiff by way of counterclaims and set-off. 1 Van Fleet, §§ 168–172; Black on Judgments, § 768; *Davis* v. *Hedges*, L. R. 6 Q. B. 687; *Kennedy* v. *Davisson*, 33 S. E. Rep. 292; *Riley* v. *Hole*, 33 N. E. Rep. 491; *Conner* v. *Varney*, 10 Gray, 231; *Myrian* v. *Woodcock*, 104 Massachusetts, 326; *Gilmore* v. *Williams*, 38 N. E. Rep. 976; 19 Ency. P. & P. 731; 24 Am. & Eng. Ency. 785. The questions of failure of consideration and damages to crop were not involved in the

first suit and the judgment was not *res judicata* in regard to those issues.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case involves the question as to whether the state courts gave due force and effect to a judgment of the Circuit Court of the United States for the District of South Carolina in an action brought by plaintiff in error against the defendant in error.

The action in the case at bar was brought by defendant in error, whom we shall call Kirven, against plaintiff in error, whom we shall call the Chemical Company, for damages resulting from the defective manufacture of certain fertilizers bought by Kirven of the Chemical Company, through one McCall, to whom he gave his note for twenty-two hundred and twenty-eight dollars. The allegation of complainant is:

"That the said fertilizers, to wit, acid phosphate and dissolved bone, had been manufactured with such gross negligence and want of skill that, instead of being of advantage to the crops to which they were applied, they destroyed the same in large part, and were not only worthless to the plaintiff, but, by destroying his crops, damaged him very heavily, and by the injury which was inflicted on his crop of cotton and corn by fertilizers which were manufactured and sold for use upon them, he was damaged in the sum of $1,995."

The Chemical Company, in its answer, set up, among other defenses, the judgment of the Circuit Court of the United States. The plea was not sustained and judgment was entered for Kirven for the amount sued for, which was affirmed by the Supreme Court of the State. *Kirven* v. *Virginia-Carolina Chemical Co.*, 77 S. Car. 493.

The facts, so far as necessary to be stated, are as follows: The Chemical Company, being a New Jersey corporation, brought action against Kirven in the Circuit Court of the United States for the District of South Carolina on the note before mentioned. Kirven, among other defenses, set up

that the note was given for fertilizers, "for which he agreed to pay a sound price, which is set forth in the note sued upon, and were purchased for the use of the defendant himself and his tenants and customers in making a crop for the year in which the said note was given, but the said fertilizers were so unskillfully manipulated and manufactured and prepared, and were of such inferior quality, that instead of being a benefit to the crops of defendant and his tenants and customers, to whom he furnished the same, they were deleterious and destructive to the crops, and destroyed the same in large part, and there was an entire failure of consideration to the defendant for said note."

Kirven subsequently filed a supplementary answer, in which he omitted, the Chemical Company not objecting, the defense above set out, but pleaded as a counterclaim certain proceedings instituted by the Chemical Company in North Carolina, in which it attached certain cotton belonging to Kirven, sold the same and "applied and appropriated the proceeds to its own use and benefit." The value of the cotton and the amount "so seized and appropriated" were alleged to be twenty-four hundred and fifty dollars ($2,450.00).

Kirven, when testifying as to the purchase of the fertilizers, said: "I did not know anything, until later on, there was a complete destruction of my crop." Counsel for the company objected "to the latter clause, on the ground that that whole question is taken out of the complaint." The objection was sustained and the answer stricken out. The Chemical Company recovered judgment for nine hundred eleven dollars and seven cents ($911.07).

A motion is made to dismiss the writ of error, on the grounds (1) that the assignment of errors in the Supreme Court of the State lacked certainty of specification, as it only stated that the refusal by the trial court to give proper and full credit to the judgment of the Circuit Court, "thereby denied to the defendant [the Chemical Company] a right arising under the authority of the United States." This, it

is contended, is not sufficient to raise a Federal right, and the following cases are cited: *Chicago & N. W. Ry. Co.* v. *Chicago*, 164 U. S. 454; *Clarke* v. *McDade*, 165 U. S. 168; *Miller* v. *Cornwall R. R. Co.*, 168 U. S. 131; *Harding* v. *Illinois*, 196 U. S. 78; *Thomas* v. *State of Iowa*, 209 U. S. 258.

The cases are not applicable. In neither of them was the contention under the Constitution of the United States identified or passed upon. In the case at bar there is a definite right arising under the authority of the United States and the decision of the court was in effect against it. The case falls within *Crescent City &c. Co.* v. *Butchers' Union &c. Co.*, 120 U. S. 141; *Pittsburg &c. Ry.* v. *Loan & Trust Co.*, 172 U. S. 493; *Deposit Bank* v. *Frankfort*, 191 U. S. 499.

The question on the merits is a narrow one. Its solution depends upon the application of well-known principles—too well known to need much more than statement. It is established that the bar of a judgment in another action for the same claim or demand between the same parties extends to not only what was pleaded or litigated in the first action, but what might have been pleaded or litigated. If the second action is upon a different claim or demand, the bar of the judgment is limited to that which was actually litigated and determined. *Cromwell* v. *Sac County*, 94 U. S. 351; *Northern Pacific Ry. Co.* v. *Slaght*, 205 U. S. 122. Of course, as contended by the Chemical Company, there are some defenses which are necessarily negatived by the judgment—are presumed never to have existed. These are such as go to the validity of the plaintiff's demand in its inception or show its performance, such as is said in *Cromwell* v. *Sac County*, *supra*, as forgery, want of consideration or payment. But this court has pointed out a distinction between such defenses and those which, though arising out of the transaction constituting plaintiff's claim, may cut it down or give rise to an antagonistic demand. Of such defenses we said, speaking through Mr. Justice Holmes in *Merchants' Heat & Light Co.* v. *Clow & Sons*, 204 U. S. 286, 290, that the right to

plead them as a defense "is of modern growth, and is merely a convenience that saves bringing another suit, not a necessity of the defense." And showing how essentially they were independent of the plaintiff's demand, although they might be of a defense to it, it was said that when the defendant set them up he became a plaintiff in his turn and subject to a jurisdiction that he otherwise might have denied and resisted. The principle was applied to recoupment as well as to set-off proper. Even at common law, it was said (p. 289), "since the doctrine has been developed, a demand in recoupment is recognized as a cross demand as distinguished from a defense. Therefore, although there has been a difference of opinion as to whether a defendant by pleading it is concluded by the judgment from bringing a subsequent suit for the residue of his claim, a judgment in his favor being impossible at common law, the authorities agree that he is not concluded by the judgment if he does not plead his cross demand, and that whether he shall do so or not is left wholly to his choice." This doctrine is attempted to be avoided by insisting that Kirven's plea in the Circuit Court and his cause of action in the case at bar is an assertion of a want of consideration for the note, and, it is urged, brings the case under one of the defenses mentioned in *Cromwell* v. *Sac County, supra,* which would have defeated recovery on the note, and that the judgment obtained necessarily negatives the facts upon which Kirven now bases his cause of action. "Call it what he may please," the Chemical Company says, "the basis of Kirven's claim in this suit is an alleged failure of consideration of such great degree that it amounted to positive viciousness, which would have been a perfect defense to the suit in the United States Court." It may be, indeed, that such "viciousness" could have been set up in the action in the Circuit Court, but it would be to confound distinctions that have always been recognized, and the effect of which are pointed out in *Merchants' Heat & Light Co.* v. *Clow & Sons, supra,* to conclude that the judgment recovered

negatives the existence of that "viciousness," or the damages which were consequent to it. This was the view taken by the Supreme Court of the State, that court deciding that the cause of action in the Circuit Court and that in the case at bar were upon different claims or demands—"one being upon a promissory note, and the other for unliquidated damages," arising from the destruction of Kirven's crops. And the Supreme Court also decided, that Kirven withdrew the defense based on the damages to him. It was omitted, as we have seen, from the supplementary answer. Testimony in regard to it was excluded upon the objection of the Chemical Company, and there is support for the contention that the company is estopped to urge that a defense which was excluded upon its objection was involved in the action and concluded by the judgment.

It is, however, contended by the Chemical Company that whether new matter constitutes a defense or counterclaim under §§ 170, 171 of the Code of Procedure of South Carolina (inserted in the margin [1]), it must be set up by a defendant in his answer and cannot be, if not set up, used as an independent cause of action. It is also contended that this being the practice in the state courts, by virtue of the

[1] SEC. 170. The answer of the defendant must contain:

"1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

"2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition."

SEC. 171. The counterclaim mentioned in the last section must be one existing in favor of the defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action:

"1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

"2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

provisions of § 914 of the Revised Statutes of the United States, it becomes the practice in causes in the courts of the United States held in South Carolina. That section requires "the practice, pleadings, forms and modes of proceedings" in the Federal courts to "conform as near as may be" to the practice in the state courts. An answer to this contention is that the Supreme Court of the State did not so construe the Code of Procedure. On the effect of the judgment of the Circuit Court of the United States as *res judicata* the court divided, but three members of the court must have entertained opinions adverse to the contention of the Chemical Company. Mr. Justice Gary discussed the effect of the judgment, and was of opinion that it was not *res judicata*, a conclusion at which he could not have arrived if the code of the State required Kirven to set up his demand for damages in the answer. Mr. Justice Woods, in his concurring opinion, expressed the view that under the code the demand could have been, but was not required to be, pleaded in defense. Mr. Justice Pope dissented from that construction, and also from the effect of the judgment as *res judicata*. Mr. Justice Jones concurred with the Chief Justice only as to the effect of the judgment.

Finally, it is urged that in the case of *Greenwood Drug Company* v. *Bromonia Company*, 81 S. Car. 516, decided since the case at bar, the Supreme Court of the State of South Carolina is in accord with the contention of the Chemical Company as to the effect of judgments as *res judicata*, and has modified the views expressed by that court in the case at bar. It may well be contended that we are not concerned to consider to what extent that learned court has modified its views, as we have taken jurisdiction of this case because of our right to decide the weight and effect to be given to the judgment of the Circuit Court. It is enough, however, to say that the Supreme Court of South Carolina did not question the correctness of its decision in the case at bar.

Judgment affirmed.

SNYDER *v.* ROSENBAUM.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 25. Argued November 8, 9, 1909.—Decided December 6, 1909.

In this case the judgment of the Supreme Court of the Territory of Oklahoma, involving contract rights, is affirmed.

The opinion of the Supreme Court of the Territory followed to the effect that the facts stated constituted duress within the meaning of the territorial statute.

Stating only part of a statutory definition of duress in the charge to the jury held not reversible error, it not appearing that the defendant was hurt thereby.

18 Oklahoma, 168, affirmed.

THE facts are stated in the opinion.

Mr. Gardiner Lathrop, with whom *Mr. Armwell L. Cooper, Mr. John E. Wilson* and *Mr. John S. Wright* were on the brief, for plaintiff in error.

Mr. C. J. Wrightsman and *Mr. J. J. Darlington,* with whom *Mr. Carl Meyer* and *Mr. L. W. Lee* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error brought by the executors of Robert M. Snyder to reverse a judgment upon a written contract in favor of one Stribling, assigned by him to the defendant in error, Rosenbaum. *Snyder* v. *Stribling,* 18 Oklahoma, 168. The contract was dated September 1, 1909, and purported to be a sale by Stribling of 12,700 head of steer cattle, then in pasture near Gray Horse, Oklahoma, of which 12,500 were

to be counted out to the purchaser; with particulars as to age. Also, of from 3,200 to 3,500 acres of corn, 1,400 acres of cane, and about 5,000 acres of hay, all near the same place. Also, of certain horses, mules, wagons, and ranch outfit, employed by Stribling about the said cattle. By a later clause the farms where the fodder was were specified, and it was added that the exact acreage was not guaranteed. The agreed price was $500,000, to be paid, first, by the transfer to Stribling of a ranch in Arizona, with the herd and outfit thereon, at the valuation of $150,000; next, by the assumption of an encumbrance of $240,000 on 10,500 of the cattle sold; 'the balance . . . to be paid . . . or accounted for satisfactorily to said Stribling with . . . days of the signing of this instrument.' It was agreed that 10,500 of the cattle were free from encumbrances except the $240,000 just mentioned, and that if there was any encumbrance of the remaining 2,000 such encumbrance should be deducted from the purchase price. "Said cattle to be counted within fifteen days." Both parties to the contract were experienced men.

Stribling alleged performance of the contract on his part and a breach by Snyder in not conveying his Arizona ranch, and in not accounting for a cash balance of $5,200. The answer set up a document of October 1, 1900, signed by Snyder and Stribling, and addressed to a third party, as a supplemental contract; denied performance of this or the original agreement by Stribling, stating various details of failure, and alleged fraud. The replication averred that to secure an extension of time for the payment of the mortgage on the cattle referred to in the original contract, Stribling and Snyder, on September 5, made an agreement with the holder, by one part of which Snyder agreed to market enough of the cattle to pay the notes that were overdue, and by which he also bound himself to pay the other mortgage notes as they fell due. The replication continued that on October 1, 1900, Stribling had delivered the cattle and other property, and

that Snyder, being in possession of them, told Stribling that unless he signed the document set up in the answer he would not pay for the cattle or pay the mortgage debt or release the cattle; that both parties understood that this threat, if carried out, would lead to an immediate foreclosure and Stribling's ruin, and that in those circumstances, characterized as duress, Stribling signed.

There was a trial and the jury found for the plaintiff. It made in addition a very great number of special findings, establishing, subject to any question of law that may have been reserved, much more than was necessary to support the verdict. It found the following facts among others: In pursuance of the September contract, 12,391 head of cattle were counted out to the purchaser, and the counting of the rest of the 12,500 was stopped by the purchaser's agent, he being satisfied, and there being enough cattle in sight to make up the total. After the count, on or about September 26, 1900, the purchaser took possession and Stribling then ceased to exercise control over the property. This included 12,500 head of cattle, the horses, mules, wagons, harness, pastures, camp outfit and such feed as was there. Stribling asked Snyder for a settlement and Snyder made no objection to the correctness of the count or to the representations as to the acreage of feed or to Stribling's performance otherwise, but nevertheless refused to do his part. He sold the cattle again by a transaction which it is not necessary to trace, and the negotiations concerning which were not known to Stribling at the time of Snyder's threats mentioned in the replication, and of the signing of the document of October 1. The threats alleged are found to have been made and to have induced Stribling to sign, without other consideration. At this time the value of the cattle was going down, and that of the Arizona property was going up, facts that may partly account for Snyder's conduct. It is found that he wanted to avoid the September contract, and to get the cattle by merely discharging the liens. But the parties did not carry out the

provisions of the October document, and upon this finding and the finding as to the pressure under which it was executed it is unnecessary to state its provisions. They were more onerous to Stribling in several respects, requiring a further count, and forfeiting the Arizona property if the full number was not turned over and payment made for any deficiency within five days of the count.

All fraud on Stribling's part is negatived, and the upshot of the whole matter is that he performed his contract in every respect except that there was not so much fodder as was supposed, and for that the jury made an allowance of nine thousand dollars.

The argument for the plaintiffs in error discusses the evidence at great length. But we shall deal only and very briefly with the rulings that seem to us to require notice. It is enough to say at the outset that there was some evidence to support the special findings that we have mentioned. But it is urged that, this being a suit upon the contract, if it was not performed to the letter, the plaintiff cannot recover. The judge instructed the jury that a contract of this kind, for the delivery of a certain number of cattle, is severable, and that if the whole number of cattle or the full number of acres of feed were not delivered, still the plaintiff could recover the contract price less an allowance for the damage occasioned by the failure. This is assigned as error. It is unnecessary to consider whether the construction of the contract was too liberal in favor of the plaintiff or whether it embodied the understanding upon which such dealings take place. The jury found that all the cattle were delivered. As to the deficiency in the acreage of fodder, the contract stated that the precise amount was not guaranteed, and the jury found that Snyder was acting on his own inspection. The deficiency did not go to the root of the contract. Furthermore if, after the parties have had a full trial, and after such specific findings as were made, any amendment were necessary, which we are far from intimating, no doubt it would be allowed. The defendant suffered no possi-

ble surprise. See also Wilson's Stats. Oklahoma, 1903, § 4344.

It is objected further that the other cattle, above the 10,500 mentioned in the contract as mortgaged, and the fodder were subject to liens for about $110,000. But this possibility was contemplated by the contract, the liens were satisfied out of the purchase price, and no harm was done. Finally, it is said, that the delivery was not made within fifteen days. But, by statute, time is not of the essence of a contract, 'unless by its terms expressly so provided.' Wilson, Stats. 1903, § 809. The delay was not the fault of Stribling, but was due to Snyder and his agents. The cattle were accepted without objection on that ground, and if the delay could have been complained of under the circumstances, performance *ad diem* was waived.

The other principal defense and the ground of counterclaim relied upon was the alleged contract of October 1. As the validity of this contract was denied and the execution of it said to have been abandoned, of course the judge was right in refusing instructions that assumed it to be in force. But complaint is made of an instruction to the jury in the language of the statutes as to duress and undue influence. Probably through a mechanical slip, only a part of the statute as to duress was recited, so that fraudulent confinement of the person seemed to be stated as an exhaustive definition. But this did not hurt the defendant, if for no other reason, because there was no pretence of duress in that sense. The judge then went on to quote the definition of one form of undue influence, as 'taking a grossly oppressive and unfair advantage of another's necessities or distress.' Wilson, Stats. 1903, § 746. It is objected that undue influence was not pleaded. But the facts were pleaded and were found by the jury in like form. We should assume that those facts amounted to undue influence within the meaning of the Oklahoma statutes until the Supreme Court of the State says otherwise. But it is said that they do not amount to duress,

and therefore an instruction should have been given, as asked, that there was no evidence of duress. We see no reason for not following the opinion of the territorial court that the facts also constituted duress within the meaning of the statute. See *Silsbee* v. *Webber*, 171 Massachusetts, 378. But it does not seem to matter what they are called if they are found to have existed. Furthermore, we see no ground on which we can go behind the finding that neither side carried out the alleged October contract. There was some evidence to that effect, and we are not concerned with its weight. We do not think it necessary to mention all the points that we have examined. Upon the whole case we are of opinion that no error of law is disclosed that entitles the plaintiffs in error to a new trial.

Judgment affirmed.

RIO GRANDE DAM AND IRRIGATION COMPANY *v.* UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 49. Argued December 3, 1909.—Decided December 13, 1909.

Where a case is opened that further evidence may be produced, it is also open for the amendment of the original pleadings or for additional pleadings appropriate to the issues; and permission by the lower court to file such supplemental complaint is not inconsistent with the mandate of this court remanding the case with directions to grant leave to both sides to adduce further evidence.

Under the provisions of the Code of New Mexico allowing supplemental pleadings alleging facts material to the issue, the fact that the defendant corporation has, since the suit was brought by the Government to enjoin it from so building a dam as to interfere with the navigability of an international river, failed to exercise its franchise in accordance with the statute, is germane to the object of the suit and may be pleaded by supplemental complaint.

The allowance of amendments of supplemental pleadings must at every stage of the cause rest with the discretion of the court, which discretion must depend largely on the special circumstances of each case, nor will the exercise of this discretion be reviewed in the absence of gross abuse.

Attorneys of record are supposed to be present during the terms of the court in which their causes are pending, and are chargeable with notice of proceedings transpiring in open court.

In this case the action of the trial court in taking a supplemental complaint for confessed in the absence of any pleading after the time therefor had elapsed, sustained, there appearing to be no excuse for the default and no irregularity appearing in the order permitting the filing of the complaint or in the service thereof.

The fact that for a time work was enjoined at the instance of the Government does not excuse the delay in completing work under statutory permission within the time prescribed where the delay exceeds the limit after deducting all the time for which the injunction was in force.

13 New Mexico, 386, affirmed.

THE general object of this suit—which was brought by the United States in one of the courts of New Mexico on the twenty-fourth day of May, 1897—was to obtain an injunction to prevent the Rio Grande Dam and Irrigation Company from constructing and maintaining a dam across, and a reservoir over and near, the Rio Grande River at a certain point in that Territory. In the court of original jurisdiction the suit was dismissed and the dismissal was affirmed by the Supreme Court of the Territory; but that judgment was reversed by this court, with instructions to set aside the decree of dismissal and to inquire whether the intended acts of the defendants in the construction of a dam and appropriating the waters of the Rio Grande would substantially diminish the navigability of that stream within the limits of present navigability; and, if so, to enter a decree restraining those acts to the extent that they would so diminish. *United States* v. *Rio Grande Irrigation Company*, 174 U. S. 690, 708, 710. The mandate of this court to that effect was executed by the Supreme Court of the Territory, and the cause went back to the court of original

jurisdiction with directions to proceed in accordance with that mandate.

The cause was again heard in the court of original jurisdiction, that court, denying a motion, in behalf of the United States, for a continuance in order that it might more fully prepare its case. The suit, on final hearing, was again dismissed, and that judgment was sustained by the Supreme Court of the Territory. But this court reversed the decree of the latter court and remanded the cause with instructions to reverse the decree of the court of original jurisdiction, and with directions "to grant leave to both sides to adduce further evidence." *United States* v. *Rio Grande Dam & Irrigation Co.*, 184 U. S. 416, 424, 425. The mandate of this court to the above effect was executed, and the case was again placed on the docket of the court of original jurisdiction.

For a full statement of the issues and facts up to this point in the litigation reference is made to the opinions of this court as reported in 174 U. S. 690, and 184 U. S. 416.

The record shows that on the seventh day of April, 1903—after the last decision in this court—the United States, by leave of the court of original jurisdiction, filed a *supplemental* complaint, which set forth the then status of the case. That complaint referred to the defendant's plea, stating that it had complied with the requirements of the act of Congress approved March 3d, 1891, repealing timber culture laws and for other purposes, 26 Stat. 1095, 1102, c. 561, §§ 20, 21, and "had acquired a right to construct said dam and divert said water by reason of compliance with the terms of said Act." It then proceeded: "II. Plaintiff further alleges that defendant's plea above referred to, claiming a right to construct said dam under the said act of Congress, approved March 3d, 1891, c. 561, was filed on June 26, A. D. 1897, and that its articles of incorporation and proof of its incorporation, and the map and survey of its reservoir had been filed and approved by the Secretary of the Interior long prior to the filing of said plea, as appears from an inspection of said plea itself. III. Plaintiff

further alleges that in and by section twenty of the said act of March 3d, 1891, above referred to, it was provided 'that if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch or reservoir, to the extent that the same is not completed at the date of the forfeiture,' and that although five years since the filing and approval of said articles of incorporation, proofs of organization, maps and surveys have long since elapsed, defendant has not complied with the requirements of said act, but has failed to construct or complete within the period of five years after the location of said canal and reservoir any part or section of the same, and the same has by reason thereof become forfeited. IV. Plaintiff further alleges that during all of said time, except from May 24th, 1897, to ——— 1897, the date when the temporary injunction was dissolved, the said defendants have been in no wise hindered, restrained or prevented from complying with the provisions of said act by any judicial order or process whatsoever. V. Wherefore, plaintiff prays to be permitted to file this supplemental bill of complaint, and that the same be considered upon the hearing of this cause, and that the defendants be decreed to have forfeited all the rights they may have had, or claimed under and by virtue of said act of March 3d, 1891, not hereby admitting, however, that the defendants ever acquired any rights under and by virtue of said act. Plaintiff further prays that the injunction, and all other relief prayed for in and by said amended bill of complaint, be granted, and that said injunction be made perpetual, and that it have and recover its costs expended in this cause, and thus plaintiff will ever pray."

A copy of this supplemental complaint was served on the attorney of the defendants on the day (April 7th, 1903) it was filed. More than forty days thereafter, on the twenty-first day of May, 1903, a decree was entered finding the allegations of the supplemental complaint—no demurrer, answer or other

pleading having been filed thereto—"are confessed and are true." The court further found "that the articles of incorporation and the map, survey of the reservoir of the defendant corporation, the Rio Grande Dam and Irrigation Company, were filed with the Secretary of the Interior prior to the twenty-sixth day of June, A. D. 1897, and were, prior to said date, approved by the Secretary of the Interior; and it further finds that the said defendants have not completed its said reservoir or said ditch, or any section thereof, within five years after the location of the said reservoir and its said ditch line, or within five years after the approval of the same by the Secretary of the Interior; and the court further finds that five years since the filing and approval of the said articles of incorporation, proof of organization, maps and surveys of the said reservoir and ditch line of the defendants had long since elapsed prior to the filing of the said supplemental bill and that the defendants had not complied with the requirements of the act of Congress, approved March 3, 1901, under which the same were filed, but have failed to construct or complete within the period of five years after the location of the said canal and reservoir any part or section of the same." And it was adjudged "that the rights of the said defendants, or either of them, to so construct and complete the said reservoir and said ditch, or any part thereof, under and by virtue of the said act of Congress of March 3, 1901, be and the same are hereby declared to be forfeited. It is further ordered, adjudged and decreed by the court by reason of the premises that an injunction be, and the same is hereby granted against the said defendants, enjoining them from constructing or attempting to construct the said reservoir, or any part thereof, and that the same be made perpetual." (By an amended decree filed October 5th, 1903, and entered *nunc pro tunc* as of May 21st, 1903, the date given as March 3d, 1901, in the decree was made to read March 3d, 1891, in order to conform to the actual date of the act of Congress intended to be referred to both by the United States and by the court.)

A statute of New Mexico, in force at the time and before the above decree was rendered, provided: "Every pleading, subsequent to the complaint, shall be filed and served within twenty days after service of the pleading to which it is an answer, demurrer, or reply." Compiled Laws of New Mexico, 1907, Title 33; Code of Civil Procedure, c. 1, art. 4, sub. sec. 46.

On the thirty-first of October, 1903, the defendants moved the court to vacate the order allowing the supplemental bill to be filed, and that they be permitted to come in and answer the supplemental bill. This motion was denied and upon appeal to the Supreme Court of the Territory the action of the trial court on this point was sustained. The former court, at the same time, March 2d, 1906, adjudged that the right of the defendants, or either of them, to construct and complete its reservoir and ditch, or any part thereof, within the time required by the act of Congress of March 3d, 1901, was forfeited. It was also adjudged that the defendants be enjoined from constructing, or attempting to construct, the said reservoir or any part thereof. The injunction was made perpetual. From that judgment the present appeal was prosecuted.

Mr. William W. Bride and *Mr. Frederick S. Tyler*, with whom *Mr. Charles A. Douglas* was on the brief, for plaintiffs in error:

The lower court erred in permitting a supplemental complaint to be filed. This court has many times frowned upon such acts. *Southard* v. *Russell*, 16 How. 547; *Ex parte Dubuque*, 1 Wall. 69; *Ames* v. *Kimberly*, 136 U. S. 629; *Re Gamewell Co.*, 73 Fed. Rep. 908; *West* v. *Brashear*, 14 Pet. 51; *Mason* v. *Harpers Ferry*, 20 West Va. 223; *Boggs* v. *Willard*, 70 Illinois, 315; *Rees* v. *McDaniels*, 131 Missouri, 681; *Gage* v. *Bailey*, 119 Illinois, 539; *Choteau* v. *Allen*, 114 Missouri, 56; *Mackall* v. *Richards*, 116 U. S. 47; *Re Sandford Tool Co.*, 160 U. S. 255; *Sibbald* v. *United States*, 12 Pet. 488; *Tex. & Pac. Ry.* v. *Anderson*, 149 U. S. 237.

The direction to allow further proof was specific and the

court below varied that direction—and this can be corrected by mandamus or appeal. *United States* v. *Fossatt*, 21 How. 445; *Re Sandford Tool Co.*, 160 U. S. 255. The supplemental bill was improperly so called; it was not, nor was its purpose, related to the original bill but it set up independent cause of action. This is not permissible. *Accumulator Co.* v. *Electric Co.*, 44 Fed. Rep. 602, 607; 2 Street's Fed. Eq. Prac., §§ 1170, 1171; 1 Foster's Fed. Prac., 4th ed., 631; *Trust Co.* v. *Street Railway*, 74 Fed. Rep. 67; *Putney* v. *Whitmire*, 66 Fed. Rep. 385; *Stafford* v. *Howlett*, 1 Paige (N. Y.), 200; Vansile's Eq. Plead., § 263; *Milner* v. *Milner*, 2 Edw. Ch. (N. Y.) 114; *Higginson* v. *C., B. & Q. R. R.*, 102 Fed. Rep. 197; Fletcher's Eq. Plead. 892.

The supplemental bill must be germane to the original bill, and if the original bill shows no ground for relief it cannot be aided by a supplemental bill setting up matters that have since arisen. *Minnesota Co.* v. *St. Paul Co.*, 6 Wall. 742; Story Eq. Plead., § 339; *Hughes* v. *Carue*, 135 Illinois, 519; *Maynard* v. *Green*, 30 Fed. Rep. 643; *Prouty* v. *Lake Shore Ry.*, 85 N. Y. 275; *Snead* v. *McCoull*, 12 How. 407.

The notice was insufficient. Equity Rule 57, and cases cited in Desty's Rules, 7th ed., p. 110.

The Solicitor General for the United States, appellee:

The trial court properly allowed complainant's supplemental bill to be filed. Nothing in the previous decisions of this court was incompatible with the filing of the supplemental bill or with the subsequent proceedings upon it. Allowance of the filing of a supplemental bill is within the discretion of the trial court. *Berliner Gramophone Co.* v. *Seaman*, 113 Fed. Rep. 750, 754; *Jacob* v. *Lorenz*, 98 California, 332, 337; *Farmers' Loan & Trust Co.* v. *Bankers' & Merchants' Telegraph Co.*, 109 N. Y. 342. And, in general, granting or refusing leave to file a new plea, or to amend a pleading, is discretionary and is not reviewable on appeal except for gross abuse of discretion. *Mandeville* v. *Wilson*, 5 Cranch, 15, 17;

Gormley v. *Bunyan*, 138 U. S. 623; *Chapman* v. *Barney*, 129 U. S. 677; *Walden* v. *Craig*, 9 Wheat. 576; *Chirac* v. *Reinicker*, 11 Wheat. 280; *Ex parte Bradstreet*, 7 Pet. 634.

Notice of complainant's application for leave to file its supplemental bill was served upon the defendants' attorney; and no evidence to the contrary is found in the record. But the omission of notice would not be material error, because a copy of the bill was at once served upon the attorney for defendants and they had full opportunity thereupon to move to strike it off the file or demur. As defendants failed in any way to attack the filing of the bill or to demur or plead in any way to it within the time allowed by § 2685, New Mexico Code of Civil Procedure, it was the duty of the trial court to take the bill *pro confesso* and to enter the decree.

Notice of an application for leave to file a supplemental bill is not in all cases necessary. It is a matter of discretion with the court whether to require such notice. *Eager* v. *Price*, 2 Paige Ch. 333, 335; *Lawrence* v. *Bolton*, 3 Paige, 294, 295; *Barriclo* v. *Trenton Mut. Life & Fire Ins. Co.*, 13 N. J. Eq. 154, 155; *Winn & Ross* v. *Albert et al.*, 2 Md. Ch. 42; *Taylor* v. *Taylor*, 1 Mac. & G. 397.

Whether or not a bill is not supplemental in character, is waived by failure to demur, plead or object thereto within the time allowed. The proper method of objecting on the ground of want of supplemental matter is by demurrer. 2 Daniell Ch. Pl. & Pr., 6th Am. ed., p. 1535; *Bowyer* v. *Bright*, 13 Price, 316; *Stafford* v. *Howlett*, 1 Paige Ch. 200.

The supplemental bill does not set up matter foreign to the original case in alleging forfeiture of defendants' rights in their dam and reservoir sites. Forfeiture could not be claimed in the original bill because it was not true when the bill was filed. It is certainly proper to add the claim of forfeiture to the original bill when the cause of forfeiture occurred after the suit was begun. Matter may be introduced by supplemental bill which could have been added to the original bill if then available. *Winn & Ross* v. *Albert et al.*, 2 Md. Ch. 42, 48;

Hardin v. *Boyd*, 113 U. S. 756. As to scope allowable to a supplemental bill, see *Jones* v. *Jones*, 3 Atk. 110; *Eager* v. *Price*, 2 Paige, 333; *Saunders* v. *Frost*, 5 Pick. 275; *Fisher* v. *Holden*, 84 Michigan, 494; *Jacob* v. *Lorenz*, 98 California, 332; *Hasbrouck* v. *Shuster*, 4 Barb. 285; *Candler* v. *Pettit*, 1 Paige Ch. 168; *Winn & Ross* v. *Albert et al.*, 2 Md. Ch. 42; *Mutter* v. *Chauvel*, 5 Russ. 42; *Reeve* v. *North Carolina Land & Timber Co.*, 141 Fed. Rep. 821; *Jenkins* v. *Int. Nat. Bank*, 127 U. S. 484.

The rule that a bad title set up in the original bill cannot be aided by supplemental bill setting up a new and distinct title obtains only when complainant's original title is wholly bad; it does not prevent the assertion of a new title when it adds to or supplements the first title, instead of contradicting it. *Winn & Ross* v. *Albert, supra.* And see *Jacques* v. *Hall*, 3 Gray, 194, 197; *Candler* v. *Pettit*, 1 Paige, 168; *Edgar* v. *Clevenger*, 3 N. J. Eq. 258; *Lowry* v. *Harris*, 12 Minnesota, 255, 266; *Reeve* v. *Timber Co.*, 141 Fed. Rep. 821, 834. There is no inconsistency between the supplemental and original bills in this case. The purpose of each was to restrain defendants' construction and use of the proposed dam and reservoir.

Even if the supplemental bill had been improperly allowed to be filed, it was right to deny defendants' motion to vacate the allowance of the filing of the bill and the decree that had been entered or to open defendants' default and permit them to plead. Defendants' inaction and laches deprived them of any claim to relief; their motion was too late under the New Mexico statute; the supplemental character of complainant's bill was not questionable by motion but only by demurrer; and the answer which defendants asked leave to interpose failed itself to show any defense against default.

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

We perceive no error in the judgment now under review.

The main contention of the defendants is that it was error to permit the United States to file its supplemental bill. We do not accept this view of the trial court's duty. When the cause was last here the court expressed the conviction that if the case was finally disposed of on the record as it then was great wrong might be done to the United States and to all interested in preserving the navigability of the Rio Grande. Hence, the cause was sent back that each side might adduce further evidence, if they had any to adduce. When the Government asked to file its supplemental bill the suit was of course reinstated on the docket of the court of original jurisdiction for such action as might be proper or necessary. The case having been opened that further evidence might be produced, it was certainly open for an amendment of the original pleadings or for such additional pleadings as might be appropriate to the issues between the parties. The parties were not limited to the production merely of evidence. The defendants, in the discretion of the court, could have been allowed, upon a proper showing and before taking further proof, to amend their pleadings, and equally the Government, before taking further proof, could have been allowed to file a supplemental complaint. *Marine Ins. Co.* v. *Hodgson*, 6 Cranch, 206, 218. Besides, subsection 87 of the New Mexico Civil Code would seem to be broad enough to cover the question of power. It provides: "A party may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the cause, or praying for any other or different relief, order or judgment." The facts set forth in the supplemental complaint were manifestly not foreign to the Government's original cause of action. In every substantial sense those facts were material. Strictly speaking, they may have constituted new matter, but they did not present a new cause of action. *Jenkins* v. *International Bank of Chicago*, 127 U. S. 484. They grew out of and were connected with the same transaction from which this litigation arose, and were germane to the object of the suit. That object was to restrain the defendants

from constructing and maintaining dams, reservoirs, canals or ditches that would obstruct the navigable portion of the Rio Grande River. If all the grounds of relief set out in the supplemental complaint did not exist when the original complaint was filed, they were alleged to exist when the supplemental complaint was tendered, and being connected with the original cause of action it was right to bring them, in proper form, to the attention of the court when determining whether the Government was entitled to the relief it asked. So the Supreme Court of the Territory held, and so we hold. There was, plainly, no abuse of discretion or of the established rules of practice in permitting the supplemental complaint to be filed. The allowance of amendments of equity pleadings must "at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case." *Hardin* v. *Boyd,* 113 U. S. 756, 761.

Upon the question of the diligence or want of diligence of the parties, it may be said that the supplemental complaint was tendered at a time when the court was open; the leave to file was given in open court; and the defendant's attorney was served with a copy of that complaint on the very day it was tendered and filed. On this part of the case the Supreme Court of the Territory said that attorneys of record are presumed to be present during terms of the court in which their causes are pending, and in contemplation of law were chargeable with notice of all proceedings transpiring in open court in respect of such causes; also, that "under the facts of this case, counsel are presumed to have been present, and to have such notice as the law requires of matters transpiring in open court on the day on which leave was granted to file the supplemental complaint, and the same was filed and served upon them. *Younge* v. *Broxson,* 23 Alabama, 684; *Sanders* v. *Savage,* 63 S. D. 218. The court was vested with discretion by the last clause of sec. 104, *supra,* [Code of Civil Procedure, as amended by c. 11 of Laws of 1901] which does not seem to have been abused, nor was there any abuse of the general dis-

cretion to allow an amended or supplemental bill in equity conferred upon the courts of the United States, as may be seen by reference to the case of *Berliner Gramophone Co.* v. *Seamon*, 113 Fed. Rep. 750, in which it was held that, 'the granting of leave to file an amended and supplemental bill is a matter within the discretion of the court, and its action will not be reviewed in an appellate court unless there has been a gross abuse of this discretion.'"

The objection that the trial court erred in taking the supplemental complaint for confessed cannot be sustained. That objection was thus properly disposed of by the Supreme Court of the Territory: "There being no error or irregularity in the court's order allowing the supplemental complaint to be filed, the same having been done in open court, and a copy of the same having been served upon one of the attorneys of record on the same day on which it was filed, the statute required an answer or other proper pleading to be filed within twenty days from the date of such filing, and in the event of failure to plead, or secure additional time to plead, neither of which were done in this case, it was perfectly regular for the court to render decree. *Gregory* v. *Pike*, 29 Fed. Rep. 588. Appellants seek to be relieved from their own default by alleging neglect on the part of their attorneys. . . . There being service of a copy of the supplemental complaint upon one of the attorneys of record on the day on which it was filed it was entirely regular for the court to render the decree when applied for 44 days after such service, in the absence of any appearance or pleading by the appellants."

Some stress is laid on the fact that the Government obtained an injunction to prevent the defendants from constructing its reservoir and dam. That fact, it is contended, estops the Government from relying on the five-years' limitation prescribed by the above act of March 3d, **1891,** c. 561. But this view is without merit. The preliminary injunction referred to was dissolved July 31st, 1897, and was never reinstated. The supplemental bill was taken as confessed on

May 21st, 1903, and a perpetual injunction was then awarded against the defendants. So that between the dissolution of the preliminary injunction and the granting of the perpetual injunction more than five years elapsed, during which the defendants were not impeded or hindered by any injunction against them. This is sufficient to show that the point just stated is without merit. We need not, therefore, consider the larger question, whether the five-years' limitation prescribed by Congress in the above act of March 3d, 1891, could have been disregarded or enlarged either by the action or non-action of the parties or by any order of injunction made by the court in the progress of the cause.

There are some minor questions in the case, but they are not of substance and need not be noticed. We perceive no error of law in the record, and the judgment is

Affirmed.

MR. JUSTICE MCKENNA did not participate in the consideration or determination of this case.

UNITED STATES *v.* CELESTINE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 235. Argued October 14, 1909.—Decided December 13, 1909.

Although an Indian may be made a citizen of the United States and of the State in which the reservation for his tribe is located, the United States may still retain jurisdiction over him for offenses committed within the limits of the reservation; and so held as to a crime committed by an Indian against another Indian on the Tulalip Indian Reservation in Washington, notwithstanding the Indians had received allotments under the treaties with the Omahas of March 16, 1834, and of Point Elliott of January 22, 1835. *Mat-*

ter of Heff, 197 U. S. 488, distinguished, the Indian in that case being an allottee under the general allotment act of February 8, 1887, c. 119, 24 Stat. 388.

Legislation of Congress is to be construed in the interest of the Indians; and, in the absence of a subjection in terms of the individual Indian to state laws and denial of further jurisdiction over him by the United States, a statute will not be construed as a renunciation of jurisdiction by the United States of crimes committed by Indians against Indians on Indian reservations.

The act of May 8, 1906, c. 2348, 34 Stat. 182, extending the trust period of allottees under the act of 1887, suggests that Congress believed it had been hasty in its prior action in granting citizenship to Indians.

At the May term, 1908, of the Circuit Court of the United States for the Western District of Washington an indictment was found against the defendant, the first count of which reads:

"That one Bob Celestine, an Indian, on the thirtieth day of August, in the year of our Lord 1906, within the limits of the Tulalip Indian Reservation, within the boundaries of the State of Washington, and within said Western District of Washington, Northern Division, did, with force and arms, make an assault upon one Mary Chealco, an Indian woman, with an axe, which the said Bob Celestine then and there held in his hands, and did then and there feloniously, willfully, knowingly, and with malice aforethought strike, beat, and mortally wound said Mary Chealco with said axe upon the head of the said Mary Chealco, with intent to kill and murder her, the said Mary Chealco, giving to her, the said Mary Chealco, a mortal wound upon the head, from which mortal wound said Mary Chealco then and there languished and died, within said Tulalip Indian Reservation, in said Western District of Washington."

The second count is in similar terms, but charges in addition that the Tulalip Indian Reservation, where the offense was committed, is "a place under the exclusive jurisdiction of the United States."

By a special plea the defendant challenged the jurisdiction of the Circuit Court, alleging that at the time of the offense there had been allotted to him as the head of a family certain lands situate on the Tulalip Indian Reservation, within the limits of the State (then Territory) of Washington, under the provisions of the treaty of January 22, 1855, (12 Stat. 927), and in accordance with an executive order of December 23, 1873, and that a patent therefor was issued and delivered to him on May 19, 1885; that he was then a member of the Tulalip tribe of Indians; that ever since that date he "has been and still is a citizen of the United States, and therefore subject to the laws of the Territory and State of Washington;" that he "was born within the territorial limits of the United States and has always resided within such limits," and that, therefore, he was entitled to "all the rights, privileges and immunities of said citizens of the United States."

This plea also alleged that the murdered woman was a citizen of the United States and the widow of one Chealco Peter, who, like the defendant, had received an allotment of land within the Tulalip Reservation, and a patent thereof similar to that of defendant; that she became entitled to her husband's allotment upon his death, and that the place of the commission of the offense was upon the very land allotted to said Chealco Peter, and without the jurisdiction of the court.

A demurrer by the Government to the plea was overruled and judgment entered sustaining the plea.

A writ of error to this court was then sued out by the United States under authority of the act of March 2, 1907, c. 2564, 34 Stat. 1246.

Mr. Assistant Attorney General Harr for the United States:

This case presents squarely for the first time in this court the question whether jurisdiction of the crime of murder committed by an Indian allottee upon allotted land of an

Indian reservation in a State is vested in the state or in the Federal courts. A determination of this question is deemed important, because there should be no uncertainty concerning a matter so vital to the successful punishment of criminals. The Tulalip Reservation was a legally constituted Indian reservation. *Re Wilson,* 140 U. S. 575; *Draper* v. *United States,* 164 U. S. 240.

The United States has authority to define and punish crimes by or against Indians on reservations within the States. *United States* v. *Kagama,* 118 U. S. 375; *Draper* v. *United States,* 164 U. S. 240; *United States* v. *Thomas,* 151 U. S. 577; *Elk* v. *United States,* 177 U. S. 529; *United States* v. *Bridleman,* 7 Fed. Rep. 894; *United States* v. *Martin,* 14 Fed. Rep. 817; *United States* v. *Barnhart,* 22 Fed. Rep. 285.

The United States has not surrendered its criminal jurisdiction over the Tulalip Reservation. *Matter of Heff,* 197 U. S. 488, distinguished.

Exemption from Federal jurisdiction is not to be presumed in absence of clear legislative provision. *Rugles* v. *Illinois,* 108 U. S. 526, 531.

This case lacks the element which in the *Heff case* was declared essential to confer jurisdiction upon the state courts, to wit, a clear Federal legislative provision subjecting the Indians to state laws.

The act of May 8, 1906, 34 Stat. 182, extending to the expiration of the trust period the date when allottees under the act of 1887 shall be subject to the state laws, and omitting any references to allottees under other laws and treaties is significant. It indicates that Congress found it had been too hasty in placing the first-mentioned allottees under the jurisdiction of the State, and that it did not think any extension of time necessary as to allottees under other acts and treaties, because they had not been subjected to state laws.

Citizenship is not inconsistent with continued Federal jurisdiction. *United States* v. *Logan,* 105 Fed. Rep. 240; *United*

States v. *Mullin*, 71 Fed. Rep. 682; *Rainbow* v. *Young*, 161 Fed. Rep. 835; *United States* v. *Rickert*, 188 U. S. 432; *McKay* v. *Kalyton*, 204 U. S. 458; *Beck* v. *Real Estate Co.*, 65 Fed. Rep. 30; *Farrell* v. *United States*, 110 Fed. Rep. 942; *Coombs, Petitioner*, 127 Massachusetts, 278; *State* v. *Denoyer*, 6 N. Dak. 586.

State v. *Columbia George*, 39 Oregon, 127, governs this case. Columbia George was tried and convicted in the Federal court. An application by him and Toy Toy, with whom he was jointly indicted, for leave to file a petition for the writ of *habeas corpus*, was denied by this court, 201 U. S. 641. Thereafter a petition by Toy Toy for a writ of *habeas corpus* upon the ground that, as he was a citizen, the Federal court was without jurisdiction, was denied by the Circuit Court and its action affirmed by this court on appeal, 212 U. S. 542.

To hold that the Federal courts are without jurisdiction of such offenses, after the state courts have declined to exercise jurisdiction, might give rise to a serious condition of affairs.

The rule contended for does not deprive the allottee of any of the rights or privileges of citizenship. It is not contended that a limited citizenship is conferred upon allottees, but rather that citizenship is consistent with tribal existence and Indian character. *United States* v. *Real Estate Co.*, 69 Fed. Rep. 886, 891.

The offense in question was committed on an Indian reservation within the meaning of the act of March 3, 1885. *Couture* v. *United States*, 207 U. S. 581; *Eells* v. *Ross*, 64 Fed. Rep. 417, and see *United States* v. *Flournoy Co.*, 71 Fed. Rep. 576; *United States* v. *Mullin*, and *Rainbow* v. *Young*, *supra*. The conclusion that allotted land is not thereby excepted from a reservation and is still Indian country within the intention of Congress, seems to be the only reasonable and proper one. Otherwise Federal statutes relating to reservations and the Indian country and punishing crimes therein

(Rev. Stat., §§ 2127–2157), would cease to apply, and thus Congress, charged with the duty to protect the Indians, would be held to have abandoned that duty entirely, when in fact it only extended to them the privileges of citizenship.

There was no appearance or brief for the defendant in error.

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

The fourth paragraph of the act of March 2, 1907, *supra*, authorizes a review of a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." The defendant in this case had not been put upon trial, therefore he had not been in jeopardy. The decision of the Circuit Court sustained the special plea in bar. This fourth paragraph differs from the two preceding, in that the review authorized by them is limited to cases in which "the decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded," while no such limitation appears in this paragraph. The full significance of this difference need not now be determined, but clearly the fourth paragraph gives to this court a right to review the precise question decided by a trial court in sustaining a special plea in bar, although that decision may involve the application rather than the invalidity or construction, strictly speaking, of the statute upon which the indictment was founded.

The general provision of the statutes in reference to punishment of the crime of murder committed within the exclusive jurisdiction of the United States is found in chap. 3, Title 70, Rev. Stat., §§ 5339–5391, as amended by the act of January 15, 1897, c. 29, 29 Stat. 487.

Section 9 of the act of March 3, 1885, c. 341, 23 Stat. 385, provides for the punishment of certain crimes by Indians, as follows:

"That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, . . . and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

By this section Indians committing against other Indians on a reservation in a State any of the crimes named are subject to Federal laws and tried in Federal courts.

That the offense was committed within the limits of the Tulalip Indian Reservation is distinctly charged in the indictment and not challenged in the plea in bar. Although the defendant had received a patent for the land within that reservation, and although the murdered woman was the owner of another tract within such limits, also patented, both tracts remained within the reservation until Congress excluded them therefrom.

By the second clause of § 3, Art. IV, of the Constitution, to Congress, and to it alone, is given "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." From an early time in the history of the Government it has exercised this power, and has also been legislating concerning Indians occupying such territory. Without noticing prior acts, it is sufficient to refer to that of June 30, 1834, c. CLXI, 4 Stat. 729, the first section of which reads:

"*Be it enacted*, That all that part of the United States west of the Mississippi, and not within the States of Missouri and

Louisiana, or the Territory of Arkansas, and, also that part of the United States east of the Mississippi river, and not within any State to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country."

Construing this section, it was decided, in *Bates* v. *Clark*, 95 U. S. 204, 209, that all the country described in the act as "Indian country" remains such "so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress." The section was repealed by Rev. Stat., § 5596. Still, it was held that it might be referred to for the purpose of determining what was meant by the term "Indian country" when found in sections of the Revised Statutes which were reënactments of other sections of prior legislation. *Ex parte Crow Dog*, 109 U. S. 556; *United States* v. *Le Bris*, 121 U. S. 278. But the word "reservation" has a different meaning, for while the body of land described in the section quoted as "Indian country" was a reservation, yet a reservation is not necessarily "Indian country." The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, and when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress. By the treaty of January 22, 1855 (12 Stat. 927), known as the treaty of Point Elliott, it was provided that certain lands should be reserved for the "use and occupation of the Indians." And, further, article 3, "that the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians." On December 23, 1873, the President established the boundaries of the Tulalip Reservation in the Territory of Washington. The tract sub-

sequently allotted to defendant, as well as that upon which the crime was committed, are within the boundaries prescribed in this executive order. Article 7 of the treaty of Point Elliott authorizes the President to set apart separate tracts within the reservation to such individuals or families as were willing to avail themselves of the privilege and locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. The treaty with the Omahas, March 16, 1854, (10 Stat. 1043,) provides for the location by an individual or family on land within the Omaha Reservation, its assignment for a permanent home, for the issue of a patent to such person or family, with conditions against alienation or leasing, exemption from levy, sale or forfeiture, not to be disturbed by the State without the consent of Congress; and, further, that if the (p. 1045) "person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment; . . . and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land." The patent issued to the defendant recites that it is issued under the provisions of the article referred to in the treaty with the Omaha Indians.

The plea does not challenge the continued tribal organization of the Tulalip Indians, or question that the tribe, as well as the general body of the reservation, continues under the general care of the United States. Indeed, at the time of the crime the Tulalip Reservation was occupied by 453 Indians, under the charge of an Indian agent. Rep. Com. Ind. Affairs, 1906, pp. 377, 483. Thirteen thousand five hundred and sixty acres have been allotted to 94 of these Indians, and the residue, 8,930 acres, remains unallotted.

Rep. Com. Ind. Affairs, 1908, p. 162. The fact of the patent to Chealco Peter is all that is claimed shows a want of jurisdiction of the United States over the place of the offense, but the conditions of the treaty with the Omahas, made by reference a part of the treaty with the Tulalip Indians, providing for only a conditional alienation of the lands, make it clear that the special jurisdiction of the United States has not been taken away.

Eells et al. v. *Ross* (12 C. C. A. 205, Circuit Court of Appeals of the United States for the Ninth Circuit) presented the question of the revocation of a reservation. The treaty with the Puyallup Indians contains like provisions in regard to alienation and forfeiture as are in the treaty with the Omahas.

Circuit Judge McKenna, now Mr. Justice McKenna of this court, in delivering the unanimous opinion of that court, said (p. 207):

"It is not disputed that the lands are a part of those set apart as the Puyallup Reservation, and that the reservation has not been directly revoked; but it is contended that the allotment of the lands in severalty, and afterwards making the Indians citizens, necessarily had the effect to revoke the reservation. There is plausibility in the argument, and it needs to be carefully considered. It is clear that the allotment alone could not have this effect, (*The Kansas Indians*, 5 Wall. 737) and citizenship can only have it if citizenship is inconsistent with the existence of a reservation. It is not necessarily so.

"Some of the restraints of a reservation may be inconsistent with the rights of citizens. The advantages of a reservation are not; and if, to secure the latter to the Indians, others not Indians are excluded, it is not clear what right they have to complain. The act of 1887, which confers citizenship, clearly does not emancipate the Indians from all control, or abolish the reservations."

Dick v. *United States*, 208 U. S. 340, does not conflict with

these views, for there the place of the offense was the village of Culdesac, which, although within the boundaries of the Nez Perce Reservation, as at first established, was located upon lands passed by patent from the United States under the townsite laws to the probate judge of Nez Perce County, and by the townsite act such location could only be on public lands. Rev. Stat., § 2380.

But it is contended that although the crime may have been committed on an Indian reservation, yet it does not come within the last sentence of § 9 of the act of March 3, 1885, *supra*, by reason of the fact that both defendant and the woman murdered held patents from the United States, and *Matter of Heff*, 197 U. S. 488, is cited as authority. But there are these important differences between the two cases. In that the person to whom the defendant sold liquor (the charge being that of selling liquor to an Indian) had received a patent under the provisions of the act of Congress of February 8, 1887, known as the General Allotment Act (c. 119, 24 Stat. 388), whereas the patents in this case were issued under the authority of the treaty with the Omahas, March 16, 1854, *supra*, and the treaty of Point Elliott, January 22, 1855, *supra*. It also appeared that the sale was made, not on any reservation, while here the murder was committed within the limits of one.

Section 5 of the act of February 8, 1887, provides (24 Stat. 389) "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor," etc. Section 6 is as follows (24 Stat. 390):

"SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its

jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

It will be seen that the first sentence of the latter section, which provides that the allottees shall be "subject to the laws, both civil and criminal, of the State or Territory in which they may reside," applies to allotments and patents made under the authority of that act, whereas the other sentence refers to allotments made under the act of 1887, or under any law or treaty, and in respect to the allottee it is provided only that he "is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens." In other words, so far as the plea is concerned, it is only that Celestine was a citizen of the United States, and entitled to all the rights, privileges and immunities of such citizenship.

We assume, without deciding, that although Celestine was born within the territorial limits of the United States he was not, under the first section of the Fourteenth Amendment, a citizen of the United States prior to the issue of the patent to him; that the jurisdiction of the United States was over the tribe of which he was a member, and not over him personally; so that by the act of 1887 he was given a citizenship in the United States and in the State which did not theretofore belong to him. But, although made a citizen of the

United States and of the State, it does not follow that the United States lost jurisdiction over him for offenses committed within the limits of the reservation. We had occasion in the *Matter of Heff*, *supra*, to notice the fact that the first dealings with Indians were with them as tribes, but that of late there had been a change in the policy and a disposition to put an end to tribal organization and give to them as individuals all the rights of citizenship, saying (197 U. S. 499):

"Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end."

Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of a reservation; at any rate, it cannot be said to be clear that Congress intended

by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race. There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the State; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States.

The act of May 8, 1906, c. 2348, 34 Stat. 182, extending to the expiration of the trust period the time when the allottees of the act of 1887 shall be subject to state laws, is worthy of note as suggesting that Congress, in granting full rights of citizenship to Indians, believed that it had been hasty. See, upon the general questions discussed, *United States* v. *Mullin*, 71 Fed. Rep. 682; *Rainbow* v. *Young*, 161 Fed. Rep. 835; *State* v. *Columbia George*, 39 Oregon, 127; *State* v. *Columbia George*, 201 U. S. 641; *Couture* v. *United States*, 207 U. S. 581; *Toy Toy* v. *Hopkins*, 212 U. S. 542.

The judgment is

Reversed.

UNITED STATES *v.* SUTTON.

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

No. 312. Submitted October 15, 1909.—Decided December 20, 1909.

United States v. *Celestine*, *ante*, p. 278, followed, as to continuance of jurisdiction of United States over offenses committed within the limits of an Indian reservation.

The Indians, as wards of the Government, are the beneficiaries of the prohibition against the introduction of liquor into Indian country; and, under the Washington enabling act, jurisdiction and control over Indian lands remains in the United States, and Congress has power to prohibit and punish the introduction of liquor therein.

The limits of an Indian reservation are not changed by allotments in severalty during the trust period, and, where the lands allotted are subject to restrictions against alienation and to defeasance, the prohibition against liquor continues to be effective.

THE defendants were indicted in the District Court of the United States for the Eastern District of Washington for introducing liquor into the Indian country, as thus stated in the indictment:

"To wit, into and upon a certain Indian allotment No. 670, within the limits of the boundary of the Yakima Indian Reservation, in the Eastern District of Washington, which said allotment had theretofore been allotted to a certain Indian, a member of the Yakima tribe of Indians, named George Wesslike, under and by virtue of the provision of the act of Congress of February 8, 1887, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,' (24 Stat. 388,) said allotment being then and now one held in trust by the Government for said allottee and being inalienable by the said allottee without the consent of the United States."

A demurrer was filed, and on that demurrer the following facts were agreed to:

"1. That the Yakima Indian Reservation, in the Eastern District of Washington, is inhabited by the Yakima and other Indians under the general charge and control of an Indian agent and superintendent of the United States.

"2. That prior to September 3, 1908, a very large number of allotments of land within said reservation had been made to Indians entitled thereto, which said allotments had been made and allotted under and by virtue of the provision of the act of Congress of February 8, 1887, known as the general allotment act.

"3. That allotment No. 670, described in the indictment, is a part of and within the boundaries of the Yakima Indian

Reservation, and the same had been made and allotted, and the usual trust patent thereto issued to the allottee named in the indictment under the provision of the act of February 8, 1887, prior to September, 1908.

"4. That the trust limitation has not yet expired and the title to said allotment is still being held in trust by the Government; that the title to said allotment is not alienable by the allottee without the consent of the United States.

"5. That on or about September 3, 1908, the defendants did go on and upon said allotment described in the indictment, taking and carrying with them certain ardent spirits and intoxicating liquor, to wit, alcohol, in a demijohn and flasks."

The indictment was founded on the act of January 30, 1897, 29 Stat. 506, which provides:

"That . . . any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter."

The Yakima Reservation was established under the treaty of June 9, 1855, 12 Stat. 951, which, in article 2, provides:

"All which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent.

* * * * * * * *

"ARTICLE VI. The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

The demurrer was sustained, and thereupon the Government brought the case here on writ of error under the act of March 2, 1907, c. 2564, 34 Stat. 1246.

Mr. Assistant Attorney General Harr for the United States.

There was no appearance or brief for the defendant in error.

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

The question whether the indictment charges any offense against the laws of the United States involves the validity of the act of January 30, 1897, as applied to the facts stated, and therefore the case is one properly before us under the act providing for writs of error in certain instances in criminal cases. Ch. 2564, 34 Stat. 1246; *United States* v. *Keitel*, 211 U. S. 370, 397.

We have recently considered, in *United States* v. *Celestine*, *ante*, the question of the jurisdiction of the United States over offenses committed within the limits of a reservation, as also the effect of allotments therein upon its continued existence, and further discussion of those matters is unnecessary. The limits of the Yakima Reservation were not changed by virtue of the allotments that are referred to in the stipula-

tion of facts. The lands allotted were subject to restrictions against alienation, and the title which was conferred by the allotments was subject to defeasance. Sixth Article, Treaty with the Omahas, 10 Stat. 1043–5; *United States* v. *Celestine.* The offense charged was not one committed by a white man upon a white man, *United States* v. *McBratney,* 104 U. S. 621; *Draper* v. *United States,* 164 U. S. 240, or by an Indian upon an Indian, *United States* v. *Celestine, ante,* but it was the introduction of liquor into an Indian reservation. In this offense neither race or color are significant. The Indians, as wards of the Government, are the beneficiaries, but for their protection the prohibition is against all, white man and Indian alike. Legislation of this nature has been for a long time in force. Fourth sec., chap. 174, Laws 1832, 4 Stat. 564; § 2139, Rev. Stat. If the Yakima Reservation were within the limits of a Territory there would be no question of the validity of the statute under which this indictment was found, but the contention is that the offense charged is of a police nature and that the full police power is lodged in the State, and by it alone can such offenses be punished. By the second paragraph of § 4 of the enabling act with respect to the State of Washington, (c. 180, 25 Stat. 677,) the people of that State disclaimed all right and title "to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Construing this, in connection with other provisions of the enabling act, it was held in *Draper* v. *United States,* 164 U. S. 240, that it did not deprive the State of jurisdiction over crimes committed within a reservation by others than Indians or against Indians, following in this *United States* v. *McBratney,* 104 U. S. 621. But in terms "jurisdiction and control" over Indian lands remain in the United States, and there being nothing in the

section withdrawing any other jurisdiction than that named in *Draper* v. *United States*, undoubtedly Congress has the right to forbid the introduction of liquor and to provide punishment for any violation thereof. *Couture, Jr.*, v. *United States*, 207 U. S. 581. It is true that only a *per curiam* opinion was filed in that case, and the judgment was affirmed on the authority of *United States* v. *Rickert*, 188 U. S. 432; *McKay* v. *Kalyton*, 204 U. S. 458, but an examination of the record shows that its facts are similar to those in the present case. See also an opinion by Shiras, District Judge, in *United States* v. *Mullin*, 71 Fed. Rep. 682, and one by Circuit Judge Van Devanter, speaking for the Circuit Court of Appeals for the Eighth Circuit, in *Rainbow* v. *Young*, 161 Fed. Rep. 835.

Without pursuing the discussion further, we are of opinion that the District Court erred in its ruling, and the judgment is

Reversed.

COMMISSIONERS OF SANTA FÉ COUNTY *v.* TERRITORY OF NEW MEXICO EX REL. COLER.

SAME *v.* SAME.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

Nos. 42, 43. Submitted November 29, 1909.—Decided December 20, 1909.

Although a defense to the merits if pleaded in the original action might have prevented rendition of the judgment, it cannot be urged to prevent mandamus from issuing to enforce the judgment.

Under the laws of New Mexico, where there is no possible excuse for a board of county commissioners not to comply with a judgment, a peremptory writ of mandamus in the first instance is authorized.

Where the bill shows it is clearly the purpose of defendant officers not to perform a duty imposed upon them, demand is not necessary before suit for mandamus.

Where parts of a county have been detached by statute which provides for the detached portions bearing their proportion of indebtedness, the counties to which those portions are attached are not necessary parties to a suit to recover obligations of the original county. After judgment the original county which is primarily liable may enforce contribution through the proper officers for the proportionate share of the detached portions.

In this case it was held that the facts justified the amount of the tax levy required by the writ of mandamus as modified by the Supreme Court of the Territory.

Practice of the courts in a Territory is based upon local statutes and procedure and this court is not disposed to review the decisions of the Supreme Court of the Territory in such cases, and, following the Supreme Court of the Territory of New Mexico, this court holds that the power of that court to affirm or reverse and remand includes the power to modify, and extends to proceedings in mandamus.

14 New Mexico, 134, affirmed.

THE facts are stated in the opinion.

Mr. A. B. Renehan for appellant:

The peremptory writ of mandamus should not have been issued without a hearing or opportunity for respondents to be heard. The writ is confined to the requirement of official duties of a ministerial character. 2 Spelling, Ex. Rem., §§ 1432–1434, 1437.

The court in mandamus proceedings can inquire into the original judgment so far as to ascertain whether the claim is legally payable out of the taxes sought to be applied. *Railroad Co.* v. *New Mexico,* 72 Pac. Rep. 14; *Brownsville* v. *Loague,* 129 U. S. 505.

The mandamus cannot be issued as there was no demand before suit. Spelling, Ex. Rem., §§ 1381, 1447. The action should have been directed against the treasurer of the county and not against the county board. Sections 4021, 4062, C. L. 1897; and see § 343; *Bass* v. *Taft,* 137 U. S. 752; *Ex parte Rowland,* 104 U. S. 615.

Where the facts are, as in this case, disputed, a peremptory writ cannot issue in the first instance. 13 Ency. Pl. & Pr. 722;

and see also 13 Ency. Pl. & Pr. 773–775; *State* v. *Goodfellow*, 1 Mo. App. 145.

The Supreme Court of New Mexico had no jurisdiction to modify the judgment of the lower court by changing the theory and cause of action. Under C. L. 1897, § 897, the power of the appellate court is limited to revising or modifying a judgment only in actions at law or equity and not in such proceedings as mandamus. *Territory* v. *County Commissioners*, 5 New Mex. 17. There being no statute in the Territory providing for jury trials in mandamus common-law procedure governs and the Supreme Court can only reverse or affirm. *State* v. *Suwannee County*, 21 Florida, 1; *Castle* v. *Lawler*, 47 Connecticut, 340; and see § 10, C. L. 1897, p. 43, act of September 30, 1850.

The remedy given by the statute, § 343, C. L. 1897, is exclusive. *Fourth Nat. Bank* v. *Francklyn*, 120 U. S. 751; 7 Ency. Pl. & Pr. 372.

The pleading being on information and belief is insufficient as the pleader had knowledge of the facts. *Jones* v. *Pearl Mining Co.*, 20 Colorado, 417; *Nichols* v. *Hubert*, 150 Missouri, 620.

The counties of Rio Arriba and Torrance were necessary parties under the existing laws of the Territory. Subsection 5, C. L. 1897, subs. 175; § 6, ch. 114, L. 1905; ch. 70, L. 1903; ch. 24, L. 1903; ch. 20, L. 1903.

Under the act of June 8, 1878, c. 168, 20 Stat. 101, explanatory of § 1889, Rev. Stat., the Territory was prohibited from issuing these bonds. *Lewis* v. *Pinia*, 155 U. S. 67. Although held valid in *Coler* v. *County Commissioners*, 6 New Mex. 88, the question of their validity under the act was not raised. The validating act of June 16, 1897, c. 30, 29 Stat. 487, although construed in *Utter* v. *Franklin*, 172 U. S. 498, does not validate these bonds as it is too indefinite to determine which bonds are validated. There is no element of *res judicata* in this case. The judgments are not attacked, only the method of enforcement and the excessive amount of the

levy. *Railway Co.* v. *Territory*, 72 Pac. Rep. 14; *United States* v. *Macon County*, 99 U. S. 591; *Brownsville* v. *Loague*, 129 U. S. 502.

Mr. Charles A. Spiess for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

These appeals are prosecuted to review judgments of the Supreme Court of New Mexico, modifying, and affirming as modified, judgments of mandamus of the District Court of Santa Fé County, commanding the appellants to levy a tax of ten mills in each case on each dollar of taxable property in the county, to pay certain judgments for the amount of principal and interest upon bonds issued by the county. The cases are here on separate records, but as they are submitted together we dispose of them, as the Supreme Court of the Territory did, in one opinion.

The proceedings were commenced by petitions, which are alike, except as to the amount of the judgment recovered. In No. 42 it is alleged to be $60,926.02; in No. 43 it is alleged to be $74,358.19. Both judgments were recovered in the District Court of the county in which the petitioners (appellees here) were complainants and the board of county commissioners were defendants. It is alleged that the judgments ordered the sums due as above stated, and the interest thereon to become due at five per cent per annum from the date of the judgments, "to be assessed and levied upon and out of the taxable property situate in the said county of Santa Fé, and to cause the same to be collected in the manner provided by law, and to pay the same out of the treasury of said county to the said complainants, their legal representatives or assignees, upon the delivery of a proper voucher therefor." Default in the payment of each of the judgments and its requirements is alleged, and that the board held a meeting during the month of July or August, 1905, and made a levy

for various territorial purposes, but "wholly failed and refused to make any levy whatsoever, and still fail and refuse to make any levy whatsoever, for the said year of 1905, for the purpose of raising funds to pay the aforesaid judgment and interest and costs thereon." The want of a plain, speedy and adequate remedy at law is also alleged. Peremptory writs of mandamus were issued without a hearing.

Subsequently the appellants filed a petition in each case in the District Court and prayed "that the peremptory order be suspended herein, and that they be permitted to show cause and be heard before the order and writ are made permanent."

To sustain this prayer they alleged that at the date of the rendition of the judgments of appellees all of the property within the county of Santa Fé subject to taxation was liable for the payment of its *pro rata* of the judgments; that the thirty-fifth legislative assembly "eliminated" portions of Santa Fé County, and attached them respectively to the county of Rio Arriba and the county of Torrance, and made them subject to their proportions of the indebtedness of Santa Fé County; that the taxable property situate therein is liable for its part of the indebtedness; that the county commissioners are without jurisdiction to levy and assess taxes upon it, and that the peremptory writs include only "the property and territory within the present boundaries" of Santa Fé, and do not pretend to include that in Rio Arriba and Torrance; that by a mandamus issued out of the district court on the twenty-fifth day of January, 1901, the county commissioners were required to levy a tax upon the taxable property in Santa Fé sufficient in amount to produce a sum of $135,284.19, with interest thereon from the twenty-fourth of September, 1900, until paid at five per cent per annum, and $30.00 costs, the said sum being for the amount of the judgments in cases 4091 and 4092 of the district court of Santa Fé County; that the board obeyed the writ and levied eighty-two mills on each dollar of taxable valuation, and

certified the same to the treasurer and *ex officio* tax collector of the county, and directed him to place the same on the tax rolls and collect in the manner provided by law; that the levy is still standing on the tax rolls of the county, and is a lien upon the taxable property of the county as then existing, and subject to the payment of the judgments; that the commissioners are without authority to enforce the same, and that the levy is ample and sufficient to cover the amount of the judgments in cases Nos. 4091 and 4092, and that the levy of ten mills in each case is largely in excess of the amount required, and is "unjust and unfair" to the taxpayers of the county of Santa Fé, and ruinous to its "progress and prosperity." It is alleged that the board is entitled to be heard on the amount of levy, or whether any levy should be ordered, as there exists a legal and adequate levy to cover the judgments; that it is impossible to determine the amount of levy necessary to be made for the year succeeding 1905 until the tax roll for that year has been completed and the amount of taxable property determined; that the board should not be held in default until the time shall arrive when the levy can be made, and they shall have failed to perform their duty; that the levy of the tax, as required by the writ, is not one which the law "enjoins as a duty resulting from an office, trust or station," because the levy of eighty-two mills, when collected, will be sufficient to pay the judgments, and that it is not a duty of the board to collect it, but "the duty of the treasurer and *ex officio* tax collector of Santa Fé County." It is alleged appellees have a plain, speedy and adequate remedy at law.

As an additional ground of the motions, it is alleged that the act of Congress, by which the bonds are "pretended to have been validated, approved, and confirmed, is indefinite, uncertain, and incapable of reasonable interpretation and enforcement, so as to be applied to any bonds issued by the county of Santa Fé," and does not sufficiently identify what bonds are intended to be validated, approved and confirmed;

nor what holders of the bonds, it being alleged that they "are subjects of different ownership and are not all in the hands of one person, and it cannot be determined from the said act of Congress what holder of said bonds, in excess of the amount named in the said act of Congress, shall not have the benefits of validation." And further, that at the time of the passage of the act of Congress there was more than one refunding act in force in the Territory, but what refunding act is referred to by the act of Congress is not disclosed.

The motions to suspend the peremptory writs were denied and the orders denying them were affirmed by the Supreme Court of the Territory. The latter court, however, modified the writs, as will be presently pointed out.

The assignments of error in the Supreme Court of the Territory repeated and emphasized the grounds urged in the motions to suspend the peremptory writs of mandamus. In this court the modification of the judgments by the Supreme Court of the Territory is attacked and some new contentions are made.

The case is submitted on briefs, and we shall not attempt to trace an exact correspondence of the arguments of appellants with the assignments of error, nor indeed shall we follow the details of the argument, but consider those matters only which we think can in any way affect the merits of the controversy. It will be observed in the beginning that the writs of mandamus issued by the District Court are but the execution by it of its judgments of the twenty-fourth of September, 1900, the amounts of which the board of commissioners were ordered to assess against the taxable property of the county and pay the same. We may say, therefore, at the outset that whatever could have been urged to prevent the rendition of the judgments cannot now be urged to prevent their enforcement. This disposes of the defense made against the orders under review, that the act of Congress validating the bonds is uncertain and indefinite, even if it had merit otherwise. The objections that are urged against the act of Congress are

that it cannot be understood from it what refunding act is referred to, there being two, it is contended, or whether all of the bonds issued under it have been validated or only an amount thereof, not exceeding $172,500.00, and if no more than $172,500.00, which bonds have been validated. And it is urged further that there is no identification of what holders of the bonds in excess of the amount named in the act of Congress shall not have the benefits of the validation. Manifestly such defenses should have been set up in the original actions and are now precluded by the judgments therein rendered. It is established by the judgments that the amount of bonds issued was in accordance with the act of Congress and was not excessive in amount, and also that the plaintiffs in the action (appellees here) were legal owners of such bonds and entitled to the "benefits of validation." *Murphy* v. *Utter*, 186 U. S. 95, 113. The appellants, therefore, are confined to the other objections urged by them.

The principal of these objections is that peremptory writs should not have been issued without a hearing, and that there should have been a demand made of the commissioners before suit. As to the first, it may be said that it probably appeared to the District Court that the board could have no possible excuse, and in such case a peremptory writ is authorized in the first instance by the laws of the Territory. By § 2764 of the Compiled Laws of New Mexico for the year 1897 it is provided that "when the right to require the performance of the act is clear, and it is apparent no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance."

The second ground is also untenable. The original judgments expressed the obligation of the board. They imposed the duty of levying taxes to pay them, and, it is alleged, that the board had levied taxes for other territorial and county purposes, but had failed and refused to make any levy whatever to pay the judgments. In other words, it is averred, that it is clearly the purpose of the board not to perform the

duty imposed upon it. In such a case no demand is necessary. *Northern Pacific R. R.* v. *Dustan*, 142 U. S. 492, 508.

We are therefore brought to the consideration of the sufficiency of the excuses which the board made in its motions to suspend the writs. We may briefly repeat them: (1) that portions of Santa Fé County were attached to other counties, which portions are subject to the payment of the judgments, and that the board is without jurisdiction over them; (2) that a levy of eighty-two mills had been made, which is a lien upon the property of Santa Fé County "as then existing," and that the board is without authority to enforce the collection of the levy; (3) that the levy of twenty mills (ten in each case) is excessive; (4) that the board was entitled to be heard as to the amount of the levy, or whether any levy was necessary, "there existing upon the tax rolls a legal and adequate levy to cover" the judgments which it is the duty of the tax collector to collect; (5) that it was impossible to determine the amount of the levy necessary for the year succeeding the year 1905 until the rolls for that year had been completed and the amount of taxable property determined; (6) that the board is not in default and should not be held liable until in default.

The District Court evidently considered that these excuses were without substantial merit, and such also was the view of the Supreme Court of the Territory. To the first, that is that the portions of Santa Fé County which had been segregated from it should have been included in the writs, it was replied by the Supreme Court that it was provided by Chapter 20 of the Session Laws of 1903 that such segregated portions were required to contribute their just proportion to the bonded debt of Santa Fé, that provision was made for assessment, levy and collection of such proportion by the officers of the new county upon the order of the old county, and that the money collected should be paid into the treasury of the old county. It was therefore decided that the county of Santa Fé could "compel contribution from the two other counties

which had received a portion of its territory, in proportion to the amount of taxable property received, and this is the method provided by law." This view of the statute is not directly attacked by appellants, and, if it may be said that the general argument is a criticism of it, the answer is what was said in *English* v. *Arizona*, 214 U. S. 359, 363, 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." Chapter 20 of the Session Laws of 1903 is an answer also to other contentions of appellants. If the county of Santa Fé is primarily liable for the bonds she is the proper party to an action upon them, and through her officers the payment of the judgments recovered can be enforced. The contention of appellants, therefore, that the counties of Rio Arriba and Torrance are "necessary parties to a complete determination of the case," is untenable, as indeed all other contentions that are based upon the addition to those counties of portions of Santa Fé County.

The most serious contentions of appellants are that the levy of eighty-two mills was sufficient to pay the judgments, interest and costs, and that the levy of twenty mills in addition was excessive. We think, however, that the reply made by the Supreme Court of the Territory adequately disposed of them. The learned court pointed out that the resolution of the board of county commissioners, a copy of which appears in the record, showed that the levy of eighty-two mills had the purpose only, and was sufficient only, to pay the then amount of the judgments, together with interest. It was further pointed out that the interest to accrue was not provided for, and that it amounted on the day when the peremptory writs of mandamus were issued to $32,874.05. It follows necessarily, as the court said, that the contention that the eighty-two mills levied was sufficient, "is unfounded and untrue in fact." To the contention that the twenty mills levied are excessive, in that they are more than sufficient to pay $32,874.05, the court replied that, if this were so, the

peremptory writs should not have been issued. But, the court added, it is not shown that the assessable value of property in Santa Fé County has increased, while it does appear on the other hand that portions of the county had been cut off; therefore, it was said, it is fair to presume "that the assessed valuation of the county is not in excess of what it was in 1901, when the eighty-two mills levy was made." From this presumption it was concluded that twenty mills would produce, if collected in full, $32,996.00, an excess only of $112.05. And it was observed that since the peremptory writs were issued interest had accrued to the amount of $10,000.00.

The writs required not only the levy of twenty mills for the year 1905, but for each and every year thereafter and until the judgments with interest and costs be paid. This the Supreme Court pronounced error, and modified the judgments by striking out the requirements for a continuous levy. This appellants assign as error, contending that the Supreme Court had no jurisdiction to modify the judgments of the lower court, and that by doing so it changed the "theory and cause of action." The argument to sustain the contention is somewhat roundabout. Exclusive original jurisdiction in mandamus, it is said, is conferred on the District Court by § 2771 of the laws of the Territory, and, while an appeal lies to the Supreme Court as in other civil actions (§ 2772), that the power of the court to modify the judgment of a district court, given by § 897,[1] does not extend to a judgment in

[1] "In all cases now pending in the Supreme Court or which may be hereafter pending in the Supreme Court, and which may have been tried by the equity side of the court, or which may have been tried by a jury on the common law side of the court, or in which a jury may have been waived and the case tried by the court or the judge thereof, it shall be the duty of the Supreme Court to look into all the rulings and decisions of the court which may be apparent upon the records, or which may be incorporated in the bill of exceptions, and pass upon all of them and upon the errors if any shall be found therein, in the rulings and decisions of the court below, grant a new

mandamus. The jurisdiction of the Supreme Court, it is urged, "was simply to affirm or reverse and remand." This, it will be observed, is very general. It would seem even to imply that the Supreme Court has not even the power of direction, but must leave the District Court to get right ultimately through successive judgments, appeals and reversals. And the anomaly is attempted to be sustained by saying that mandamus is not included in the useful power given to the Supreme Court by § 897 in cases taken to it to "render such other judgment as may be right and just and in accordance with law," because, it is said, that mandamus "is not a case on the equity side of the court, nor is it one tried on the law side with a jury, nor is it one in which a jury has been waived and trial had by the court or judge, especially as concerns the present proceeding." This is a misunderstanding of the statute. Its purpose is to not only give the power to review, but to prevent its defeat through the distinction between causes of action and modes of trial. Further argument is unnecessary. Even if the contention had grounds of support it would be answered by the case of *English* v. *Arizona*, 214 U. S. 359, and the case of *Armijo* v. *Armijo*, 181 U. S. 558, 561. In the latter case we said that practice "in the courts of the Territory is based upon local statutes and procedure, and we are not disposed to review the decision of the Supreme Court in such cases. *Sweeney* v. *Lomme*, 22 Wall. 208." Of the other contentions of appellants, it is enough to say that they are without merit.

Judgments affirmed.

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trial or render such other judgment as may be right and just, and in accordance with law; and said Supreme Court shall not decline to pass upon any question of law or fact which may appear in any record either upon the face of the record or in the bill of exceptions, because the cause was tried by the court or judge thereof without a jury, but shall review said cause in the same manner and to the same extent as if it had been tried by a jury."

ILLINOIS CENTRAL RAILROAD COMPANY *v.* SHEEGOG.

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

No. 41. Argued December 12, 1909.—Decided December 20, 1909.

Where the joinder of the resident and the non-resident defendants prevents removal to the Federal court, the fact that on the trial the jury finds against the non-resident defendant only has no bearing on the question of removal if the joinder was not fraudulent.

Allegations of fact, so far as material in a petition to remove, if controverted, must be tried in the Federal court, and therefore must be taken to be true when the state court fails to consider them.

A plaintiff may sue the tort-feasors jointly if he sees fit, regardless of motive, and an allegation that resident and non-resident tort-feasors are sued for the purpose of preventing removal to the Federal court is not a sufficient allegation that the joinder was fraudulent.

A lessor railroad company remains responsible, so far as its duty to the public is concerned, notwithstanding it may lease its road, unless relieved by a statute of the State.

Whether defendants can be sued jointly as tort-feasors is for the state court to decide; and so held that, where the state court decides that a lessor road in that State is responsible for keeping its roadbed in order, the joinder of both lessor and lessee roads in a suit for damages caused by imperfect roadbed and management is not fraudulent and the lessee road, although non-resident, cannot remove if the lessor road is resident.

126 Kentucky, 252, affirmed.

THE facts are stated in the opinion.

Mr. Edmund F. Trabue, with whom *Mr. John C. Doolan, Mr. Attilla Cox, Jr.,* and *Mr. Blewett Lee* were on the brief, for plaintiff in error:

The lessor and conductor were joined as petitioner's co-

defendants solely to prevent a removal to the Federal court, and the trial court sustained their motions for peremptory instructions in their favor, and plaintiff below prosecuted no appeal from these judgments, but abandoned his case as to them both.

The allegations of fact in a petition for removal must be accepted by the state court as true, because an issue on such allegations can be tried only in the Federal court. *Railway* v. *Dunn*, 122 U. S. 513, 517; *Plymouth* v. *Amador Co.*, 118 U. S. 264, 270; *Louisville R. R. Co.* v. *Wangelin*, 132 U. S. 599; *Alabama Gt. Southern Ry. Co.* v. *Thompson*, 200 U. S. 218; *Wecker* v. *National Co.*, 204 U. S. 176; *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207; *Dow* v. *Bradstreet*, 46 Fed. Rep. 824; *Arrowsmith* v. *Railroad Co.*, 57 Fed. Rep. 165; *Diday* v. *Railway Co.*, 107 Fed. Rep. 565; *Union Co.* v. *C., B. & Q. R. R. Co.*, 119 Fed. Rep. 209; *Kelly* v. *C. & A. R. Co.*, 122 Fed. Rep. 286; *Gustafson* v. *Railway Co.*, 128 Fed. Rep. 85; *Dishon* v. *C., N. O. & T. P. Ry. Co.*, 133 Fed. Rep. 471; *Boatmen's Bank* v. *Fritzlen*, 135 Fed. Rep. 650, 668 (certiorari denied, 198 U. S. 586); *South Dakota Co.* v. *Cin. & St. P. Ry. Co.*, 141 Fed. Rep. 578, 581; *Thomas* v. *Great North. Ry. Co.*, 147 Fed. Rep, 83, 86; *Atlanta, K. & N. Ry. Co.* v. *Sou. Ry. Co.*, 153 Fed. Rep. 122, 126; *M'Guire* v. *Great North. Ry. Co.*, 153 Fed. Rep. 434, 439; *Politz* v. *Wabash Ry. Co.*, 153 Fed. Rep. 941; *M'Alister* v. *Ches. & Ohio Ry. Co.*, 157 Fed. Rep. 740, 743; *Harrington* v. *Gt. Nor. Ry. Co.*, 169 Fed. Rep. 714; *Donovan* v. *Wells, Fargo & Co.*, 169 Fed. Rep. 363.

The state court, therefore, had no jurisdiction to try or determine the question of fact tendered by the petition for removal, much less to try it on evidence heard only on the merits. *Rutherford* v. *I. C. R. R. Co.*, 120 Kentucky, 15; *Coley* v. *I. C. R. R. Co.*, 121 Kentucky, 385; *Dudley* v. *I. C. R. R. Co.*, 127 Kentucky, 221; *Underwood* v. *I. C. R. R. Co.*, 31 Ky. L. R. 595, holding that the state court may try issues of fact upon a petition for removal, is a doctrine unsound in

principle and in conflict with the decisions of this court and all of the other Federal courts.

Where the plaintiff joins as the real defendant's co-defendants persons known to be improper parties and fabricates averments concerning them in order to misstate their connection with the case, a petition for removal in alleging fraud in the joinder of the improper defendants may aver the untruth of the plaintiff's averments, otherwise the right of removal to the Federal court might always be frustrated by the plaintiff *ad libitum;* and the courts will be astute to prevent such devices. Miller, J., 4 Dill. 277 (cited in 57 Fed. Rep. 169), and see *Crawford* v. *I. C. Ry. Co.,* 130 Fed. Rep. 395; *C., R. I. & P. Ry. Co.* v. *Stepp,* 151 Fed. Rep. 908, and other cases cited *supra.*

Although the state court was without jurisdiction to try an issue of fact upon the petition for removal and the assumption of the state court to pass upon the truth of the averments of such petition of itself entitles the Illinois Central to a reversal of the judgment now assailed, nevertheless the same result would follow a consideration of the case which the state court assumed to try as arising upon the record, because it is demonstrable from the opinion itself that the state court was not justified in holding that the derailment of the engine was the proximate result of the failure of the lessor to perform its public duty in its failure to construct safe roadbed.

This unwarrantable speculation is too far-fetched to justify the joinder of the Kentucky Company upon the assumption that the supposed condition of its track caused the wreck in any such fantastic way as suggested by the state court. *Neeling* v. *C., St. P. & K. R. R. Co.,* 98 Iowa, 554; *Cox* v. *C. & N. W. Ry. Co.,* 102 Iowa, 711.

If the state court had had jurisdiction to try the truth of the averments of the petition for removal it must have heard witnesses to that end. Instead of so doing the state court tried the Illinois Central's averments on jurisdiction by evi-

dence upon the merits, and as if it were trying the liability of the Kentucky Company, which had previously been dismissed. Its judgment is, therefore, reversible from any standpoint.

Defendant in error's case against the plaintiff in error is a distinct cause of action on which a separate suit might be brought and complete relief afforded without any other party in court. *Barney* v. *Latham*, 103 U. S. 205.

Permission of state practice to join defendants does not prevent a separable controversy between plaintiff and one of them. *Kelly* v. *Railroad Co.*, 122 Fed. Rep. 286, 291; *Williard* v. *Railroad Co.*, 124 Fed. Rep. 796, 801; *Yates* v. *Railroad Co.*, 137 Fed. Rep. 943; *Iowa Ry. Co.* v. *Bliss*, 144 Fed. Rep. 446; *Manufacturing Co.* v. *Brown*, 148 Fed. Rep. 308; *South Dakota Co.* v. *Railway Co.*, 141 Fed. Rep. 578, 581; *Stockton* v. *Oregon Short Line*, 170 Fed. Rep. 627, 633; *Wallin* v. *Reagan*, 171 Fed. Rep. 758, 763.

State legislation cannot control Federal jurisdiction. *Hyde* v. *Stone*, 20 How. 170, 175; *Smyth* v. *Ames*, 169 U. S. 466; *Brow* v. *Wabash*, 164 U. S. 271.

Mr. John G. Miller, with whom *Mr. P. B. Miller* was on the brief, for defendant in error:

Case is not removable until the record on its face shows facts which give the Federal court jurisdiction. *Ex parte Wisner*, 203 U. S. 449; *Kinney* v. *Columbia Sav. & Loan Asso.*, 191 U. S. 78.

If the case be not removed, the jurisdiction of the state court remains unaffected; and under the act of Congress the jurisdiction of the Federal court could not attach until it becomes the duty of the state court to proceed no further. *Crehore* v. *M. & O. Ry. Co.*, 131 U. S. 240; *Stone* v. *South Carolina*, 117 U. S. 430; *Carson* v. *Hyatt*, 118 U. S. 279; *Stevens* v. *Nichols*, 130 U. S. 230; *Phœnix Ins. Co.* v. *Pechner*, 95 U. S. 183; *National Steamship Co.* v. *Tugman*, 106 U. S. 118; *B. & O. R. R. Co.* v. *Koontz*, 104 U. S. 514.

The controversy must be wholly between citizens of different States in order to remove the case, and such is not the case when one or more defendants jointly sued are citizens of the same State with plaintiff. *Core* v. *Vinal*, 117 U. S. 347; *Chesapeake* v. *Ohio R. R. Co.*, 179 U. S. 131; *Powers* v. *C. & O. R. R. Co.*, 169 U. S. 92; *Alabama G. S. R. R. Co.* v. *Thompson*, 200 U. S. 206; *C., N. O. & T. P. R. R. Co.* v. *Bohon*, 200 U. S. 221.

If the act of an individual is within the terms of the law, whatever may be the reasons which govern him, or whatever may be the result, it cannot be impeached. *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Prewitt* v. *Mut. Life Ins. Co.*, 115 Kentucky, 26.

Plaintiff's motive in the performance of a lawful act was not open to inquiry. *C. & O. R. R. Co.* v. *Dixon*, 179 U. S. 131.

The construction given to the statute of the State by the highest tribunal of the State is regarded as part of the statute and is binding upon the courts of the United States as a text. *Leffingwell* v. *Warren*, 2 Black, 599; *Com. Bank* v. *Buckingham*, 5 How. 317; *Jackson* v. *Lamphire*, 3 Pet. 280.

When the highest judicial tribunal of a State has determined the extent of the powers and liabilities of corporations created under its laws, the decision is conclusive on the national courts in all cases in which no question of general or commercial law and no question of right under the Constitution of the United States is involved. See 92 Fed. Rep. 124; *Clayborne* v. *Brooks*, 111 U. S. 400; *Detroit* v. *Osborne*, 135 U. S. 499; *Gilman* v. *Sheboygan*, 2 Black, 510; *L. & N. R. R. Co.* v. *Kentucky*, 183 U. S. 508; *Connell* v. *Utica E. R. R. Co.*, 13 Fed. Rep. 241; *C. & O. Ry. Co.* v. *Dixon*, 179 U. S. 131; *Southern Ry. Co.* v. *Carson*, 194 U. S. 136; *Alabama G. S. R. Co.* v. *Thompson*, 200 U. S. 206; *Cin., N. O. & T. P. R. R. Co.* v. *Bohon*, 200 U. S. 221.

In case of a misjoinder, a plaintiff's motive in joining a party as defendant can be questioned only when by legislative act or judicial decision it is the settled law of the State in which

the action is brought that the defendant, alleged to be joined as a sham and a fraud, is not liable; and no such question can arise where the law of the State by judicial decision or legislative act fixes the liability of such defendant. Cases *supra*, and *Person* v. *I. C. R. R. Co.*, 118 Fed. Rep. 342.

The action for death is regulated by the Kentucky constitution and statute. Const. Ky., § 241; Ky. Stat., § 6. And the liability of a railroad corporation that leases its track is regulated by the Kentucky constitution, § 203, which forbids the shifting of that liability from the lessor to the lessee.

Independent of the constitutional provision the corporation owning the road and having received a charter from the State is under certain public duties that even a duly authorized lease will not shift or change, and the owner cannot divest itself of those public duties. *Brooker* v. *M. & B. S. R. R. Co.*, 119 Kentucky, 137; *McCabe* v. *M. & B. S. R. R. Co.*, 112 Kentucky, 861; *Swice* v. *M. & B. S. R. R. Co.*, 116 Kentucky, 253; *Howard* v. *M. & B. S. R. R. Co.*, 70 S. W. Rep. 631; *Davis* v. *C. & O. Ry. Co.*, 75 S. W. Rep. 227; *Clinger* v. *M. & B. S. R. R. Co.*, 109 S. W. Rep. 317.

While the lessor may not be liable to the servant of the lessee for an injury caused by the negligent act or omission of the lessee as to some duty growing out of the mere relationship of master and servant, the lessor is liable for an injury to any member of the public, including the servant of the lessee, who may be injured by a negligent act or omission as to a public duty, such as a failure to keep its roadbed or track, cattle guards, fences, or station houses in a reasonably safe condition. *Swice* v. *M. & B. S. Ry. Co.*, 116 Kentucky, 253; *Nugent* v. *Boston Railroad Co.*, 80 Maine, 62; *Curl* v. *Railroad*, 28 Kansas, 622; *Arrowsmith* v. *Railroad*, 57 Fed. Rep. 165; *Lee* v. *S. P. R. R. Co.*, 116 California, 97.

To sue all three of the defendants for damages resulting from the negligent acts charged in the petition of plaintiff, is allowable under the Kentucky practice, and all were jointly bound or liable. *Pugh* v. *C. & O. Ry. Co.*, 101 Kentucky,

77; *Rutherford* v. *I. C. R. R. Co.*, 27 Ky. L. R. 397; *Jones* v. *I. C. R. R. Co.*, 26 Ky. L. R. 31; *I. C. R. R. Co.* v. *Coley*, 28 Ky. L. R. 336; *Cent. Pass. Ry. Co.* v. *Kuhn*, 86 Kentucky, 578; *Hawkins* v. *Riley*, 17 B. Mon. 101; *C. & O. R. R. Co.* v. *Dixon*, 179 U. S. 131.

Under the authorities *supra*, the construction given by the Court of Appeals of Kentucky to § 119 of the Kentucky Civil Code is conclusive; and no act of the legislature or authority for the lease is set forth in the petition for removal; and that being true, the lease, if such existed, is not shown by any allegation to have been authorized by law and should, therefore, be treated as void. *Thomas* v. *West Jersey R. R. Co.*, 101 U. S. 71; *Railroad* v. *Winans*, 17 How. 30.

Petition to remove after a trial on the merits comes too late. A peremptory instruction to find for any of the defendants was "ruling on the merits and not a ruling on the question of jurisdiction." "The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried." *Whitcomb* v. *Smithson*, 175 U. S. 635; *Kansas City Suburban Belt Ry.* v. *Herman*, 187 U. S. 63.

Therefore, not only does the petition of the plaintiff allege facts that would constitute a joint cause of action against all of the defendants, as held by the Court of Appeals of Kentucky, but as stated by the opinion of that court in this case, "the testimony showed without much contradiction" the truth of plaintiff's allegations as to the miserably defective and dangerous condition of this track and thus absolutely fixed the liability of both the lessee and the lessor for the death of the plaintiff's intestate which was caused thereby,—and the effort to avoid this conclusion by claiming the striking of the stray mule by the engine was the proximate cause, only makes matters worse for the corporations, because their actionable negligence in violating § 1793, Kentucky statute, as to a cattle guard at that place, caused the collision with the mule.

MR. JUSTICE HOLMES delivered the opinion of the court.

THIS is a writ of error to reverse a judgment rendered by the Court of Appeals of Kentucky in favor of the defendant in error, notwithstanding a petition and bond for removal to the Circuit Court of the United States. *I. C. Ry. Co.* v. *Sheegog's Admr.*, 126 Kentucky, 252.

The defendant in error brought this action for causing the death of his intestate, John E. Sheegog, by the throwing off the track of a railroad train upon which the deceased was employed as an engineer. The defendants were the conductor of the train, the Illinois Central Railroad Company, which was operating the railroad and owned the train, and the Chicago, St. Louis and New Orleans Railroad Company, which owned the road and tracks where the accident happened, but which had let the same to the first-mentioned road. It was alleged that through the negligence of both companies the roadbed, track, etc., were in an improper condition; that through the negligence of the Illinois Central the engine and cars were in an improper condition; and that the death was due to these causes acting jointly, the negligence of the Illinois Central in permitting its engine, cars and road to be operated while in such condition, and the negligence of the conductor in ordering and directing the management of the train.

In due season the Illinois Central Railroad Company, being an Illinois corporation, filed its petition to remove. The difficulty in its way was that the other two defendants were citizens and residents of Kentucky, to which State the plaintiff also belonged. To meet this the petition alleged that the plaintiff had joined these parties as defendants solely for the purpose of preventing the removal. It admitted the lease and averred that the Illinois Central Company operated the road exclusively and alone employed the deceased. It went on to allege that the charge of joint negligence against the lessor and lessee in causing the wreck as stated was made only for the above purpose and was fraudulent and knowingly false.

The question is whether these allegations were sufficient to entitle the petitioner to have its suit tried in the Federal court. It may be mentioned here that the jury found for the other two defendants and against the Illinois Central Railroad Company, but that fact has no bearing upon the case. *Whitcomb* v. *Smithson*, 175 U. S. 635, 637.

Of course, if it appears that the joinder was fraudulent as alleged, it will not be allowed to prevent the removal. *Wecker* v. *National Enameling & Stamping Co.*, 204 U. S. 176. And further, there is no doubt that the allegations of fact, so far as material, in a petition to remove, if controverted, must be tried in the court of the United States, and therefore must be taken to be true when they fall to be considered in the state courts. *Crehore* v. *Ohio & Mississippi Ry. Co.*, 131 U. S. 240, 244. *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207. On the other hand, the mere epithet fraudulent in a petition does not end the matter. In the case of a tort which gives rise to a joint and several liability the plaintiff has an absolute right to elect, and to sue the tort-feasors jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face. *Alabama Great Southern Ry. Co.* v. *Thompson*, 200 U. S. 206. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Bohon*, 200 U. S. 221. If the legal effect of the declaration in this case is that the Illinois Central Railroad Company was guilty of certain acts and omissions by reason of which a joint liability was imposed upon it and its lessor, the joinder could not be fraudulent in a legal sense on any ground except that the charge against the alleged immediate wrongdoer, the Illinois Central Railroad itself, was fraudulent and false.

We assume, for the purposes of what we have to say, that the allegations concerning the lessor state merely a conclusion of law from the acts and omissions charged against its lessee. Or, if they be taken to be allegations of fact, we as-

sume, again merely for the purposes of decision, that they are effectively traversed by the petition to remove. The Kentucky Court of Appeals appears to us to have discussed the case on this footing. Whether it did or not, the question whether a joint liability of lessor and lessee would arise from the acts and omissions of the Illinois Central Railroad Company alone was a question of Kentucky law for it to decide, and it appears to us to have decided it.

We should observe in the first place that the cause of action alleged is not helped but rather hindered by the allegation that the deceased was an employé of the Illinois Central Road. The case did not stand on the breach of any duty owed peculiarly to employés, and on the other hand was encumbered with the fact that a part of the negligence charged was that of a fellow-servant. The plaintiff recovered for a breach of a duty to the public which at best was not released or limited by his intestate's having been in the company's service. Now whether we agree with it or not the doctrine is familiar that in the absence of statute a railroad company cannot get rid of the liabilities attached to the exercise of its franchise, by making a lease. Whatever may be the law as to purely contract relations, to some extent at least the duties of the lessor to the public, including that part of the public that travels on the railroad, are held to remain unchanged. In this case the Court of Appeals, after noting that it does not appear that the lessor was relieved by statute, quotes an earlier Kentucky decision which seemingly adopted the following language of a commentator: "If it be true, as the decisions with substantial unanimity admit, that a lessor railway remains liable for the discharge of its duties to the public unless expressly exempted therefrom by statute, it seems difficult to conceive its absence of liability in any event, except perhaps when the plaintiff is suing upon an express contract made with him by the lessee corporation." *McCabe* v. *Maysville & Big Sandy R. R. Co.*, 112 Kentucky, 861, 875.

The court, however, then goes on to refer to a distinction

taken in a later Kentucky case between torts arising from negligent operation and those resulting from the omission of such duties as the proper construction and maintenance of the road, *Swice* v. *Maysville & Big Sandy Ry. Co.*, 116 Kentucky, 253, and quotes, with seeming approval, decisions in other States limiting the liability of the lessor to the latter class. But it then proceeds to show that the recovery in this case is upon a breach of a duty to the public, and that according to the declaration and the verdict the injury was due, in part, at least, to the defective condition of the road. It ends by saying (p. 278): "The appellee not only had reasonable grounds to believe that the resident corporation was responsible to him, but he had actual grounds to believe it." We understand the words 'actual grounds' to mean that the belief was correct on the allegations and findings according to Kentucky law. So that, whatever may be the precise line drawn by that court hereafter, it stands decided that in Kentucky the facts alleged and proved against the Illinois Central Railroad in this case made its lessor jointly liable as matter of law. This decision we are bound to respect.

It follows, if our interpretation of the decision is correct, that no allegations were necessary concerning the Chicago, St. Louis and New Orleans Railroad Company, except that it owned and had let the road to its co-defendant. The joint liability arising from the fault of the Illinois Central Road gave the plaintiff an absolute option to sue both if he preferred, and no motive could make his choice a fraud. The only way in which fraud could be made out would be by establishing that the allegation of a cause of action against the Illinois Central Railroad was fraudulent, or at least any part of it for which its lessor possibly could be held. But it seems to us that to allow that to be done on such a petition as is before us would be going too far in an effort to counteract evasions of Federal jurisdiction. We have assumed, for purposes of decision, that the railroad held on what may be called a secondary ground is to be charged, if at all, only as

a consequence of the liability of its lessee. But when we come to the principal and necessary defendant, a man is not to be prevented from trying his case before that tribunal that has sole jurisdiction if his declaration is true by a mere allegation that it is fraudulent and false. The jury alone can determine that issue unless something more appears than a naked denial. *Louisville & Nashville R. R. Co.* v. *Wangelin*, 132 U. S. 599, 603. *Chesapeake & Ohio Ry. Co.* v. *Dixon*, 179 U. S. 131, 138. However, the petition for removal hardly raises this point. For it directs itself wholly against the allegations of joint negligence, and does not attempt to anticipate the trial on the merits so far as the conduct of the Illinois Central is concerned.

Judgment affirmed.

MR. JUSTICE DAY, with whom concurred MR. JUSTICE HARLAN, dissenting.

In my view this decision departs from rulings recently made, and tends to disturb settled principles essential to the maintenance of jurisdiction in the Federal courts. In order to apply my views I will briefly restate the facts of the case.

Sheegog's administrator brought an action in the state court of Kentucky against the Illinois Central Railroad Company, a corporation of the State of Illinois, the Chicago, St. Louis and New Orleans Railroad Company, a corporation of the State of Kentucky, and F. J. Durbin, a citizen of Kentucky. The Illinois Central Railroad Company was the lessee of the Chicago, St. Louis and New Orleans Railroad Company, and F. J. Durbin was alleged to be a conductor in the employ of the lessee road and in charge of the train, in the operation of which, as engineer, plaintiff's intestate was killed. The charge of the complaint was that at the time of injury the defendant, the Chicago, St. Louis and New Orleans Railroad Company, was the owner of the roadbed, right of way, etc., and the Illinois Central Railroad Company was the lessee of

the railroad property, and the owners of the cars, engines, trains and appliances, in the operation of which the intestate was killed; that the defendant Durbin was the conductor in the employ of the Illinois Central Railroad Company, operating the train at the time of the injury. The negligence charged against the defendant railroad companies was that the roadbed, rails, track, cattle guards, ties, fences and right of way of the railroad was allowed to be, and for a long time had been, in a weak, rotten, ruinous and defective condition; and, in addition thereto, as to the Illinois Central Railroad Company, its cars and engines were knowingly allowed to be and remain in an improper, defective and dangerous condition, and were improperly constructed, whereby the injury was caused, and that the defendant Durbin was guilty of negligence in running, ordering and directing the train, and contributed to the injury thereby. And as a conclusion the plaintiff charged the negligence of the railroad companies, as above described, in the maintenance of the track, roadbed, cattle guards, etc., together with the negligence of the Illinois Central Railroad Company in directing and permitting its cars, engines and road to be operated while in a dangerous and defective condition, and the negligence of the conductor in directing the running and management of the train, "all together jointly caused said wreck, and killed the plaintiff's intestate."

Within the time allowed by law the Illinois Central Railroad Company, the present plaintiff in error, appeared and filed its petition for removal to the Federal court. As the sufficiency of this petition to make a cause for removal is the ultimate question in the case it is necessary to set out its allegations somewhat in detail:

"Your petitioner says that plaintiff's decedent at the time he received the fatal injury complained of was an employé of your petitioner, and not an employé of either of your petitioner's co-defendants, and was not and never had been an employé or in the employ of said lessor, or said F. J. Durbin,

and that all the said facts were well known to plaintiff when this action was brought. Your petitioner says that to avoid such removal to the Federal court of this action plaintiff joined your petitioner's co-defendants, one a Kentucky corporation and the other a citizen of Kentucky, and falsely and fraudulently alleged in its petition that the train on which decedent was engaged was, through joint and gross negligence and carelessness of all the defendants, derailed, and said decedent instantly killed, and falsely and fraudulently alleged that by the negligence of both defendants' roadbed, rails, track, cattle guards, fences and right-of-way of the said railroad was allowed to be, and for a long time had been, in a weak, rotten, ruinous, defective and improper condition, and by the negligence of your petitioner its engine and cars were knowingly allowed to remain in an improper and defective and dangerous condition, and said engine and cars to be so constructed as to be in a dangerous condition, and that this improper and dangerous condition of the road premises and cars of the defendants was known to the defendants, and that at the time of the wreck and accident the same were being operated in a careless manner by all the defendants, and the defendant Durbin, by his negligence in running, ordering and directing said train contributed to cause said accident, and that the negligence of the defendant in its maintenance of its track, roadbed, engine, cattle guards, rails, ties, fences, etc., as set out above, together with the negligence of your petitioner in directing and permitting its engine cars and roadbed to be operated while in a defective and dangerous condition, and the negligence of said Durbin in ordering and directing the running and management of said train, and in failing to give proper directions, altogether caused said wreck, and killed said decedent, when the plaintiff well knew that such allegations were untrue, and plaintiff did not expect to establish said allegations, and did not make them for the purpose of proving them at the trial, or of substantiating his cause of action therewith, but made them solely for the pur-

pose of attempting to set up a joint cause of action against the three defendants in order to make a case which would not be removable to the Federal court."

The state court overruled this motion to remove, and its action was affirmed by the Court of Appeals of Kentucky. *I. C. Ry. Co.* v. *Sheegog's Admr.*, 126 Kentucky, 252.

In the court below a peremptory instruction was given the jury to find in favor of the Kentucky corporation and the individual defendant. Notwithstanding this fact the Court of Appeals of Kentucky applied a rule which it had laid down in former decisions, and held that the facts developed on the trial had shown that the administrator had reasonable grounds to join the local defendants, and was therefore justified in overruling the motion to remove. In other words, while the opinion seems to recognize that if the allegations of the petition for removal were true a fraudulent joinder was shown, nevertheless the proof upon the merits showed that the joinder was proper.

The ground upon which the Kentucky Court of Appeals held the Kentucky railroad jointly liable with the Illinois Central for the injuries sustained is not very clear, in view of the fact that the opinion in some parts of it seems to make the liability depend upon the failure to construct a proper road and in other parts seems to rest the responsibility upon the continuing duty of the lessor railroad company to furnish and maintain a safe roadbed in order to discharge the duties which it had undertaken by accepting the franchise which the State had conferred upon it. In the case to which the court makes reference, *Nugent* v. *Boston, C. & M. R. Co.*, 80 Maine, 62, where a brakeman was injured by reason of the negligent construction of an awning of a station house of the defendant company, near the track, the liability of the lessor company was rested both upon the ground of the continuing duty to the public and because of the application of the principle which makes a lessor liable for a defective construction of the subject-matter of the lease. In either view it is perfectly

apparent that the liability of the Illinois Central to its employés, and that of the lessor company to the public, rests upon entirely different principles. In the case of the latter the liability is because of the duty which, it is held, the lessor owes to the public; and in the former, because of the obligations of the employer to his employé arising from the relation of master and servant. In this connection the Court of Appeals of Kentucky, 126 Kentucky, in the opinion in this case, said (p. 275):

"In all cases where a valid lease is found (or, as in this discussion where it is assumed), the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of relationship of employer and employé under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company, when it attaches, does not spring from this relationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employé of the operating company may be regarded as one. Thus, in those cases where the injury has resulted to an employé of the operating company by reason of the negligence of a fellow servant, or of want of care of the lessee company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company for injury which may result, the lessor is in no way responsible. But where injury has resulted to an employé of the operating company by reason of a failure of the lessor to perform its public duty, as in the failure to construct a safe road, as is here charged, the injured employé may sue the lessor company, as one of the public, for its failure to perform that duty, and not because, between himself and the lessor company, the relation of employé and employer, or any relation of contractual privity, exists."

After citing the case from 80 Maine, *supra*, the court adds (p. 277):

"This case is very similar to the one at bar, in which it was

alleged and proved that the intestate's death was the proximate result of the failure of the lessor to perform its public duty in its failure to construct a safe roadbed."

It is apparent that the liability of the two railroad companies, although both might be liable for a defective roadbed, track, etc., sprang from a different relation, and was controlled by different principles. The liability to the plaintiff's intestate, of the Kentucky corporation, was to him as one of the public, that of the Illinois corporation arose from the relation of master and servant, and the duties thereby imposed upon the employer.

But let it be conceded that a proper construction of the opinion of the Kentucky Court of Appeals holds both the railroad companies, although upon different relations to the plaintiff's intestate, liable for a defective roadbed, it is none the less true that the Illinois Central Railroad Company had a right of removal to the Federal jurisdiction, in which to test its liability, unless it was properly joined with the other defendants in an action brought in good faith in the state court.

It is the result of the decisions of this court, as I understand them, that if the facts which asserted a joint liability with the local defendant are shown by proper petition for removal, and proof if necessary, to have been made for the purpose of defeating the jurisdiction of the Federal court, the right of removal still exists in favor of the non-resident company. This court has had occasion to consider this subject in a number of recent cases. Before taking them up we may state certain principles applicable to the law of removals under the removal act which are so well settled as scarcely to need the citation of authorities.

When the petition for removal is filed in the state court, accompanied by the proper bond, a question of law as to the sufficiency of the petition for removal only is presented to that court. *Steamship Co.* v. *Tugman*, 106 U. S. 118; *Stone* v. *South Carolina*, 117 U. S. 430; *Carson* v. *Hyatt*, 118 U. S.

279; *Burlington, Cedar Rapids & Northern R. R. Co.* v. *Dunn*, 122 U. S. 513; *Crehore* v. *Ohio & Mississippi Ry. Co.*, 131 U. S. 240; *Traction Company* v. *Mining Co.*, 196 U. S. 239.

It is equally well settled, and is a result of the principle just stated, that where the right of removal arises because of certain facts averred in the petition, that issue cannot be tried in the state court, but must be heard in the Federal court, which alone has jurisdiction to determine such issues of fact. *Carson* v. *Dunham*, 121 U. S. 421; *Burlington, Cedar Rapids & Northern R. R. Co.* v. *Dunn*, 122 U. S. 513; *Crehore* v. *Ohio & Miss. Ry. Co.*, 131 U. S. 240; *Kansas City Railroad* v. *Daughtry*, 138 U. S. 298; *Traction Company* v. *Mining Co.*, 196 U. S. 239.

In recent cases in this court the former adjudications have been reviewed and followed, and it has been held that for the purposes of removal the cause of action must be regarded as joint or several, accordingly as the plaintiff has averred the same to be in his complaint, in the absence of inferences arising from the pleading or shown extrinsically upon a petition for removal, which warrant the conclusion that a fraudulent joinder has been made for the purpose of avoiding the jurisdiction of the Federal court. *Chesapeake & Ohio Ry. Co.* v. *Dixon*, 179 U. S. 131; *Alabama Great Southern Ry. Co.* v. *Thompson*, 200 U. S. 206; *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Bohon*, 200 U. S. 221. In the *Alabama Great Southern Ry. Case*, 200 U. S. 206, certain employés, citizens of Tennessee, had been joined with the Alabama and Great Southern Railroad Company in an action for negligence, and the question of the right to join them was certified to this court, and it was held, after reviewing the former cases, that, in the absence of fraudulent joinder, the cause of action might be regarded for the purposes of removal to be that which the plaintiff had averred it to be.

In the *Bohon Case*, 200 U. S. 221, considered with the *Alabama Great Southern case, supra*, the action was brought against the railroad company and one Milligan, an engineer

in charge of an engine, the negligent operation of which, it was alleged, resulted in the death of the plaintiff's intestate. It appeared that the joinder was permitted by the laws of Kentucky, and it was held in this court that, in the absence of a showing of fraudulent joinder, the case was not a removable one. An examination of the petition for removal in that case shows that while there were allegations that the joinder was fraudulent, that conclusion was averred to arise because there was no joint liability of the railroad company and the employé; that he was joined because he was a resident of Kentucky for the purpose of preventing removal. But there is no averment in the petition for removal in the *Bohon case* as there is in this case—that the allegations of fact upon which the complaint was based were untrue, made without any expectation of proving them, and for the purpose of defeating a removal to the Federal court. In concluding the discussion in the opinion in the *Bohon case* it was said (p. 226):

"A State has an unquestionable right by its constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed jointly and severally against those liable for the injury, and the plaintiff in due course of law and in good faith has filed a petition electing to sue for a joint recovery given by the laws of the State, we know of nothing in the Federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a nonresident defendant therein properly joined in the action under the constitution and laws of the State wherein it is conducting its operations and is duly served with process."

In *Wecker* v. *Enameling & Stamping Company*, 204 U. S. 176, suit was brought in the state court in Missouri by Wecker against the Enameling and Stamping Company, Harry Schenck and George Wettengel. Wettengel was a citizen of the State of Missouri, the enameling company was a foreign corporation. The complainant charged that the plaintiff was employed by the company in working about certain pots

used in the melting of grease and lubricant matter, which matter was delivered to the plaintiff in barrels of great weight, and which it was the plaintiff's duty to hoist to the top of the furnace and into the pots for melting. The negligence charged against the corporation consisted in allowing the pots to remain open and exposed while filled with hot and boiling lubricants, without covering, railing or device or means of any character to protect the plaintiff from slipping or falling therein, and negligently failing to provide safe and sufficient hoisting apparatus for the use of the plaintiff in his employment, and failing to instruct him in his duties, whereby and because of the negligence charged the plaintiff lost his balance and fell into one of the unguarded and open pots, receiving thereby great and painful injuries. Wettengel, it was charged, was employed by the corporation, and charged with the superintendence and oversight of the plaintiff in the performance of his duties, and with the duty of superintending and planning the construction of the furnace, and providing for the pots a reasonably safe and suitable covering, and sufficiently safe hoisting apparatus, and with the duty of instructing the plaintiff as to the manner of performing his duties. The complaint charges the negligence of Wettengel in planning and directing the construction of the furnace structure and in providing suitable coverings and railings, and in providing and placing reasonably safe and sufficient hoisting apparatus, and in giving instructions as to the manner of performing the plaintiff's duties, and therefore charges that the negligence of the corporation and Wettengel, jointly, caused the injury, and prayed for a joint judgment against them.

In its petition for removal the non-resident corporation charged that Wettengel was not, at the time of the accident and prior thereto, charged with the superintendence and oversight of the plaintiff, or with the duties of planning or directing the construction of the furnace, or providing a reasonably safe and suitable furnace and pots and railings or other device to protect the plaintiff, and was not charged

with the duty of placing reasonably safe and sufficient hoisting apparatus, nor with the duty of instructing the plaintiff in respect to his duties; that Schenck was a non-resident of Missouri, and that Wettengel had been improperly and fraudulently joined as a defendant for the purpose of fraudulently and improperly preventing, or attempting to prevent, the defendant from removing the cause to the United States Circuit Court, and that plaintiff well knew at the beginning of the suit that Wettengel was not charged with the duties aforesaid, and joined him as a defendant to prevent the removal of the case, and not in good faith. Defendant offered affidavits tending to show that Wettengel was employed in the office as a draftsman; that he had nothing to do with the selecting of plans or approving the same; that he had no authority to superintend the work or to give instructions to any of the men as to the manner in which they should perform the work; that he was merely a subordinate in the employ of the company, whose sole duties were to attend to the mechanical work of drafting, to make the necessary drawings for the use of the mechanics, and he had nothing to do with the providing of the pots, railings, etc., or the hoisting apparatus; that his position was merely clerical, and confined to the making of drawings to enable mechanics to construct work from plans furnished by others in the employ of the defendant. Upon these affidavits the Circuit Court reached the conclusion that the attempt to join Wettengel was not made in good faith; that the allegations as to him were fraudulent and fictitious, for the purpose of preventing a removal to the Federal court.

This court declined to consider the question as to whether, as a matter of law, the cause of action was joint or several, or whether, upon the allegations of the complaint, Wettengel could be held jointly with the corporation, (204 U. S. 183), and affirmed the judgment of the court below upon its findings of fact upon the issue of fraudulent joinder.

This case, therefore, held the doctrine of this court to be

that the Circuit Court of the United States upon a proper petition for removal may examine into the merits sufficiently to determine whether the allegations, by reason of which a non-resident defendant may be sued in a state court, are fraudulently and fictitiously made for the purpose of preventing removal. It is true that where one has a cause of action of which both state and Federal courts have jurisdiction his motive in bringing the action in the one jurisdiction or the other is immaterial, and he may sue in the state court because he preferred that jurisdiction to a Federal court to which he had an equal right to go.

But this case presents a very different question. The inquiry here is not whether a cause of action exists which may be prosecuted in either court, but whether the allegations of the complaint, which give the right to a joint action in the state court, are falsely and fictitiously made without the intention of proving them, and with the sole purpose of avoiding Federal jurisdiction. Since its decision the case of *Wecker* v. *The Enameling & Stamping Company* has been frequently cited and followed in the Federal courts. *McGuire* v. *Great Northern Ry. Co.*, 153 Fed. Rep. 434; *Donovan* v. *Wells, Fargo & Co.*, 169 Fed. Rep. 363; *Lockard* v. *St. Louis & S. F. R. Co.*, 167 Fed. Rep. 675; *People's U. S. Bank* v. *Goodwin*, 160 Fed. Rep. 727; *McAlister* v. *Chesapeake & Ohio Ry. Co.*, 157 Fed. Rep. 740.

Applying these principles to the case at bar, the allegations of the complaint filed in the state court undertook to make a cause of action against the Illinois Central Company, the non-resident corporation, upon three grounds: First, because it was jointly liable with the Chicago, St. Louis and New Orleans Railroad Company, the local corporation, for a defective roadbed; second, because it was liable for the negligent conduct of the conductor, Durbin, in running its trains; third, because it was liable for the negligent and improper construction of its locomotive and cars. As to the third ground of the complaint, the defective locomotive and

cars, the authorities agree that there is no responsibility upon the part of the lessor company. The policy of the law as ruled by the Kentucky Court of Appeals made the lessor corporation responsible for a defective roadbed, it was not responsible for defective appliances supplied by the lessee company or for negligence in the running and management of the road. This was expressly held by the Kentucky Court of Appeals in *Swice's Administratrix* v. *Maysville & Big Sandy Ry. Co.*, 116 Kentucky, 253, prior to its decision in the case at bar. Therefore, as to this ground of complaint there was no contributing neglect of the local company or the conductor, Durbin.

If the allegations which gave a right to join these defendants were false and fictitious, such joinder should not be allowed to defeat the right of the foreign corporation to avail itself of the Federal jurisdiction. As we had occasion to say in the *Wecker case*, the courts of the United States should not interfere with the jurisdiction of the state courts in cases properly within the same, and the Federal courts should be equally vigilant to defeat all fraudulent devices or attempts to avoid the jurisdiction of the Federal courts. If the allegations of the petition for removal were true the statements of the complaint as to the negligence of Durbin and the local corporation were false and fraudulent, and made without the intention of proving the same, and for the purpose of preventing removal.

The sole jurisdiction to inquire into the truth of these allegations was in the Federal court, and while it would require a clear and strong case to make out such allegations of fraudulent joinder, jurisdiction to make just such an inquiry is vested by law, under the removal act, in the Federal courts. It may be that the allegations for removal might have been more specific, but they were sufficient to enable the Federal court to enter into an inquiry as to the fraudulent character of the joinder of the resident defendants. It might find, upon investigation, that the allegations as to the condition

of the roadbed and the negligence of the conductor were so entirely without foundation as to warrant the conclusion that the local corporation and the conductor were fraudulently joined to avoid the Federal jurisdiction. Indeed, it is to be noted in this connection that at the close of the evidence the trial court directed a verdict in favor of the local corporation and the conductor. It is true that the right to remove depends upon the allegations of the petition, but the course of the case in the state court is an illustration of the possible result of an investigation of the truth of the allegations of the petition for removal.

I therefore reach the conclusion that, upon the face of the petition for removal, there were allegations which ended the jurisdiction of the state court, and a sufficient statement of facts to enable the Federal court to investigate the truthfulness thereof with a view to determine whether they were so false and fictitious as to show that they were made with a view to prevent the removal to the United States court.

In my opinion the judgment of the Court of Appeals of Kentucky should be reversed.

MR. JUSTICE HARLAN concurs in this dissent.

GRAVES *v.* ASHBURN.

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

No. 51. Argued December 7, 1909.—Decided December 20, 1909.

Where the remedy at law is of doubtful adequacy and the policy of the State is clearly indicated for the protection of an important industry, equity may interfere, although under different circumstances an injunction might be denied; and so held as to an injunction against cutting or boxing timber on pine lands in Georgia.

Possession of unenclosed woodland in natural condition is a fiction

of law rather than a possible fact, and can reasonably be assumed to follow the title; and, in this case, *held* that a suit in equity could be maintained to remove cloud on title and cancel a fraudulent deed of timber lands in Georgia notwithstanding there was no allegation of possession.

A suit in equity may be maintained to cancel a deed improperly given where the invalidity does not appear on its face, and under which by the state law, as in Georgia, possession might give a title.

The fact that the defendant has, during the pendency of an equity action to set aside a deed, continued to waste the property does not destroy the jurisdiction of the court; the bill may be retained and damages assessed.

The objection of multifariousness is one of inconvenience, and, after trial, where the objection was not sustained by the lower court and defendants did not stand upon their demurrer setting it up, it will not prevail in this court in a case where the bill charged a conspiracy between several trespassers whose trespasses extended over contiguous lots treated as one.

THE facts are stated in the opinion.

Mr. Marion Erwin, with whom *Mr. William J. Wallace* was on the brief, for petitioners.

Mr. Alfred R. Kline and *Mr. Robert L. Shipp* for respondents.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the petitioners against H. T. Crawford, W. W. Ashburn, now represented by his executrix, his lessees, and, originally, against other defendants who have been disposed of and are not before us. The petitioners show title in themselves, derived from the State, to four nearly square lots of land, of about 490 acres each, contiguous to each other and making one large square in the Eighth District of Colquitt County, Georgia. The right hand upper square upon the map is numbered 353, the left hand upper square, 354, the left hand lower, 383, and the right hand lower, 384. This land had upon it pine woods valuable

for timber and turpentine. The bill alleges that the petitioners being residents of New York employed a firm of lawyers to look after the same; that by a breach of trust and without title or authority a deed was made on behalf of the firm purporting to convey the north half of lot 353 to the defendant Ashburn; that he had notice of the want of title, but nevertheless let the timber privileges to another defendant, and that the latter was about to cut the timber and had already boxed the trees and taken turpentine from other portions of the same lot. In pursuance of the same general fraudulent plan another voidable or void conveyance was made to Crawford of lot 383, and thereafter Crawford began to box the trees on that lot and to carry away the turpentine. Further particulars are not necessary here. The bill sought an injunction against boxing the trees, carrying away turpentine, or cutting timber, and a cancellation of the fraudulent deeds.

The Circuit Court dismissed the bill against Crawford, on the ground that the plaintiffs had a complete remedy at law, and it did not pass on the title to lot 383 and the south half of 353. It declared the plaintiffs' title to lots 354, 384 and the north half of 353, and granted the relief prayed in respect of them against Ashburn and others. There were cross appeals, and the Circuit Court of Appeals dismissed the bill, concurring with the Circuit Court as to Crawford, and holding, with regard to Ashburn, that so far as the cloud upon the title was concerned it did not appear sufficiently, from the bill, that the plaintiffs were in possession, and if they were, the deed to Ashburn did not constitute a cloud. As to the cutting of trees, it was held that the remedy at law was complete.

We shall deal first with the last ground of decision, which involves a difference of opinion between different Circuit Courts of Appeals. It is assumed, as was found by the Circuit Court, that the plaintiffs' title was made out and that the defendant is or may be responsible for the wrong. If the

defendant is responsible we are of opinion that an injunction ought to issue. The industry concerned is so important to the State of Georgia and the remedy in damages is of such doubtful adequacy that equity properly may intervene, although in different circumstances an injunction against cutting ordinary timber might be denied. The policy of the State is indicated by § 4927 of the Civil Code, 1895, continuing earlier acts. "In all applications . . . to enjoin the cutting of timber or boxing or otherwise working the same for turpentine purposes, it shall not be necessary to aver or prove insolvency, or that the damages will be irreparable." Although in form addressed to procedure this implies a principle grounded upon a view of public policy. See *Camp* v. *Dixon*, 112 Georgia, 872. *Gray Lumber Co.* v. *Gaskin*, 122 Georgia, 342. The same result has been reached apart from statute by the Circuit Court of Appeals for the Sixth Circuit and in other cases. *Peck* v. *Ayres & Lord Tie Co.*, 116 Fed. Rep. 273. *United States* v. *Guglard*, 79 Fed. Rep. 21. *King* v. *Stuart*, 84 Fed. Rep. 546. Whatever the ultimate disposition of the case a final decree should not be entered until the evidence has been considered in the light of the rule that we lay down. We leave the further consideration to the court below.

As the case is before us, it is proper to add that we perceive no sufficient reason in the grounds stated for denying a cancellation of the deed to Ashburn. The first of these grounds is that the plaintiffs do not allege that they are in possession of the land concerned. We infer that the premises, or the greater part of them, are woodland, not enclosed by fences, but in their original natural condition. If so, then possession is a fiction of law rather than a possible fact, and it would be reasonable to assume that possession remains with the title. *Green* v. *Liter*, 8 Cranch, 229. Georgia Code, § 3878. We may say more broadly, and without qualifying *Lawson* v. *United States Mining Co.*, 207 U. S. 1, 9, that in view of the statute, the relief, in case of such lands, should not be made to depend upon shadowy distinctions, according to the

greater or less extent of the trespasses committed. See *Holland* v. *Challen*, 110 U. S. 15. *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, 449. It has been intimated by the Georgia court that relief would be granted, irrespective of possession. *Pierce* v. *Middle Georgia Land & Lumber Co.*, 131 Georgia, 99. *Griffin* v. *Sketoe*, 30 Georgia, 300. See also *Sharon* v. *Tucker*, 144 U. S. 533, 536, 543. The other ground mentioned is that if Ashburn should sue, his deed would not enable him to recover. But in any case proper for relief the deed does not convey a good title. It is enough that the invalidity does not appear upon its face, but rests partly on matter *in pais*, and that possession under it for seven years might give a title by the Georgia Code, § 3589, embodying earlier statutes.

The fact that Crawford during the pendency of the suit had cut the trees on a portion of the land did not destroy the jurisdiction of the court. If that or the other grounds that we have mentioned were the reasons for dismissing the bill as to him, it should be retained and damages assessed. *Milkman* v. *Ordway*, 106 Massachusetts, 232, 253. If different facts from those that we have discussed were found to exist it does not appear.

It is urged that the bill is multifarious. But it charges a conspiracy between the several trespassers, and trespasses extending over the greater part of the four contiguous lots treated as one. The objection of multifariousness is an objection of inconvenience. The defendants did not stand upon their demurrers setting it up. There has been a trial after long delay. In view of the evidence and the fact that the objection did not prevail with the lower courts, we are of opinion that it should not prevail now. While the decree must be reversed, our decision is without prejudice to any finding upon the facts consistent with the rules that we have laid down.

Decree reversed and case remitted to the Circuit Court for further proceedings.

SCOTT COUNTY MACADAMIZED ROAD COMPANY *v.* STATE OF MISSOURI EX REL. HINES, PROSECUTING ATTORNEY OF CAPE GIRARDEAU COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 52. Argued December 7, 8, 1909.—Decided December 20, 1909.

Following the construction given by the state court, *held* that where a charter for a toll-road provided that the privileges granted should continue fifty years subject to the right of the county to acquire it after twenty years, all privileges ceased on the expiration of the fifty years; and the owner of the franchise was not deprived of his property without due process of law, nor was the obligation of the contract in its charter impaired, by an injunction, from further maintaining toll-gates on such road.

207 Missouri, 54, affirmed.

THE facts are stated in the opinion.

Mr. Edward S. Robert, with whom *Mr. Douglas W. Robert* and *Mr. William L. Becktold* were on the brief, for plaintiff in error:

A franchise or charter granted by a State to a quasi-public corporation is a contract the obligation of which cannot be impaired. *St. Clair Turnpike Co.* v. *Illinois*, 96 U. S. 63; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674; *Pearsall* v. *Great Northern R. R. Co.*, 161 U. S. 663.

The decision of a state court, holding as a matter of construction, that a particular charter or charter provision does not constitute a contract, is not binding on this court. *Mobile & O. R. R. Co.* v. *Tennessee*, 153 U. S. 486.

Due process of law requires compensation to be made, or secured, to the owner of private property when it is taken by

a State or under its authority for public use. *C., N. O. & T. P. R. Co.* v. *Kentucky,* 115 U. S. 321; *C., B. & Q. Ry. Co.* v. *Chicago,* 166 U. S. 226; *Norwood* v. *Baker,* 172 U. S. 269.

A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use without compensation made or secured to the owner, is wanting in the due process of law required by the Fourteenth Amendment. *Tindal* v. *Wesley,* 167 U. S. 222; *Smyth* v. *Ames,* 169 U. S. 526.

Corporations are persons within the meaning of the constitutional provision forbidding the deprivation of property without due process, as well as a denial of the equal protection of the laws. *Covington Turnpike Co.* v. *Sandford,* 164 U. S. 578; *Smyth* v. *Ames,* 169 U. S. 466; *People* v. *Roberts,* 171 U. S. 658, 683; *Railway Co.* v. *Ellis,* 165 U. S. 150; *United States* v. *Express Co.,* 164 U. S. 686; *Railway* v. *Beckwith,* 129 U. S. 268; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196; *Cooper &c. Co.* v. *Ferguson,* 113 U. S. 727.

If an instrument is subject to two constructions, the rule that the construction most favorable to the public should be adopted does not apply, if its application would obviously defeat the legislative intent. *A fortiori* the rule has no application where the meaning of the grant is clear and free from ambiguity. *Moran* v. *Miami Co.,* 2 Black, 722; *St. Clair Turnpike Co.* v. *Illinois, supra.*

Mr. M. A. Dempsey and *Mr. T. D. Hines* for defendant in error:

The charter expressly provides that the privileges granted by the charter shall continue for fifty years. The company and its franchise to take tolls therefore expired February 24, 1903. Session Laws, 1853, 337, 338.

The roadbed in question was a public highway established by public authority for public use, and is to be regarded as a public easement and not as private property. The right to

travel over the road was an easement vested in the public, and when the charter expired this easement continued, disburdened of tolls, but otherwise unaffected. *State* v. *Hannibal County Road Co.*, 138 Missouri, 332; Campbell on Highways, No. 8, p. 8; No. 14, p. 11; *Benedict* v. *Gait*, 3 Barb. 469; *Davis* v. *New York*, 14 N. Y. 516; *St. Clair Co. Turnpike Co.* v. *Illinois*, 96 U. S. 63; 27 Am. and Eng. Ency. of Law, 320; *Pittsburg &c.* v. *Commonwealth*, 104 Pa. St. 583; *State* v. *Lake*, 8 Nevada, 276; *State* v. *Curry*, 6 Nevada, 75; *State* v. *Dayton*, 10 Nevada, 115; *Wood* v. *Turnpike Co.*, 24 California, 474; *Craig* v. *People*, 47 Illinois, 487; *Police* v. *Jury*, 44 La. Ann. 137; *Hayward* v. *Mayor*, 8 Barb. 492; *Hooker* v. *Utica*, 12 Wend. 371; *State* v. *Passaic*, 42 N. J. L. 524; *State* v. *Mayor*, 29 N. J. L. 441; *Kansas* v. *Lawrence*, 22 Kansas, 438; *Blood* v. *Woods*, 95 California, 78; *People* v. *Davidson*, 21 Pac. Rep. 538; *State* v. *Maine*, 27 Connecticut, 641; *Central Bridge* v. *Lowell*, 15 Gray, 106; *People* v. *Newburg*, 86 N. Y. 302; *Heath* v. *Barrymore*, 50 N. Y. 302.

The words "perpetual succession" mean continuous succession during the life of the charter only. Of themselves they do not confer perpetuity upon a corporation. The word "perpetual" qualifies the succession and not the duration of the corporation. *State ex rel.* v. *Payne*, 129 Missouri, 477; *Ralls Co. Case*, 138 Missouri, 332.

The claim of fee simple to the roadbed as a defense is untenable.

No constitutional question is involved. The county does not seek to take any property without compensation or without process of law, but merely seeks by process of law an adjudication as to whether or not the right or franchise to take tolls has expired.

Injunction is a proper remedy. This court is without jurisdiction to determine the appeal. There is no Federal question in the case. *Mills* v. *County of St. Clair*, 8 How. 567; *Davidson* v. *New Orleans*, 96 U. S. 97; *New Orleans* v. *N. O. Waterworks Co.*, 185 U. S. 336; *Satterlee* v. *Matthewson*, 2

Pet. 380; *Watson* v. *Mercer*, 8 Pet. 88; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 583; *Bank* v. *Buckingham*, 5 How. 317; *Miss. & M. R. Co.* v. *Rock*, 4 Wall. 177.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit brought in pursuance of a statute to enjoin the plaintiff in error from maintaining toll-gates upon a road alleged to be a public highway. The defendant justifies under a charter granted by a special act of February 24, 1853, which contained the following section: "8. The privileges granted in this charter shall continue for fifty years; provided, that the county courts of the counties of Cape Girardeau and Scott may, at the expiration of twenty years, or any time thereafter purchase said road at the actual cost of construction, and make it a free road." Mo. Laws, 1853, pp. 337, 338. The defendant says that it has not received the cost of construction, and sets up the Constitution of the United States, Art. I, § 10, the Fourteenth Amendment, and other less material clauses. The reply is that the right to take tolls expired on February 24, 1903, when the fifty years contemplated by the charter had elapsed. There was a trial and a judgment for the relator, which was affirmed by the Supreme Court of the State, and the case was brought here. *State ex rel.* v. *Road Co.*, 207 Missouri, 54.

The plaintiff in error contends that the privileges referred to in § 8 are but three: the life of the corporation brought into being by the charter, the exclusive right to maintain a toll-road granted by § 2, and the right to take higher tolls than those allowed to toll companies organized under a general act then in force; but that it cannot be deprived of its right to take tolls except by a purchase of the road at the actual cost of construction. It says that the provision for the right to purchase at the expiration of twenty years 'or at any time thereafter' imports that the right to make the road free, even after fifty years, can be gained only by pur-

chase, and that the clause makes a contract and creates a right of property which it is beyond the power of the State to impair or take away. The Supreme Court of Missouri took a different view. It held after an elaborate discussion that the plaintiff in error never had more than an easement, that this easement was of a public character charged only with the burden of paying toll during the time allowed by the charter, and that after that time the public had an unencumbered right. The sole question here is whether the construction of the charter and the supposed contract was wrong.

We are of opinion that the decision of the state court was right, and that the meaning of § 8 is so plain that it cannot be made much clearer by argument. "The privileges granted in this charter" means all the privileges, including the privilege of taking toll. The limitation of fifty years would be almost meaningless if tolls were not embraced. The plaintiff in error recognizes the difficulty, and tries to meet it by the suggestion that as applied to tolls the word 'privileges' is to be limited to the excess of the tolls allowed above those mentioned in a general act then in force. But the general act is not referred to in the section granting the right to charge tolls, or, indeed, in the charter at all; it was a law with which the specially chartered corporation had nothing to do. There is not the slightest reason to suppose that there was any implied reference to or thought of it when this act was passed. The words of purchase, 'at the expiration of twenty years, or any time thereafter,' do not convey the meaning that the express limitation of fifty years is done away with in the same section that imposes it, but must be read subject to that more specific phrase, even if 'any time thereafter' practically is cut down to any time within the fifty years, so far as its value to the plaintiff in error is concerned. It was a reservation in favor of the county, not the grant of a new right to the plaintiff in error, and its operation is sufficient if as extensive as the need.

As we are of opinion that the plaintiff in error has no such rights as it claims, even if we assume that it has all the rights of the original corporation created by the charter, it is unnecessary to consider other difficulties in the case.

Judgment affirmed.

FIRST NATIONAL BANK *v.* CITY COUNCIL OF ESTHERVILLE.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 64. Argued December 10, 1909.—Decided January 3, 1910.

Where the validity of the local statute under which national bank shares are assessed was not drawn in question, but the only objection in the state court was that the assessment was in excess of actual value, exorbitant, unjust and not in proportion with other like property, no Federal right was set up or denied and this court has no jurisdiction to review the judgment under § 709, Rev. Stat. Writ of error to review 136 Iowa, 203, dismissed.

THE facts are stated in the opinion.

Mr. Charles A. Clark for plaintiff in error:

The statutes of Iowa, §§ 1305–1322 of the Code, provide a scheme of taxation of banks by which the franchises, good will, good business management, dividend earning power, and United States bonds held as required by law are all included by force of the very statutes themselves, while all of these elements are excluded by force of the same statutes, as to moneyed capital in the hands of individual citizens and invested in the very moneyed institutions which come in competition with national banks.

This discrimination against national banks is clearly not warranted but forbidden by § 5219, Rev. Stat., and renders

the Iowa system of taxing national banks utterly null and void. *San Francisco Nat. Bank* v. *Dodge*, 197 U. S. 70; *Van Allen* v. *Assessors*, 3 Wall. 581; *Bradley* v. *The People*, 4 Wall. 462; *People* v. *Commissioners*, 94 U. S. 418; *People* v. *Weaver*, 100 U. S. 543; *Mercantile Bank* v. *New York*, 121 U. S. 145, 152; *Owensboro Nat. Bank* v. *Owensboro*, 173 U. S. 679, 683; *Hubbard* v. *Board*, 23 Iowa, 145.

There is no power to tax the shares of national banks except as allowed by act of Congress, now § 5219, Rev. Stat. *Home Savings Bank* v. *Des Moines*, 205 U. S. 516; *Owensboro Nat. Bank* v. *Owensboro*, 173 U. S. 668; *People* v. *Weaver*, 100 U. S. 539, 543; *Weston* v. *Charleston*, 2 Pet. 449; *Osborn* v. *Bank*, 9 Wheat. 738; *McCullough* v. *Maryland*, 4 Wheat. 316; *Bank of Albia* v. *City Council*, 86 Iowa, 36, 37.

The assessor, the board of equalization, and the courts of Iowa, are no less bound to keep within the sole warrant of authority for taxing national bank shares than the legislature itself.

The objections of plaintiffs in error before the board that the proposed taxation was "exorbitant and unjust," and that the valuation of shares could not exceed the value of assets, as in the case of state banks, moneyed institutions and private banks and bankers, raised, *ex vi termini*, questions as to the validity of the Iowa statutes under § 5219, Rev. Stat.

These objections were all urged before the District and Supreme Courts. The courts were bound to take judicial notice of the Federal and state statutes, authorizing the taxation complained of, as "matters of which judicial notice is taken need not be stated in a pleading." Code, § 3632.

The Supreme Court of Iowa knew perfectly well that the system of taxation of which plaintiffs in error complained was wholly void under § 5219, Rev. Stat. *Hubbard* v. *Board*, 23 Iowa, 145. And see *Bank* v. *Dodge*, 197 U. S. 70.

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. *Rogers* v. *Alabama,* 192 U. S. 230; *Smithsonian Institution* v. *St. John,* 214 U. S. 279.

The same rule applies to rights arising under statutes of the United States enacted to protect constitutional rights as in the present instance. *Chapman* v. *Goodnow,* 123 U. S. 540, 548; *Navigation Co.* v. *Homestead Co.,* 123 U. S. 552; *McCullough* v. *Virginia,* 172 U. S. 117; *M., K. & T. Ry. Co.* v. *Elliott,* 184 U. S. 530, 534; *Arrowsmith* v. *Harmoning,* 118 U. S. 194; *Chicago Life Ins. Co.* v. *Needles,* 113 U. S. 574; *People* v. *Hoffman,* 7 Wall. 16; *Williams* v. *Weaver,* 100 U. S. 547; *Waite* v. *Dowley,* 94 U. S. 527; *Swope* v. *Leffingwell,* 105 U. S. 3.

The jurisdiction cannot be defeated by showing that the record does not in direct terms refer to statutory or constitutional provision, nor expressly state that a Federal question was presented. The true jurisdictional test is whether it appears that such a question was decided adversely to the Federal right claimed. *Murray* v. *Charleston,* 96 U. S. 432, 441; *Crowell* v. *Randall,* 10 Pet. 368; *Eureka Co.* v. *Yuba County Court,* 116 U. S. 410.

The contention of plaintiffs in error arises under clause 2 of § 709, Rev. Stat., and hence need not be set up and claimed with the particularity required under clause 3. *Water Power Co.* v. *Street Railway Co.,* 172 U. S. 487; *Chapman* v. *Goodnow,* 123 U. S. 527, 548.

Where the Federal question arises upon the record, this court has jurisdiction to review, although the state court evades a decision of that question upon the ground that it was not argued either orally or in print as its decisions required, in order to have the Federal question there passed upon. *Des Moines Nav. Co.* v. *Iowa Homestead Co.,* 123 U. S. 554; *Deposit Bank* v. *Frankfort,* 191 U. S. 518, 519.

The Iowa scheme for taxation of national banks is null and void upon its face. *Home Savings Bank* v. *City of Des Moines,* 205 U. S. 503; *San Francisco Nat. Bank* v. *Dodge,* 197 U. S. 80.

Under their general prayer for relief, plaintiffs in error are entitled to have the illegal assessments wholly annulled and set aside. *Oteri* v. *Scalzo*, 145 U. S. 578; *Tyler* v. *Savage*, 143 U. S. 79; *Jones* v. *Van Doren*, 130 U. S. 684.

Iowa decisions are to same effect. *Pond* v. *Waterloo &c. Works*, 50 Iowa, 596; *Hoskins* v. *Rowe*, 61 Iowa, 180; *Laverty* v. *Sexton*, 41 Iowa, 435; *Herring* v. *Neely*, 43 Iowa, 157; *Hait* v. *Ensign*, 61 Iowa, 724.

Mr. Byron M. Coon for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court.

This was an appeal under § 1373 of the Code of Iowa from the action of the members of the city council of the city of Estherville, Iowa, sitting as a board of equalization and review, in fixing the assessed value of the shares of stock in the plaintiff bank for the year 1906. The shares of stock in the plaintiff bank were assessed by the assessor on the basis of the book or assessed value obtained by adding the capital, surplus and undivided profits of the bank and dividing the sum total by the number of shares of capital stock to ascertain the value of one share, a proper deduction having been made on account of real estate owned by the bank. The Board of Review and Equalization raised the assessed valuation of the shares to $130 per share. The bank and its shareholders appeared before the Board and objected to its action and to the valuation fixed by them as being in excess of the actual value, and exorbitant and unjust. The bank contended that the stock was not assessed and valued in proportion to other like personal property in the city of Estherville, but was grossly in excess thereof, and constituted unfair and unequal taxation, and that the taxable value of the shares of the stock in the bank should be found as the assessor had previously found it. But the Board adhering to its own judgment, plaintiffs perfected an appeal to the District Court of Emmett County,

Iowa. In that court plaintiffs filed a pleading containing a recital of the facts and demanding relief, and reiterating the same contention as made below and the same claim as to the proper manner to arrive at the assessable valuation of said shares of stock. Answer was filed in behalf of the Board, wherein it was denied that the assessment as raised was unjust, and asserted that the market value was the proper criterion for valuation, and that the actual and market value of the stock in question was even greater than that fixed in the raised assessment. It was also denied that the assessment was unfair as related to the assessment on other like property.

The District Court sustained the action of the Board of Review, whereupon the case was appealed to the Supreme Court of Iowa, which affirmed the decree of the District Court. *First Nat. Bank* v. *Estherville*, 136 Iowa, 203. In the Supreme Court it was contended for the first time that the action of the Board worked a violation of § 5219 of the United States Revised Statutes, touching upon state taxation of National Bank shares. Because of the fact that such matter was not presented to the Board or suggested on the trial in the court below, the Supreme Court refused to entertain the question. What the court said was this (p. 206):

"In doing so we shall first dispose of a matter of contention brought forward for the first time in argument in this court. This contention is through the action of the defendant board as complained of, there was worked a violation of § 5219 of U. S. Revised Statutes, having to do with the subject of state taxation of national shares. As confessedly such matter was not presented to the board, or suggested on the trial in the court below, we cannot give consideration thereto on merits in this court. And this is to follow our repeated decisions bearing on the subject. *Railway Co.* v. *Cedar Rapids*, 106 Iowa, 476; *Trust Co.* v. *Fonda*, 114 Iowa, 728."

And further (p. 208):

"On appeal to the District Court the statute (Code, § 1373) provides for a hearing as in equity. This, however, is not to

be construed as clothing the court with jurisdiction to sit as an assessing tribunal. *Frost* v. *Board*, 114 Iowa, 103; *Farmers' &c. Co.* v. *Fonda*, 114 Iowa, 728."

We are met at the threshold by a motion to dismiss for want of jurisdiction. It was ruled in *Tyler* v. *Judges of Registration*, 179 U. S. 405, 408, that although "it is true that under the third clause of § 709, Rev. Stat., where a title, right, privilege, or immunity is claimed under Federal law, such title, etc., must be 'specially set up or claimed' and that no such provision is made as to cases within the second clause, involving the constitutionality of state statutes or authorities, but it is none the less true that the authority of such statute must 'be drawn in question' by some one who has been affected by the decision of the state court in favor of its validity, and that in this particular the three clauses of the section are practically identical."

In order to give this court jurisdiction of a writ of error to the highest court of a State in which a decision could be had it must appear affirmatively that a Federal question was presented for decision, that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment rendered could not have been given without deciding it.

The only complaint made before the reviewing board and the District Court was that the assessment was in excess of the actual value of such stock and exorbitant and unjust, and that the taxable value thereof should be no greater sum than is obtained by adding the capital, surplus and undivided profits of said bank, subtracting therefrom the amount of the bank's capital invested in real estate, and dividing the remainder by the number of its shares of capital stock to obtain the true assessable value of one share of stock; also that "said stock is not assessed and valued in proportion to other like personal property in the city of Estherville, but is grossly in excess thereof, and unfair to these appellants and is unequal taxation."

These were not Federal questions. No mention of the national banking act was made, nor any right or privilege claimed under it, nor were the provisions of the Revised Statutes invoked by name or otherwise. There was no assertion of an issue in the case claiming the local statutes to be in conflict with or repugnant to the terms of § 5219 of the Revised Statutes, or the Constitution of the United States. Plaintiffs filed a written pleading in the District Court, in which they set out all proceedings leading up to the appeal and the grounds for their complaint against the action of the equalization board, and when the case went to trial filed an amendment, alleging the additional grievance of inequality.

Section 1322 of the Iowa Code reads as follows:

"National, state and savings banks.—Shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies and not to the individual stockholders. At the time the assessment is made, the officers of national banks shall furnish the assessor with a list of all the stockholders and the number of shares owned by each, and he shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the corporations shall furnish him a verified statement of all the matters provided in the preceding section, which shall also show, separately, the amount of capital stock, and the surplus and undivided earnings, and the assessor, from such statement and other information he can obtain, including any statement furnished to and information obtained by the auditor of state, which shall be furnished him on request, shall fix the value of such stock, taking into account the capital, surplus and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them and in the shares of stock of cor-

porations owning only the real estate (inclusive of leasehold interest, if any) on or in which the bank or trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporations shall not be otherwise assessed."

But the court held that the assessor need not rely entirely upon the statements which the bank is required by the section to furnish, but might take into consideration other information he might obtain, and, construing that section in connection with § 1305 of the Code of Iowa reading, "All property subject to taxation shall be valued at its actual value. . . . Such assessed value shall be taken and considered as the taxable value of such property, upon which the levy shall be made. Actual value of property as used in this chapter shall mean its value in the market in the ordinary course of trade," found that the shares should be assessed at their market or sale values, and then the court proceeded to ascertain, on the facts, whether the shares were taxed at more than their market value and whether, at a greater rate in proportion to the value of other like personal property.

If plaintiffs in error believed that the local statute was unconstitutional and invalid because of conflict with the Federal Constitution or statute, they could and should have said so, but the validity of the act was nowhere specifically drawn in question.

Writ of error dismissed.

KUHN v. FAIRMONT COAL COMPANY.

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

No. 50. Argued December 3, 6, 1909.—Decided January 3, 1910.

When administering state laws and determining rights accruing thereunder, the jurisdiction of the Federal court is an independent one, coördinate and concurrent with, and not subordinate to, the jurisdiction of the state courts.

Rules of law relating to real estate, so established by state decisions rendered before the rights of the parties accrued, as to have become rules of property and action, are accepted by the Federal court; but where the law has not thus been settled it is the right and duty of the Federal court to exercise its own judgment, as it always does in cases depending on doctrines of commercial law and general jurisprudence.

Even in questions in which the Federal court exercises its own judgment, the Federal court should, for the sake of comity and to avoid confusion, lean to agreement with the state court if the question is balanced with doubt.

When determining the effect of conveyances or written instruments between private parties, citizens of different States, it is the right and duty of the Federal court to exercise its own independent judgment where no authoritative state decision had been rendered by the state court before the rights of the parties had accrued and become final.

The Federal court is not bound by a decision of the state court, rendered after the deed involved in the case in the Federal court was made and after the injury was sustained, holding that there is no implied reservation in a deed conveying subsurface coal and the right to mine it to leave enough coal to support the surface in its original position.

THE facts are stated in the opinion.

Mr. Homer W. Williams for Kuhn:

The Griffin case decided by the state court does not construe any statute and cannot be placed in the class of cases decided

by the state courts which control Federal courts. Nor does it establish any rule of property. This is an action of trespass on the case for tort. None of the cases cited by defendant apply.

Decisions of the state court even when decided upon a statute or upon the principle of an established rule of property, do not preclude the Federal court from passing on questions of contract out of which the cause of action accrued before the decision of the state court. *Swift* v. *Tyson*, 16 Pet. 1; *Griffin* v. *Overman Wheel Co.*, 9 C. C. A. 584; *Rowan* v. *Runnels*, 10 How. 134; *Lawrence* v. *Wickware*, Fed. Cas. No. 8,148; *S. C.*, 4 McLean, 56; *Pease* v. *Peck*, 18 How. 599; *Roberts* v. *Bolles*, 101 U. S. 119; *Burgess* v. *Seligman*, 107 U. S. 20; *Detroit* v. *Railroad Co.*, 55 Fed. Rep. 569; *King* v. *Investment Co.*, 28 Fed. Rep. 33; *Groves* v. *Slaughter*, 15 Pet. 497; *Sims* v. *Hunsley*, 6 How. 1.

The Federal courts are not bound in cases involving validity of municipal bonds by decisions of state courts made after the bonds are issued. *Enfield* v. *Jordan*, 119 U. S. 680; *Bolles* v. *Brimfield*, 120 U. S. 759; *Barnum* v. *Okolona*, 148 U. S. 393; *Gibson* v. *Lyon*, 115 U. S. 439.

The Federal courts are not bound by decisions of the state court where private rights are to be determined by application of common-law rules alone, *Chicago* v. *Robbins*, 2 Black, 418; *Hill* v. *Hite*, 29 C. C. A. 55; or contract rights depending on a state statute or provision of the Constitution if the decision of state court is made after the contract. *Central Trust Co.* v. *Street Railway Co.*, 82 Fed. Rep. 1; *Trust Co.* v. *Cincinnati*, 76 Fed. Rep. 296; *Jones* v. *Hotel Co.*, 79 Fed. Rep. 447.

As to provisions in a deed that are merely contractual and do not affect the title the Federal courts are not bound by state court decisions. *Fire Ins. Co.* v. *Railway Co.*, 62 Fed. Rep. 904; *Bartholomew* v. *City of Austin*, 85 Fed. Rep. 359; *Jones* v. *Hotel Co.*, 86 Fed. Rep. 370; and see also *Speer* v. *Commissioners*, 88 Fed. Rep. 749; *Clapp* v. *Otoe County*, 104 Fed. Rep. 473.

Nor should the decision of the state court be followed to such an extent as to sacrifice truth, justice or law. *Faulkner* v. *Hart*, 82 N. Y. 416; *Lane* v. *Vick*, 3 How. 462; *Foxcraft* v. *Mallett*, 4 How. 353; *Loan Co.* v. *Harris*, 113 Fed. Rep. 36.

Mr. Z. Taylor Vinson and *Mr. Edward A. Brannon* for Fairmont Coal Company:

It is the duty of the Federal courts to follow the decisions of the highest court of a State in cases pending in the former where the decision of the state court construes a state statute or local law or interprets deeds or grants to real estate and determines rights pertaining thereto, wherein no Federal question is involved; nor is this duty affected by the fact that the decision is made by the state court after the contract rights involved in the case in the Federal court had accrued. *Hartford Ins. Co.* v. *Chicago &c. Ry. Co.*, 175 U. S. 91, 108; *Rowan* v. *Runnels*, 5 How. 134, 139; *Morgan* v. *Curtenius*, 20 How. 1; *Fairfield* v. *Gallatin County*, 100 U. S. 47, 52; *Burgess* v. *Seligman*, 107 U. S. 20, 35; *Bauserman* v. *Blunt*, 147 U. S. 647, 653; *Williams* v. *Eggleston*, 170 U. S. 304, 311; *Sioux City R. R.* v. *Trust Co. of N. A.*, 173 U. S. 99.

In determining what are the laws of the several States, we are bound to look not only at their constitutions and statutes but also at the decisions of their highest courts. *Wade* v. *Travis County*, 174 U. S. 499; *Polk's Lessee* v. *Wendal*, 9 Cranch, 87; *Luther* v. *Borden*, 7 How. 1; *Nesmith* v. *Sheldon*, 7 How. 812; *Jefferson Bank* v. *Skelly*, 1 Black, 436; *Leffingwell* v. *Warren*, 2 Black, 599; *Christy* v. *Pridgeon*, 4 Wall. 196; *Post* v. *Supervisors*, 105 U. S. 667; *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555; *Jackson* v. *Chew*, 6 Pet. 648; *Russell* v. *Southard*, 12 How. 139.

The construction of deeds for the transfer of land between private parties, given by the highest court of the State in which the land lies, will be adopted and followed by the Federal courts whenever the same question is presented to them. *East Central Eureka Co.* v. *Central Eureka Co.*, 204 U. S. 266,

272; citing *Brine* v. *Hartford Ins. Co.*, 96 U. S. 627, 636; *DeVaughn* v. *Hutchinson*, 165 U. S. 566; and see also *United States* v. *Crosby*, 7 Cranch, 115; *Clark* v. *Graham*, 6 Wheat. 577; *McGoon* v. *Scales*, 9 Wall. 23; *Olcott* v. *Bynum*, 17 Wall. 44; *Ex parte McNeil*, 13 Wall. 236; *Clark* v. *Clark*, 178 U. S. 186; *Oliver* v. *Clarke*, 106 Fed. Rep. 402; *Berry* v. *Bank*, 93 Fed. Rep. 44.

The Federal courts will lean toward an agreement of views with the state courts if the question seems balanced with doubt. *Waterworks* v. *Tampa*, 199 U. S. 244; *Mead* v. *Portland*, 200 U. S. 163; *Burgess* v. *Seligman*, 107 U. S. 20; *Wilson* v. *Standefer*, 184 U. S. 399, 412; *Bienville Water Co.* v. *Mobile*, 186 U. S. 212, 220; *Chicago Seminary* v. *Illinois*, 188 U. S. 622, 674.

The construction given by the state court to the similar deeds in the Griffin case, announced no new rules of interpretation of deeds; but, on the contrary, followed strictly a line of decisions of the state courts of West Virginia and Virginia made long prior to the date of the deed involved in this case. No rule of law previously established has been changed but the decision is in perfect accord with the English decisions. McSwinney on Mines, see 59 W. Va. 507; *Hurst* v. *Hurst*, 7 W. Va. 339; *Snodgrass* v. *Wolf*, 11 W. Va. 158; *Barber* v. *F. & M. Ins. Co.*, 16 W. Va. 658; *O'Brien* v. *Brice*, 21 W. Va. 704; *Gibney* v. *Fitzsimmons*, 45 W. Va. 334; *Long* v. *Perrine*, 41 W. Va. 158; *McDougall* v. *Musgrave*, 46 W. Va. 509; 2 Minor's Inst. pp. 996, 1066; *Carrington* v. *Goddin*, 13 Gratt. 587; *Wilson* v. *Langhorne*, 102 Virginia, 631; *King* v. *Norfolk & Western*, 99 Virginia, 625.

The court will not write new covenants into a deed. See *Gavinzel* v. *Crump*, 22 Wall. 308; *Baltzer* v. *Air Line Co.*, 115 U. S. 634; *D. & H. Canal Co.* v. *Penna. Coal Co.*, 8 Wall. 276, 290. The laws of the State in which land is situated control exclusively its descent, alienation and transfer, and the effect and construction of instruments intended to convey it. Cases *supra* and *Abraham* v. *Casey*, 179 U. S. 210; *Claiborne Co.* v.

Brooks, 111 U. S. 400; *Williams* v. *Kutland*, 13 Wall. 306; *Arndt* v. *Griggs*, 134 U. S. 316; *Suydam* v. *Williamson*, 24 How. 427; *Chicago* v. *Robbins*, 2 Black, 418; *Green* v. *Neal*, 6 Pet. 291, 296.

The rules of property covered by this principle include those governing transfer, descent, title and possession. *Warburton* v. *White*, 176 U. S. 484; 11 Cyc. 903; *Buford* v. *Kerr*, 90 Fed. Rep. 513; *Foster* v. *Oil & Gas Co.*, 90 Fed. Rep. 178.

This court has at times overruled its own decisions so as to conform to the decisions of the state court, affecting titles to real estate. *Roberts* v. *Lewis*, 153 U. S. 367; *Lowndes* v. *Huntington*, 153 U. S. 1; *Moores* v. *Bank*, 104 U. S. 625; *Forsythe* v. *Hammond*, 166 U. S. 518; *Board* v. *Coler*, 180 U. S. 506.

Mr. Justice Harlan delivered the opinion of the court.

This case is here on a question propounded under the authority of the Judiciary Act of March 3, 1891, relating to the jurisdiction of the courts of the United States. 26 Stat. 826, c. 517, § 6. The facts out of which the question arises are substantially as will be now stated.

On the twenty-first day of November, 1889, the plaintiff Kuhn, a citizen of Ohio, sold and conveyed to Camden all the coal underlying a certain tract of land in West Virginia of which he, Kuhn, was the owner in fee. The deed contained these clauses: "The parties of the first part do grant unto the said Johnson N. Camden all the coal and mining privileges necessary and convenient for the removal of the same, in, upon and under a certain tract or parcel of land situated in the county of Marion, on the waters of the West Fork River, bounded and described as follows, to wit: . . . Together with the right to enter upon and under said land and to mine, excavate and remove all of said coal, and to remove upon and under the said lands the coal from and under adjacent, coterminous and neighboring lands, and also the right to enter upon and under the tract of land hereinbefore described

and make all necessary structures, roads, ways, excavations, airshafts, drains, drainways and openings necessary or convenient for the mining and removal of said coal and the coal from coterminous and neighboring lands to market."

The present action of trespass on the case was brought January 18th, 1906. The declaration alleged that the coal covered by the above deed passed to the defendant, the Fairmont Coal Company, a West Virginia corporation, on the —— of January, 1906; that the plaintiff Kuhn was entitled of right to have all his surface and other strata overlying the coal supported in its natural state either by pillars or blocks of coal or by artificial support; that on the day named the defendant company mined and removed coal from under the land, leaving, however, large blocks or pillars of coal as a means of supporting the overlying surface; that the coal company, disregarding the plaintiff's rights, did knowingly, willfully and negligently, without making any compensation therefor, or for the damages arising therefrom, mine and remove all of said blocks and pillars of coal so left, by reason whereof and because of the failure to provide any proper or sufficient artificial or other support for the overlying surface, the plaintiff's surface land, or a large portion thereof, was caused to fall; and that it was cracked, broken and rent, causing large holes and fissures to appear upon the surface and destroying the water and water courses.

The contract under which the title to the coal originally passed was executed in West Virginia and the plaintiff's cause of action arose in that State.

A demurrer to the declaration was sustained by the Circuit Court, an elaborate opinion being delivered by Judge Dayton, *Kuhn* v. *Fairmont Coal Co.*, 152 Fed. Rep. 1013. The case was then taken upon writ of error to the Circuit Court of Appeals.

It appears from the statement of the case made by the Circuit Court of Appeals that in the year 1902, after Kuhn's deed to Camden, one Griffin brought, in a court of West

Virginia, an action, similar in all respects to the present one, against the Fairmont Coal Company, the successor of Camden. His rights arose from a deed almost identical with that executed by Kuhn to Camden. That case was ruled in favor of the Coal Company, and, subsequently, was taken to the Supreme Court of West Virginia, which announced its opinion therein in November, 1905. A petition for rehearing having been filed, the judgment was stayed. But the petition was overruled March 27, 1906, on which day, after Kuhn's suit was brought, the decision previously announced in the Griffin case became final under the rules of the Supreme Court of the State. *Griffin* v. *Coal Co.*, 59 W. Va. 480.

The contention by the Coal Company in the court below was that as the decision in the Griffin case covered, substantially, the same question as the one here involved, it was the duty of the Federal court to accept that decision as controlling the rights of the present parties, whatever might be its own opinion as to the law applicable to this case. The contention of Kuhn was that the Federal court was under a duty to determine the rights of the present parties upon its own independent judgment, giving to the decision in the state court only such weight as should be accorded to it according to the established principles in the law of contracts and of sound reasoning; also, that the Federal court was not bound by a decision of the state court in an action of trespass on the case for a tort not involving the title to land.

Such being the issue, the Circuit Court of Appeals, proceeding under the Judiciary Act of March 3d, 1891, c. 517, have sent up the following question to be answered:

"Is this court bound by the decision of the Supreme Court in the case of *Griffin* v. *Fairmont Coal Company,* that being an action by the plaintiff against the defendant for damages for a tort, and this being an action for damages for a tort based on facts and circumstances almost identical, the language of the deeds with reference to the granting clause being

in fact identical, that case having been decided *after* the contract upon which defendant relies was executed, *after* the injury complained of was sustained, and *after* this action was instituted?"

There is no room for doubt as to the scope of the decision in the Griffin case. The syllabus—(p. 480) which in West Virginia is the law of the case, whatever may be the reasoning employed in the opinion of the court—is as follows: "1. Deeds conveying coal with rights of removal should be construed in the same way as other written instruments, and the intention of the parties as manifest by the language used in the deed itself should govern. 2. The vendor of land may sell and convey his coal and grant to the vendee the right to enter upon and under said land and to mine, excavate and remove all of the coal purchased and paid for by him, and if the removal of the coal necessarily causes the surface to subside or break, the grantor cannot be heard to complain thereof. 3. Where a deed conveys the coal under a tract of land, together with the right to enter upon and under said land, and to mine, excavate and remove all of it, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface in its original position. 4. It is the duty of the court to construe contracts as they are made by the parties thereto, and to give full force and effect to the language used, when it is clear, plain, simple and unambiguous. 5. It is only where the language of a contract is ambiguous and uncertain and susceptible of more than one construction that a court may, under the well-established rules of construction, interfere to reach a proper construction and make certain that which in itself is uncertain."

Nor can it be doubted that the point decided in the Griffin case had not been previously adjudged by the Supreme Court of that State. Counsel for the Coal Company expressly state that the question here involved was never before the legislature or courts of West Virginia until the deed involved in the

Griffin case came before the Supreme Court of that State for construction; that "until then there was no law and no local custom upon the subject in force in West Virginia;" and that "only after the holding of the state court in the Griffin case could it be said that the narrow question therein decided had become a rule of property in that State."

In this view of the case was not the Federal court bound to determine the dispute between the parties according to its own independent judgment as to what rights were acquired by them under the contract relating to the coal? If the Federal court was of opinion that the Coal Company was under a legal obligation while taking out the coal in question to use such precautions and to proceed in such way as not to destroy or materially injure the surface land, was it bound to adjudge the contrary simply because, in a *single* case, *to which Kuhn was not a party* and which was determined *after* the right of the present parties had accrued and become fixed under their contract, and *after* the injury complained of had occurred, the state court took a different view of the law? If, when the jurisdiction of the Federal court was invoked, Kuhn, the citizen of Ohio had, in its judgment a valid cause of action against the Coal Company for the injury of which he complained, was that court obliged to subordinate its view of the law to that expressed by the state court?

In cases too numerous to be here cited the general subject suggested by these questions has been considered by this court. It will be both unnecessary and impracticable to enter upon an extended review of those cases. They are familiar to the profession. But in the course of this opinion we will refer to a few of them.

The question as to the binding force of state decisions received very full consideration in *Burgess* v. *Seligman*, 107 U. S. 20, 33. After judgment in that case by the United States Circuit Court, the Supreme Court of the State rendered two judgments, each of which was adverse to the grounds upon which the Circuit Court had proceeded, and the con-

tention was that this court should follow those decisions of the state court and reverse the judgment of the Circuit Court. The opinion in that case states that in order to avoid misapprehension the court had given the subject special consideration, and the extended note at the close of that opinion shows that the prior cases were all closely scrutinized by the eminent Justice who wrote the opinion. A conclusion was reached that received the approval of all the members of the court. We place in the margin [1] an extract from the opinion

[1] "We do not consider ourselves bound to follow the decision of the state court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the state tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of state laws, coördinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two coördinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, *or when there has been no decision, of the state tribunals,* the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the

of Mr. Justice Bradley. In *Bucher* v. *Cheshire Railroad Co.*, 125 U. S. 555, 584, Mr. Justice Miller, speaking for the court, observed (p. 584): "It may be said generally that wherever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the Federal courts. The whole of this subject has recently been very ably reviewed in the case of *Burgess* v. *Seligman*, 107 U. S. 20. Where such local law or custom has been established by repeated decisions of the highest courts of a State it becomes also the law governing the courts of the United States sitting in that State." See also *Jackson* v. *Chew*, 12 Wheat. 153.

Up to the present time these principles have not been modified or disregarded by this court. On the contrary, they have been reaffirmed without substantial qualification in many subsequent cases, some of which are here cited. *East Alabama Ry. Co.* v. *Doe*, 114 U. S. 340; *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555; *Gormley* v. *Clark*, 134 U. S. 338; *B. & O. R. R. Co.* v. *Baugh*, 149 U. S. 368; *Folsom* v. *Ninety-six*, 159 U. S. 611; *Barber* v. *Pittsburg &c. Ry.*, 166 U. S. 83; *Stanley County* v. *Coler*, 190 U. S. 437; *Julian* v. *Central Trust Co.*, 193 U. S. 93; *Comm'rs &c.* v. *Bancroft*, 203 U. S. 112; *Presidio County* v. *Noel-Young Bond Co.*, 212 U. S. 58.

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question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

We take it, then, that it is no longer to be questioned that the Federal courts in determining cases before them are to be guided by the following rules: 1. When administering state laws and determining rights accruing under those laws the jurisdiction of the Federal court is an independent one, not subordinate to but coördinate and concurrent with the jurisdiction of the state courts. 2. Where, *before the rights of the parties accrued,* certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the State, those rules are accepted by the Federal court as authoritative declarations of the law of the State. 3. *But where the law of the State has not been thus settled,* it is not only the right but the duty of the Federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. 4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, *or when there has been no decision by the state court on the particular question involved,* then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the Federal court should always lean to an agreement with the state court if the question is balanced with doubt.

The court took care, in *Burgess* v. *Seligman,* to say that the Federal court would not only fail in its duty, but would defeat the object for which the national courts were given jurisdiction of controversies between citizens of different States, if, while leaning to an agreement with the state court, it did not exercise an independent judgment in cases involving principles not settled by previous adjudications.

It would seem that according to those principles, now firmly established, the duty was upon the Federal court, in

the present case, to exercise its independent judgment as to what were the relative rights and obligations of the parties under their written contract. The question before it was as to the liability of the Coal Company for an injury arising from the failure of that corporation, while mining and taking out the coal, to furnish sufficient support to the overlying or surface land. Whether such a case involves a rule of property in any proper sense of those terms, or only a question of general law within the province of the Federal court to determine for itself, the fact exists that there had been no determination of the question by the state court before the rights of the parties accrued and became fixed under their contract, or before the injury complained of. In either case, the Federal court was bound under established doctrines to exercise its own independent judgment, with a leaning, however, as just suggested, for the sake of harmony, to an agreement with the state court, if the question of law involved was deemed to be doubtful. If, before the rights of the parties in this case were fixed by written contract, it had become a settled rule of law in West Virginia, as manifested by decisions of its highest court, that the grantee or his successors in such a deed as is here involved, was under no legal obligation to guard the surface land of the grantor against injury resulting from the mining and removal of the coal purchased, a wholly different question would have been presented.

There are adjudged cases involving the meaning of written contracts having more or less connection with land that were not regarded as involving a rule in the law of real estate, but as only presenting questions of general law touching which the Federal courts have always exercised their own judgment, and in respect to which they are not bound to accept the views of the state courts. Let us look at some of those cases. They may throw light upon the present discussion.

In *Chicago City* v. *Robbins*, 2 Black, 418, 428, which was

an action on the case for damages, the question was as to the right of the city of Chicago—which was under a duty to see that its streets were kept in safe condition for persons and property—to hold one Robbins liable in damages for so using his lot on a public street as to cause injury to a passer-by. The city was held liable to the latter and sued Robbins on that account. The state court, in a similar case, decided for the defendant, and it was contended that the Federal court should accept the views of the local court as to the legal rights of the parties. But this court, speaking by Mr. Justice Davis, said: "Where rules of property in a State are fully settled by a series of adjudications, this court adopts the decisions of the state courts. But where private rights are to be determined by the application of common-law rules alone, this court, although entertaining for state tribunals the highest respect, does not feel bound by their decisions."

In *Lane* v. *Vick*, 3 How. 464, 472, 476, the nature of the controversy was such as to require a construction of a will which, among other property, devised certain real estate which, at the time of suit, was within the limits of Vicksburg, Mississippi. There had been a construction of the will by the Supreme Court of the State, 1 How. (Miss.) 379, and that construction, it was insisted, was binding on the Federal court. But this court said: "Every instrument of writing should be so construed as to effectuate, if practicable, the intention of the parties to it. This principle applies with peculiar force to a will. . . . The parties in that case were not the same as those now before this court; and that decision does not affect the interests of the complainants here. The question before the Mississippi court was, whether certain grounds, within the town plat, had been dedicated to public use. The construction of the will was incidental to the main object of the suit, and of course was not binding on any one claiming under the will. With the greatest respect, it may be proper to say, that this court does not follow the state courts in their construction of a will or any other instru-

ment, as they do in the construction of statutes. Where, as in the case of *Jackson* v. *Chew*, 12 Wheat. 167, the construction of a will had been settled by the highest courts of the State, and *had long been acquiesced in as a rule of property, this court would follow it, because it had become a rule of property.* The construction of a statute by the Supreme Court of a State is followed, without reference to the interests it may affect, or the parties to the suit in which its construction was involved. But the mere construction of a will by a state court does not, as the construction of a statute of the State, constitute a rule of decision for the courts of the United States. In the case of *Swift* v. *Tyson*, 16 Pet. 1, the effect of section 34 of the Judiciary Act of 1789, and the construction of instruments by the state courts, are considered with greater precision than is found in some of the preceding cases on the same subject."

In *Foxcroft* v. *Mallett*, 4 How. 353, 379, the object of the action was to recover certain land in Maine. The case turned in part on the construction to be given to a mortgage of certain land to Williams College, and to local adjudications relating to those lands, which, it was contended, were conclusive on the parties. "But," this court said, "on examining the particulars of the cases cited to govern this (3 Fairfield, 398; 4 Shepley, 84, 88; 14 Maine R. 51), it will be seen that the construction of the mortgage to the college, in respect to this reservation or condition, never appears to have been agitated. *If it had been*, the decision would be entitled to high respect, though it should not be regarded as conclusive on the mere construction of a deed as to matters and language belonging to the common law, and not to any local statute. 3 Sumner, 136, 277."

In *Russell* v. *Southard*, 12 How. 139, 147, the controlling question was whether in any case it was admissible to show by extraneous evidence that a deed on its face of certain real estate in Kentucky was really intended by the parties as a security for a loan and as a mortgage. The court, speaking

by Mr. Justice Curtis, after citing adjudged cases sustaining the proposition that evidence of that kind was admissible in certain States, said: "It is suggested that a different rule is held by the highest court of equity in Kentucky. If it were, with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted, or rejected, not by the mere force of any state statute, but upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles"—citing *Robinson* v. *Campbell*, 3 Wheat. 212; *United States* v. *Howland*, 4 Wheat. 108; *Boyle* v. *Zacharie* 6 Pet. 635, 658; *Swift* v. *Tyson*, 16 Pet. 1; *Foxcroft* v. *Mallett*, 4 How. 353, 379.

In *Yates* v. *Milwaukee*, 10 Wall. 497, 506, the question was as to the nature and extent of the right of an owner of land in Wisconsin, bordering on a public navigable water, to make a landing, wharf or pier for his own use or for the use of the public. There was a question in the case of dedication to public use, and the city of Milwaukee sought to change or remove the wharf erected by the riparian owner in front of his lot. This court, speaking by Mr. Justice Miller, said: "This question of dedication, on which the whole of that case turned, was one of fact, to be determined by ascertaining the intention of those who laid out the lots, from what they did, and from the application of general common law principles to their acts. This does not depend upon state statute or local state law. The law which governs the case is the common law, on which this court has never acknowledged the right of the state courts to control our decisions, except, perhaps, in a class of cases where the state courts have established, by *repeated decisions*, a *rule of property* in regard to land titles peculiar to the State."

In *Louisville Trust Co.* v. *City of Cincinnati*, 76 Fed. Rep. 296, 300, 304, which was a suit by a Kentucky corporation, it became necessary to determine the force and effect of a mortgage originating in a state statute of Ohio and certain

municipal ordinances covering street easements in Cincinnati. The state court, in a suit to which the trustee in the mortgage was not a party, passed a decree declaring the scope, effect and duration of contracts or ordinances under which the mortgage, easements and franchises originated. It was insisted that the Federal court was bound to accept the views of the state court. But the Circuit Court of Appeals, held by Judges Taft, Lurton, and Hammond, ruled otherwise. Judge Lurton, speaking for all the members of that court, made an extended review of the authorities, and observed that if the state decision was regarded as conclusive upon the parties, "the constitutional right of the complainant, as a citizen of a State other than Ohio, to have its rights as a mortgagee defined and adjudged by a court of the United States is of no real value. If this court cannot for itself examine these street contracts and determine their validity, effect, and duration, and must follow the interpretation and construction placed on them by another court in a suit begun *after its rights as mortgagee had accrued, and to which it was not a party*, then the right of such a mortgagee to have a hearing before judgment and a trial before execution is a matter of form without substance. The better forum for a suitor so situated would be a court of the State. . . . The validity, effect, and duration of the street easements granted or claimed under these laws and ordinances is a question which this complainant is entitled to have decided by the courts of the United States, and the opinion of the Supreme Court of Ohio, while entitled to the highest respect as a tribunal of exalted ability, can be given no greater weight or respect than its reasoning shall demand, where the contract rights of a citizen of another State are involved, who was neither a party nor privy to the suit in which that opinion was delivered. The special fact, therefore, which justifies us in determining for ourselves the true meaning and validity of the Ohio statutes and city ordinances, out of which the rights of this complainant spring, is the fact that it is a citizen of

another State, and that the contract under which it has acquired an interest originated prior to the judicial opinion relied upon as foreclosing our judgment."

Upon the general question as to the duty of the Federal court to exercise its independent judgment where there had not been a decision of the state court, on the question involved, before the rights of the parties accrued, *Carroll County* v. *Smith*, 111 U. S. 556, and *Great Southern Hotel Co.* v. *Jones*, 193 U. S. 532, 548, are pertinent. In the first-named case the court was confronted with a question as to the validity under the state constitution of a certain statute of the State. Mr. Justice Matthews, delivering the unanimous judgment of the court, said (p. 563): "It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the State, by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one State, suing in another, the choice of resorting to a Federal tribunal. *Burgess* v. *Seligman*, 107 U. S. 20, 33." The other case—*Great Southern Hotel Co.* v. *Jones*—presented a controversy between citizens of different States. It was sought by the plaintiffs, citizens of Pennsylvania, to enforce *a mechanics' lien upon certain real property* in Ohio. The main question was as to the validity of a statute of Ohio under which the alleged lien arose. It was contended that a particular decision of the state court holding the statute to be a violation of the state constitution was conclusive upon the Federal court. But this court, following the rules announced in *Burgess* v. *Seligman*, rejected

that view by a unanimous vote. It said (p. 548): "If, *prior to the making of the contracts between the plaintiffs and McClain,* the state court had adjudged that the statute in question was in violation of the state constitution, it would have been the duty of the Circuit Court, and equally the duty of this court, whatever the opinion of either court as to the proper construction of that instrument, to accept such prior decision as determining the rights of the parties accruing thereafter. But the decision of the state court, as to the constitutionality of the statute in question, having been rendered *after the rights of parties to this suit had been fixed by their contracts,* the Circuit Court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the statute here in question. In making this declaration we must not be understood as at all qualifying the principle that, in all cases, it is the duty of the Federal court to lean to an agreement with the state court, where the issue relates to matters depending upon the construction of the constitution or laws of the State."

It has been suggested—and the suggestion cannot be passed without notice—that the views we have expressed herein are not in harmony with some recent utterances of this court, and we are referred to *East Cent. E. M. Co.* v. *Central Eureka Co.*, 204 U. S. 266, 272. That case involved, among other questions, the meaning of a deed for mining property. This court in its opinion referred to a decision of the state court as to the real object of the deed, and expressed its concurrence with the views of that court. That was quite sufficient to dispose of the case. But in the opinion it was further said (p. 272): "The construction and effect of a conveyance between private parties is a matter as to which we follow the court of the State"—citing *Brine* v. *Insurance Company,* 96 U. S. 627, 636; *DeVaughn* v. *Hutchinson,* 165 U. S. 566. Even if the broad language just quoted seems to give some support to the contention of the defendant, it is to be observed that no reference is made in the opinion to the nu-

merous cases, some of which are above cited, holding that the Federal court is not bound, in cases between citizens of different States, to follow the state decision, if it was rendered *after* the date of the transaction out of which the rights of the parties arose. Certainly there was no purpose, on the part of the court, to overrule or to modify the doctrines of those cases; and the broad language quoted from *East Cent. &c.* v. *Central Eureka Co.* must therefore be interpreted in the light of the particular cases cited to support the view which that language imports. What were those cases and what did they decide?

Brine v. *Insurance Company*, one of the cases cited, was a suit in the Federal Circuit Court to foreclose a mortgage on real estate. A foreclosure and sale were had, and the decree, following the established rules of the Federal court, allowed the defendant to pay the mortgage debt in one hundred days; and if the debt was not paid within that time, then the master was ordered to sell the land for cash in accordance with the course and practice of the Federal court. *When the mortgage was made* there was in force in Illinois and had been for many years, *a statute* which, if controlling, allowed the defendant, in a foreclosure suit, twelve months after sale to redeem the land sold. Thus, there was a conflict between the local statute and the rules and practice obtaining in the Federal court, and the question was whether the state statute or those rules governed the rights of the parties as to the time of redemption. This court held that the statute of the State, *being in force when the mortgage in question was executed*, entered into the contract between the parties and must control the determination of their rights. Speaking by Mr. Justice Miller, it said (p. 636): "The legislature of Illinois has prescribed, as an essential element of the transfer by the courts in foreclosure suits, that there shall remain to the mortgagor the right of redemption for twelve months, and to judgment creditors a similar right for fifteen months, after the sale, before the right of the purchaser to the title becomes vested. This

right, as a condition on which the title passes, is as obligatory on the Federal courts as on the state courts, because in both cases it is made a rule of property by the legislature, which had the power to prescribe such a rule. . . . At all events, the decisions of this court are numerous that the laws which prescribe the mode of enforcing a contract, *which are in existence when it is made*, are so far a part of the contract that no change in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the Constitution of the United States. *Edwards* v. *Kearzey*, 96 U. S. 595. That this very right of redemption, after a sale under a decree of foreclosure, is a part of the contract of mortgage, where the law giving the right exists when the contract is made, is very clearly stated by Mr. Chief Justice Taney, in the case of *Bronson* v. *Kinzie*, 1 How. 311." *DeVaughn* v. *Hutchinson*, 165 U. S. 566, the other case cited, involved the construction of a will made in 1867 devising real estate in the District of Columbia, and the decision was based upon the law of Maryland as it had been often declared by the courts of Maryland to be while this District was part of that State—indeed, as it was from the time Maryland became an independent State.

It thus appears that in the *Brine case* the rights of the parties were determined in conformity with a valid local *statute in force when those rights accrued;* while in the *DeVaughn case*, the decision was based upon the law of Maryland, while the District was a part of that State, evidenced by a *series of decisions* made by the highest court of Maryland, *before the rights of parties accrued.* Nothing in this opinion is opposed to anything said or decided in either of those cases. The question here involved as to the scope and effect of the writing given by Kuhn to Camden does not depend upon any statute of West Virginia, nor upon any rule established by a course of decisions made before the rights of parties accrued. So that the words above quoted from *East Central &c.* v. *Central Eureka Co.* must not be interpreted as applicable to

a case like the one before us, nor as denying the authority and duty of the Federal court, when determining the effect of conveyances or written instruments between private parties, citizens of different States, to exercise its own independent judgment where no authoritative state decision had been rendered by the state court before the rights of the parties accrued and became fixed.

Without expressing any opinion as to the rights of the parties under their contract, we need only say that, for the reasons stated, the question sent to this court by the Circuit Court of Appeals is answered in the negative. It will be so certified.

MR. JUSTICE HOLMES, with whom concurred MR. JUSTICE WHITE and MR. JUSTICE MCKENNA, dissenting.

This is a question of the title to real estate. It does not matter in what form of action it arises; the decision must be the same in an action of tort that it would be in a writ of right.—The title to real estate in general depends upon the statutes and decisions of the State within which it lies. I think it a thing to be regretted if, while in the great mass of cases the state courts finally determine who is the owner of land, how much he owns and what he conveys by his deed, the courts of the United States, when by accident and exception the same question comes before them, do not follow what for all ordinary purposes is the law.

I admit that plenty of language can be found in the earlier cases to support the present decision. That is not surprising in view of the uncertainty and vacillation of the theory upon which *Swift* v. *Tyson*, 16 Pet. 1, and the later extensions of its doctrine have proceeded. But I suppose it will be admitted on the other side that even the independent jurisdiction of the Circuit Courts of the United States is a jurisdiction only to declare the law, at least in a case like the present, and only to declare the law of the State. It is not an authority to make it. *Swift* v. *Tyson* was justified on the ground

that that was all that the state courts did. But as has been pointed out by a recent accomplished and able writer, that fiction had to be abandoned and was abandoned when this court came to decide the municipal bond cases, beginning with *Gelpcke* v. *Dubuque*, 1 Wall. 175. Gray, Nature and Sources of the Law, §§ 535–550. In those cases the court followed Chief Justice Taney in *Ohio Life Ins. & Trust Co.* v. *Debolt*, 16 How. 416, in recognizing the fact that decisions of state courts of last resort make law for the State. The principle is that a change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of the law.

The cases of the class to which I refer have not stood on the ground that this court agreed with the first decision, but on the ground that the state decision made the law for the State, and therefore should be given only a prospective operation when contracts had been entered into under the law as earlier declared. *Douglass* v. *Pike County*, 101 U. S. 677. *Green County* v. *Conness*, 109 U. S. 104. In various instances this court has changed its decision or rendered different decisions on similar facts arising in different States in order to conform to what is recognized as the local law. *Fairfield* v. *Gallatin County*, 100 U. S. 47.

Whether *Swift* v. *Tyson* can be reconciled with *Gelpcke* v. *Dubuque*, I do not care to enquire. I assume both cases to represent settled doctrines, whether reconcilable or not. But the moment you leave those principles which it is desirable to make uniform throughout the United States and which the decisions of this court tend to make uniform, obviously it is most undesirable for the courts of the United States to appear as interjecting an occasional arbitrary exception to a rule that in every other case prevails. I never yet have heard a statement of any reason justifying the power, and I find it hard to imagine one. The rule in *Gelpcke* v. *Dubuque* gives no help when the contract or grant in question has not been made on the faith of a previous declaration of

law. I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years. There were enough difficulties in the way, even in cases like *Gelpcke* v. *Dubuque*, but in them there was a suggestion or smack of constitutional right. Here there is nothing of that sort. It is said that we must exercise our independent judgment—but as to what? Surely as to the law of the States. Whence does that law issue? Certainly not from us. But it does issue and has been recognized by this court as issuing from the state courts as well as from the state legislatures. When we know what the source of the law has said that it shall be, our authority is at an end. The law of a State does not become something outside of the state court and independent of it by being called the common law. Whatever it is called it is the law as declared by the state judges and nothing else.

If, as I believe, my reasoning is correct, it justifies our stopping when we come to a kind of case that by nature and necessity is peculiarly local, and one as to which the latest intimations and indeed decisions of this court are wholly in accord with what I think to be sound law. I refer to the language of the court speaking through Mr. Justice Miller in *Brine* v. *Hartford Fire Insurance Co.*, 96 U. S. 627. To administer a different law (p. 635) is "to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right." I refer also to the unanimous decision in *East Central Eureka Mining Co.* v. *Central Eureka Mining Co.*, 204 U. S. 266, 272. It is admitted that we are bound by a settled course of decisions, irrespective of contract, because they make the law. I see no reason why we are less bound by a single one.

MR. JUSTICE WHITE and MR. JUSTICE MCKENNA concur in this dissent.

HENLEY *v.* MYERS, RECEIVER OF CONSOLIDATED BARB WIRE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 72. Submitted December 10, 1909.—Decided January 3, 1910.

The State creating a corporation may determine how transfers of its stock shall be made and evidenced, and a change in the law imposing no restraint upon the transfer, but only affecting the method of procedure, does not impair the obligation of the charter contract within the meaning of the contract clause of the Federal Constitution; and so held that the corporation law of Kansas of 1899 is not void as to stockholders who purchased stock prior thereto and sold it thereafter, because it required a statement of the transfer of stock to be filed in the office of the Secretary of State in order to relieve the transferor of stockholder's liability, the act not depriving him of any defense that might be made at the time the stock was acquired.

Methods of procedure in actions on contract that do not affect substantial rights of parties are within the control of the State, and the obligation of a stockholder's contract is not impaired within the meaning of the contract clause of the Federal Constitution by substituting for individual actions for statutory liability a suit in equity by the receiver of the insolvent corporation; and so held as to the corporation law of Kansas of 1899 amending prior laws to that effect.

In becoming a stockholder of a corporation one does not acquire as against the State a vested right in any particular mode of procedure for enforcement of liability, but it is assumed that parties make their contracts with reference to the existence of the power in the State to regulate such procedure.

THE facts are stated in the opinion.

Mr. W. W. Nevison, Mr. George J. Barker, Mr. A. C. Mitchell and *Mr. S. D. Bishop* for plaintiffs in error:

The liability of stockholders for an additional amount

equal to the stock owned by them, although statutory, is contractual in its nature, and therefore within the protection of Art. I, § 10, of the Federal Constitution. *Whitman* v. *Oxford National Bank*, 176 U. S. 559; *Woodworth* v. *Bowles*, 61 Kansas, 569. And see also *Howell* v. *Manglesdorf*, 33 Kansas, 194, 199; *Cooper* v. *Ives*, 62 Kansas, 395, 401; *Pine* v. *Bank*, 63 Kansas, 462, 469; *Stocker* v. *Davidson*, 74 Kansas, 214, 215; *Anglo-American Co.* v. *Lombard*, 132 Fed. Rep. 721, 729.

So much of § 12, ch. 10, Laws of Kansas, 1898, as provides that no transfer of stock in a corporation shall be legal and binding until a statement of the change of ownership thereof, made by the president and secretary of such corporation, is filed with the Secretary of State, is retroactive, impairs the obligation of the contracts of those who owned stock at the time of its enactment, and is therefore unconstitutional and void.

As to the valid effect of a transfer of stock see *Van Demark* v. *Barons*, 52 Kansas, 779; *Merrill* v. *Meade*, 6 Kans. App. 620; *Parkinson* v. *Sugar Co.*, 8 Kans. App. 79; *Plumb* v. *Bank*, 48 Kansas, 484; *Bank* v. *Wulfekuhler*, 19 Kansas, 60, 65; *Hentig* v. *James*, 22 Kansas, 326; 10 Cyc. 716; 19 Am. & Eng. Ency. of Law, 881.

It was not within the power of the legislature to alter this right and effect of transfer. *Edwards* v. *Kearzey*, 96 U. S. 595; 3 Thompson on Corp. § 2183; *Hope Ins. Co.* v. *Flynn*, 38 Missouri, 483; *Dartmouth College Case*, 4 Wheat. 518; *Walker* v. *Whitehead*, 16 Wall. 314; *Goodale* v. *Fennell*, 27 Ohio St. 426; *Intiso* v. *Loan Assn.*, 68 N. J. L. 588.

The portions of §§ 14 and 15 of ch. 10, Laws of Kansas, 1898, which substituted for individual actions against the stockholders of corporations upon their stockholders' liability, a suit in equity by a receiver to be appointed after a judgment against the corporation, are retroactive, impair the obligation of the contracts of not only the creditors, but the stockholders of a corporation, and are therefore unconstitutional

and void. *United States* v. *Quincy*, 4 Wall. 535, 550; *Kendall* v. *Fader*, 99 Ill. App. 104; aff'd, 199 Illinois, 294; 3 Thompson on Corp., § 3035; *Evans* v. *Nellis*, 101 Fed. Rep. 920; *Pusey & Jones* v. *Love*, 66 Atl. Rep. 1013; *Harrison* v. *Remington Paper Co.*, 140 Fed. Rep. 385; *Myers* v. *Fruit Co.*, 139 Fed. Rep. 111; *Converse* v. *Ætna Bank*, 79 Connecticut, 163; *Savings Bank* v. *Schranck*, 97 Wisconsin, 250; *Dexler* v. *Edmonds*, 89 Fed. Rep. 467; *Western Bank* v. *New York*, 96 Fed. Rep. 70.

The law of Kansas enacted January 11, 1899, repealing § 32, ch. 23, General Statutes of Kansas of 1868, and §§ 44 and 46 of ch. 23, General Statutes of Kansas of 1868, and enacting §§ 14 and 15 of ch. 10, Laws of 1898, is unconstitutional and void as it impairs the obligations of the contracts of both the creditor and stockholder.

Section 15, ch. 10, Laws of 1898, is unconstitutional and void as it impairs the obligation of the contract of the stockholder by making his additional liability an asset of the corporation and diverting the funds so collected to sources which were not contemplated by § 2, Art. XII, of the constitution of the State.

This court will not reverse its own decisions in order to follow the courts of a State in construing the constitution of that State, and it would have to do so in order to affirm this judgment. *Rowan* v. *Runnels*, 5 How. 134; *Pease* v. *Peck*, 18 How. 595; *Roberts* v. *Bolles*, 101 U. S. 119; *Mohr* v. *Manierre*, 101 U. S. 417; *Butz* v. *Muscatine*, 8 Wall. 575; *Shelby County* v. *Union Bank*, 161 U. S. 149; *M. & O. R. R.* v. *Tennessee*, 153 U. S. 486. See also *Wright* v. *Nagle*, 101 U. S. 791; *Gibson* v. *Lyon*, 115 U. S. 439; *Furman* v. *Nichol*, 8 Wall. 44; *C., B. & Q. R. Co.* v. *Nebraska*, 170 U. S. 57; *New Orleans Waterworks* v. *Sugar Refining Co.*, 125 U. S. 18; *Burgess* v. *Seligman*, 107 U. S. 20; *Stanley County* v. *Coler*, 190 U. S. 437; *Bourbon County* v. *Block*, 99 U. S. 686; *Great Southern Hotel Co.* v. *Jones*, 193 U. S. 544; *Carroll County* v. *Smith*, 111 U. S. 556; *Anderson* v. *Santa Ana*, 116 U. S. 356;

Bolles v. *Brimfield*, 120 U. S. 759; *Pleasant Township* v. *Ætna Life Ins. Co.*, 138 U. S. 67; *Barnum* v. *Okolona*, 148 U. S. 393; *Folsom* v. *Township Ninety-Six*, 159 U. S. 611; *Wicomico County* v. *Bancroft*, 203 U. S. 112; *Chicago* v. *Sheldon*, 9 Wall. 55; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443; *L. & N. R. R. Co.* v. *Palmes*, 109 U. S. 257; *McGahey* v. *Virginia*, 135 U. S. 667; *McCullough* v. *Virginia*, 172 U. S. 109; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 637.

The constitutionality of the law of 1899 has been directly before this court in the case of *Evans* v. *Nellis*, 187 U. S. 271. This court, however, did not pass upon the questions here involved, for the reason that it decided that there was no authority conferred by the act of 1899 of Kansas from which the right of the receiver to bring the suit then before the court could be deduced.

The Circuit Court of the United States for the Northern District of New York, in *Evans* v. *Nellis*, 101 Fed. Rep. 920, in an exhaustive opinion, held that the law of 1899 referred to was absolutely unconstitutional, for the reason that it impaired not only the contract of the creditor, but also that of the stockholder. We ask this court to carefully examine this decision and the reasons of the court in arriving at the conclusion set forth in said case.

Mr. E. E. Myers and *Mr. R. E. Melvin* for defendant in error:

There is no question of impairment of contract. Defendants were still stockholders when the act of 1898 was passed, and the Kansas constitution also gave the right to amend or repeal corporation laws. Art. XII, § 1, Const. Kansas.

Defendants having entered into a contract by the very terms of which they agreed that the legislature might amend the law relating to their liability and the method of collecting same cannot now, that the legislature did exactly what they contracted it might do, be heard to complain. *Sioux City Ry. Co.* v. *Sioux City*, 138 U. S. 98; *Greenwood* v. *Freight Co.*, 105

U. S. 13; *Miller* v. *State*, 15 Wall. 478; *Union Pac. R. R. Co.* v. *United States*, 99 U. S. 700; *Railroad Co.* v. *Georgia*, 98 U. S. 359; *Railroad Co.* v. *Gaines*, 97 U. S. 697; *Sinking Fund Cases*, 99 U. S. 700; *Water Co.* v. *Clark*, 143 U. S. 1.

There is no increase in liability of stockholders.

Both the legislature and the people have power to change the law in regard to the liability of stockholders without violating any provision of the United States Constitution. *Re Empire City Bank*, 18 N. Y. 199; *Re Oliver Lee & Co.'s Bank*, 21 N. Y. 9; *Re Reciprocity Bank*, 22 N. Y. 9; *Sleeper* v. *Goodwin*, 67 Wisconsin, 577; *S. C.*, 31 N. W. Rep. 335; *Damant Co.* v. *Gray*, 30 Maine, 551; *Ashuelot R. R.* v. *Elliot*, 58 N. H. 451; *Tomlinson* v. *Jessup*, 15 Wall. 454; 2 Beach, Mod. Law of Contracts, § 1648; *State* v. *Railway Co.*, 33 Kansas, 189.

The legislature may give a new and additional remedy for a right already in existence. *Plow Co.* v. *Witham*, 52 Kansas, 185; *Myers* v. *Wheelock*, 60 Kansas, 752; *Phelps* v. *Trust Co.*, 62 Kansas, 529; *Pine* v. *Bank*, 63 Kansas, 468; *West* v. *Bank*, 66 Kansas, 536, 537; *Leavenworth* v. *Water Co.*, 62 Kansas, 643; *Hill* v. *Insurance Co.*, 12 Mo. App. 148; aff'd, 86 Missouri, 466; Cooley's Const. Lim. 361; *Hill* v. *Insurance Co.*, 134 U. S. 515; *Tennessee* v. *Sneed*, 96 U. S. 69; *Bank* v. *Francklyn*, 120 U. S. 747.

Evans v. *Nellis*, 101 Fed. Rep. 920, cited and relied on by defendants, was virtually reversed and overturned by this court in *Evans* v. *Nellis*, 187 U. S. 271. This court held in effect that the law in force at the time the judgment was obtained fixed the rights and obligations of the parties and that because the judgment sued on in that action was obtained prior to the passage and taking effect of the 1898 law the receiver had no standing in court to maintain the action; that the action must be brought under the law in force at the time the judgment was obtained. So that 101 Fed. Rep. 920 is virtually wholly *obiter dictum* so far as any discussion of the constitutionality of the act of 1898 is concerned.

MR. JUSTICE HARLAN delivered the opinion of the court.

The Federal question to be disposed of on this writ of error arises under the contract clause of the Constitution. The facts upon which its decision depends are not in dispute and may be thus summarized:

On the third day of August, 1887, the plaintiffs in error became respectively subscribers to and owners of capital stock in the Consolidated Barb Wire Company, a Kansas corporation, engaged in the business of manufacturing wire. But on January 15, 1899, they sold and transferred their stock, worth par, in good faith, to responsible parties and thereafter had no interest in the company. The fact of such transfer was made to appear on the books of the company. On the same date the company sold all its property and the good will of its business, the proceeds of the sale being distributed among the defendants as stockholders in the proportion of the stock held by each. And on the day last named the company suspended and did not thereafter resume business.

In 1900 W. H. Stevenson obtained a judgment against the company upon which execution was issued and returned "no property found." In 1903 two other judgments—each of which, it is admitted, being based upon a cause of action sounding in tort—were recovered against the company, one by Briggs, administrator, and one by Maxwell. No execution was issued on either of those judgments.

In 1903 Myers, the defendant in error, was appointed receiver of the Wire Company. As such receiver, and by authority of existing statutes, he brought an action in one of the Kansas courts against the present plaintiffs in error as stockholders to recover the amount of the above judgments. Upon final hearing the trial court gave judgments against the defendants, respectively, in certain amounts, to be paid by them in proportion to the stock owned by each. The case was carried to the Supreme Court of Kansas, and the judg-

ment was affirmed. A rehearing was granted, but the judgment was again affirmed. *Henley* v. *Myers*, 76 Kansas, 736.

At the time the defendants became stockholders in the Wire Company certain constitutional and statutory provisions relating to corporations were in force in Kansas. Those referred to by counsel are given, for convenience, in the margin.[1] From an examination of those provisions it will be

[1] "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes." Const. Kansas, Art. 12, § 2.

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceedings shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment." Gen. Stat. Kans., 1868, c. 23, § 32, p. 198, *Ib.*, 1889, par. 1192.

"A corporation is dissolved, first, by the expiration of the time limited in its charter, second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation now so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business." Gen. Stat. Kans., 1868, ch. 23, § 40, as amended by laws 1883, ch. 46, § 1, March 7; *Ib.*, 1889, par. 1200.

"If any corporation, created under this or any general statute of this State, except railway or charitable or religious corporations, be dissolved leaving debts unpaid, suits may be brought against any

seen that when the defendants became the owners of stock in the company it was the law of Kansas: 1. That a stock-

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person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved." Gen. Stat. Kans., 1868, ch. 23, § 44, Oct. 31; *Ib.*, 1889, par. 1204.

"No stockholder shall be liable to pay debts of the corporation, beyond the amount due on his stock, and an additional amount equal to the stock owned by him." Gen. Stat. Kans., 1868, c. 23, § 46; *Ib.*, 1889, par. 1206.

By a statute passed in 1898, which took effect January 11th, 1899, the following section took the place of the above § 32:

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property upon which to levy such execution, such corporation shall be deemed to be insolvent; and upon application to the court from which said execution was issued, or to the judge thereof, a receiver shall be appointed, to close up the affairs of said corporation. Such receiver shall immediately institute proceedings against all stockholders to collect unpaid subscriptions to the stock of such corporation, together with the additional liability of such stockholders equal to the par value of the stock held by each. All collections made by the receiver shall be held for the benefit of all creditors, and shall be disbursed in such manner and at such times as the court may direct. Should the collections made by the receiver exceed the amount necessary to pay all claims against such corporation, together with all costs and expenses of the receivership, the remainder shall be distributed among the stockholders from whom collections have been made, as the court may direct; and in the event any stockholder has not paid the amount due from him, the stockholders making payment shall be entitled to an assignment of

holder in any corporation other than one for railroad, religious or charitable purposes, should be liable for the dues of the

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any judgment or judgments obtained by the receiver against such stockholder, and may enforce the same to the extent of his proportion of claims paid by them." Gen. Stat. Kans., 1868, ch. 23, § 32, as amended by L. 1898, ch. 10, § 14; *Ib.*, Gen. Stat. 1901, par. 1302.

"The stockholders of every corporation, except railroad corporations or corporations for religious or charitable purposes, shall be liable to the creditors thereof for any unpaid subscriptions, and in addition thereto for an amount equal to the par value of the stock owned by them, such liability to be considered an asset of the corporation in the event of insolvency, and to be collected by a receiver for the benefit of all creditors." Gen. Stat. Kans., 1868, ch. 23, § 46, as amended in 1898, ch. 10, § 15.

When the defendants acquired their stock the statute that governed the transfer of stock in corporations was as follows:

"The stock of any corporation created under this act shall be deemed personal estate, and *shall be transferable only on the books of the corporation, in such manner as the by-laws may prescribe;* and no person shall, at any election, be entitled to vote on any stock, unless the same shall have been standing in the name of the person so claiming to vote, upon the books of the corporation, at least thirty days prior to such election; but no shares shall be transferred until all previous assessments thereon shall be fully paid." Gen. Stat. Kans., 1868, ch. 23, § 27, as amended by Laws 1879, ch. 88, § 1; *Ib.*, 1889, par. 1184.

The above statute which was in force on and after January 11th, 1899:

" . . . It shall also be the duty of the president and secretary of any such corporation, *as soon as any transfer, sale or change of ownership of any such stock is made as shown upon the books of the company, to at once file with the Secretary of State a statement of the new stockholder or stockholders, the number of shares so transferred, and the par value and the amount paid on such stock. No transfer of such stock shall be legal or binding until such statement is made as provided for in this act:* provided, however that no transfers of stock shall release the party so transferring from the liability of the laws of this State as to stockholders of corporations for profit, for ninety days after such transfer and the filing and recording thereof in the office of the Secretary of State." § 12, Laws of Kansas, Special Session, 1898, p. 33.

corporation to the extent of every unpaid subscription, and for an additional amount equal to the par value of the stock owned by him. 2. That if an execution against a corporation was returned "no property found," then execution could go, on the order of court and after written notice, against any stockholder, to the extent equal in amount to his stock, together with the amount, if any, unpaid thereon. 3. That when a corporation became insolvent a receiver could be appointed on application to the proper court to close its affairs; and it was made the duty of such receiver to immediately institute proceedings against all stockholders to collect unpaid subscriptions, together with the additional liability of such stockholders equal to the par value of the stock held by each; all such collections to be for the benefit of creditors. 4. That the stock of the corporation should be transferable only *on the books of the corporation* in such manner as the law prescribed.

By an act passed in 1899, and which went into effect January 11th, 1899, *before* the defendants sold their stock, the previous statute (Gen. Stat. 1868, c. 23, § 24) was so amended as to make it the duty of the president and secretary or the managing officer of each corporation for profit doing business in the State (other than banking, insurance and railroad corporations) as soon as any transfer, sale or change of ownership of stock is made, as shown on its books, "to at once *file with the Secretary of State* a statement of such change of ownership, giving the name and address of the new stockholder or stockholders, the number of shares so transferred, and the par value and the amount paid on such stock." The same statute provided that "no transfer of such stock shall be legal or binding until such statement is made as provided." Laws of Kans. Special Sess. 1898, c. 10, § 12, p. 33. It is not claimed that the above statement had been made or filed with the company prior to the sale by the defendants of their stock, or that it was ever filed, and the result is that the transfer made by the defendants of their stock (although the

fact of such transfer may have been shown on the books of the Wire Company) was not legal or binding, if the statute was valid.

But the defendants insist that as the statutes of Kansas did not, at the time they acquired their stock, require as a condition of its legal or binding transfer that a statement of such transfer should be filed with the Secretary of State, by the president, secretary or managing officer of the corporation, the subsequent statute imposing a condition of that kind impaired the obligation of the contract under which stockholders acquired their stock in violation of the Constitution of the United States. The Supreme Court of Kansas rejected this view and they were right.

In what way the transfer of the stock of a corporation shall be made and evidenced is a matter entirely within the governmental power of the State that creates the corporation, the State taking care that such power be not so exerted as to violate any right secured by the Supreme Law of the Land. It was never contemplated by the framers of the Constitution that the national authorities should supervise the action of a State upon such a subject, so long as the State did not transgress that instrument but kept within the limits of its reserved power to enact such reasonable laws or regulations as, in its judgment, were necessary or conducive to the general good. We can well understand how the State might have concluded that the statutory requirement in force when the defendants acquired their stock, to the effect that transfers of the stock of corporations created by the State (except certain corporations) should be transferable only on the books of the corporation, was not effective or sufficient; particularly, because such books might not be easily or at all accessible. And we can also well understand how the State might have reasonably concluded, in the interest of the public, particularly of purchasers of stock, and of stockholders as well, that the evidence of such transfers should appear from the records of some public office, like that of the Secretary of State. Hence,

perhaps, the enactment of the statute which went into effect January 11, 1899. Such a requirement as that in the act of 1899 did not increase, in any degree whatever, the liability of stockholders, as agreed to by them when becoming stockholders. On the contrary, it was in the interest of stockholders as determining the fact of their ceasing to be stockholders on and after a particular date. Further, the statute did not forbid a sale of the stock upon such terms as might be agreed upon between a stockholder and any purchaser, the transfer, pursuant to such sale, being evidenced as prescribed by the statute. Nor, if sued as stockholders, did the act deprive defendants of any valid defense which they were entitled to make at the time they acquired their stock. It did nothing more than to prescribe, presumably in the interest of the parties immediately concerned and of the public, a rule under which a person, owning and selling his stock in a corporation, should be regarded as a stockholder, unless and until its sale and transfer were manifested by a statement of a particular kind filed in a named public office. If it be said that the officers, charged with the duty of making and filing that statement, might fail or refuse to discharge the duty imposed upon them, the answer is, that if injury thereby came to the stockholder, those officers would be liable to him for such injury arising from neglect of duty. Besides, those officers could be compelled by proper proceedings to perform the duty put upon them by the statute. We hold that the defendants acquired their stock subject, necessarily, to the power of the State, having due regard to the legal rights of parties, to regulate the transfer of stocks in its own corporations. In its first opinion in this case the Supreme Court of Kansas well said (p. 735): "Before the act [of 1899] was passed one who had sold stock of a corporation, in order to relieve himself from liability for its debts, was obliged to see that the transfer was noted by its officer upon its books; the enactment merely imposed an additional duty to see that a similar notation was made upon a public record. The change

imposed no restraint upon the transfer of the stock, but related only to the means by which it should be accomplished and the manner in which it might be evidenced. It is essentially a matter of method—of procedure—rather than of ultimate substantial rights."

Equally without merit is the contention that the statute of 1899 impaired the obligations of the stockholders' contract, in that it substituted for individual actions against them a suit in equity by a receiver appointed after judgment against the corporation. In becoming stockholders the defendants did not acquire a vested right in any particular mode of procedure adopted for the purpose of enforcing their liability as stockholders. It is a well-established doctrine that mere methods of procedure in actions on contract that do not affect the substantial rights of parties are always within the control of the State. It is to be assumed that parties make their contracts with reference to the existence of such power in the State.

Without expressing any opinion as to questions of a local character, we hold, for the reasons stated, that the statute of 1899 furnishes no valid basis for the contention that it impaired the obligation of the contract by which defendants acquired their stock. This is the only Federal question of a substantial character presented on this writ of error, and the judgment of the Supreme Court of Kansas must be affirmed.

It is so ordered.

UNION PACIFIC RAILROAD COMPANY *v.* HARRIS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 19. Argued November 2, 1909.—Decided January 3, 1910.

The words "public lands" in legislation refer to such lands as are subject to sale or other disposal under general laws, and no other meaning will be attributed to them unless apparent from the context of or circumstances attending the legislation.

While the power of Congress continues over lands sought to be acquired under preëmption and homestead laws until final payment, an entryman in actual possession cannot be dispossessed of his priority at the instance of an individual.

While a grant of right of way may take effect as of the date of the grant that date must be found in the act prescribing the finally adopted route.

In this case the rights of a *bona fide* settler holding a patent under preemption law and his grantee *held* superior to those of the railroad company under the act of July 1, 1862, 12 Stat. 489, 494, granting public lands for a railway right of way.

76 Kansas, 255, affirmed.

THE admitted facts are that on April 22, 1861, Bernhard Blou settled upon and improved the northeast quarter of section 12, township 14 south, of range 3, in Saline County, Kansas, and on May 13, 1861, filed the declaratory statement required by the preëmption laws. Blou, by occupation, cultivation and improvements, preserved all his rights under the preëmption until September 5, 1865, when, having made no payment or final proof, he changed his preëmption entry to one under the homestead act of May 20, 1862. He continued in occupation, on December 8, 1870 made final proof under his homestead entry, and, on March 15, 1872 received a patent.

By the act of July 1, 1862, the general Union Pacific Railroad act, 12 Stat. 489, 493, c. 120, the Leavenworth, Pawnee and Western Railroad Company, whose name was changed to the Union Pacific Railroad Company, Eastern Division,

and thereafter to the Kansas Pacific Railway Company, was granted a right of way 200 feet in width on each side of its road, through the public lands of the United States. The plaintiff in error, hereinafter called the defendant, has succeeded to the right, title and interest of the Leavenworth company. The route of the company as prescribed by the act ran from Missouri up the Kaw River until it reached the Republican River, and then north along the left bank of that river to intersect with the one hundredth meridian in the Territory of Nebraska. On July 17, 1862, the company filed its map of general route, and caused the lands within the limits of fifteen miles thereof on either side of the proposed route to be withdrawn from sale. Under the amendatory act of July 2, 1864, 13 Stat. 356, c. 216, the company filed another map, designating the same general route. Neither of these routes came within forty-five miles of the tract in controversy. Among the changes in the last-named act is one providing in § 3 for the condemnation of a right of way 200 feet wide through land occupied by the owner or claimant. The act of July 3, 1866, 14 Stat. 79, c. 159, changed the route to extend westwardly towards Denver. Under this act the company located and constructed its road westwardly along the Smoky Hill River instead of northwestwardly along the Republican River, and, as located and constructed, the road passed through the quarter-section which Blou was then seeking to acquire under the homestead law.

On January 20, 1873, Bernhard Blou executed and delivered to the Kansas Pacific Railway Company, the successor of the Leavenworth, Pawnee and Western Railroad Company, a deed for a right of way through said quarter-section, which deed the railway company accepted and paid him the consideration named in it. The land in controversy is a strip 150 feet wide, lying immediately south of a line fifty feet south of the center of the track of the defendant through the quarter-section. On November 10, 1882, Blou sold and conveyed to John Erickson by warranty deed all that part of the

quarter-section lying south of the railroad track, containing 101 acres. The defendants in error, hereinafter called the plaintiffs, derive title from Erickson. The plaintiffs and those under whom they claim had exclusive possession of the land in question from May, 1861, to August, 1902; broke and cultivated it, and paid all taxes assessed upon it since the issue of the patent. In August, 1902, the defendant fenced and took possession of the tract in controversy, whereupon this action to recover possession was commenced by the plaintiffs. The court found in their favor, and rendered judgment accordingly. This judgment was affirmed by the Supreme Court of the State (*Union Pacific R. R.* v. *Harris*, 76 Kansas, 255), and thereupon the case was brought here on error.

Mr. Maxwell Evarts, with whom *Mr. R. W. Blair* was on the brief, for plaintiff in error.

Mr. T. F. Garver and *Mr. L. C. Milliken* for defendant in error, submitted.

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

The grant of the right of way was "through the public lands." What is meant by 'public lands' is well settled. As stated in *Newhall* v. *Sanger*, 92 U. S. 761, 763: "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." See also *Barker* v. *Harvey*, 181 U. S. 481, 490; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 391. If it is claimed in any given case that they are used in a different meaning, it should be apparent either from the context or from the circumstances attending the legislation. While the power of Congress over lands which an individual is seeking to acquire under either the preëmption or the homestead law remains until by the payment of the full purchase price required by the former law or the full occupation prescribed by the lat-

ter, yet under the general land laws of the United States one who, having made an entry, is in actual occupation under the prëemption or homestead law cannot be dispossessed of his priority at the instance of any individual. *Hastings &c. Railroad Co.* v. *Whitney*, 132 U. S. 357, 363, 364. In other words, one who has taken land under the preëmption or homestead law acquires an equity of which he cannot be deprived by any individual under the like laws. Now at the time of the passage of the act of July 3, 1866, Blou was and had been for several months in actual occupation under the homestead law. Did Congress intend by its legislation to deprive him of that equity which he had under the general land laws as against any one proceeding under those laws?

Any possible rights of the railroad company in this land commence with the act of July 3, 1866, for while the acts of 1864 and 1866 were in amendment of the act of 1862, yet the route prescribed by the acts of 1862 and 1864 was far to the east of this land, and only by the act of 1866 was the company authorized to construct a road through or near it. True, as held in *Railroad Company* v. *Baldwin*, 103 U. S. 426; *Bybee* v. *Oregon & California Railroad Company*, 139 U. S. 663, 679; *Northern Pacific Railway Company* v. *Hasse*, 197 U. S. 9, 10, the grant of the right of way is absolute, and takes effect as of the date of the grant. But that date must be found in an act prescribing the finally adopted route.

A case much relied upon by the railroad company, as showing the intent of Congress in its grant of the right of way to the Union Pacific Railroad Company and its tributaries, is *Union Pacific Ry. Company* v. *Douglas County*, 31 Fed. Rep. 540. In it it was held:

"It was the evident intention of Congress by the act of July 1, 1862, 12 Stat. 491, giving a right of way to the Union Pacific Railroad Company, to grant such right of way through those lands which by surveys should be found to be sections 16 and 36, the school sections which it intended to give to the future State of Nebraska, pursuant to the provisions of the

organic act of 1854, 10 Stat, 283, creating the Territory of Nebraska."

In other words, it was held that although Congress had in 1854 created the Territory of Nebraska, with the provision that when the lands within it were surveyed sections 16 and 36 in each township should be reserved for school purposes, it meant by the act of 1862 to grant a right of way to the railroad company through lands which should thereafter be found to be those sections. But that decision does not reach to the precise question here presented, and many of the reasons which led to it are inapplicable here. It was well known that a large part of western Nebraska was at the time of the passage of the act of 1862 not only unoccupied but unsurveyed. The speedy construction of the railroad to the Pacific was desired, and nothing was said about a condemnation of the right of way. By the amendatory act of 1864, however, provision was made for such condemnation through land occupied by an owner or claimant. In *Washington & Idaho Railroad Company* v. *Osborn*, 160 U. S. 103, it appeared that Osborn was a settler upon unsurveyed public land and had placed improvements thereon, and intended when the surveys were made to preëmpt the same under the preëmption laws of the Government. The railroad company was vested by the act of March 3, 1875, 18 Stat. 482, c. 152, with a right of way through the public lands of the United States, subject to the exception of "lands within the limits of any military park or Indian reservation, or other lands specially reserved from sale" (§ 5). Osborn did not come within the terms of this exception. The act of March 3, 1875, authorized the legislature of any Territory to provide the manner in which private lands and possessory claims of lands of the United States might be condemned, and further, that when no provision should have been made such condemnation might be made in accordance with § 3 of the act of July 2, 1864, *supra*. And upon this the court, sustaining Osborn's claim of payment for the right of way, said (p. 109):

"It must, therefore, be conceded that Osborn did not, by maintaining possession for several years and putting valuable improvements thereon, preclude the Government from dealing with the lands as its own, and from conferring them on another party by a subsequent grant.

"On the other hand, it would not be easy to suppose that Congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers."

It is true, as suggested in *Western Pacific Railroad Company* v. *Tevis*, 41 California, 489, 493, that the condemnation proceedings named by the act of July 2, 1864, were in territorial courts, whereas Kansas at that time was a State. But undoubtedly the thought of Congress was the protection of an owner or claimant by condemnation proceedings and not in what courts those proceedings should be had.

Further, "this right of way through school sections had been accepted without challenge for twenty years" (31 Fed. Rep. 541). This indicated the general understanding, and was significant. The contrary appears here. The railway company not only did not disturb the possession of the settler for nearly forty years, but on the other hand purchased and paid him for a right of way through the tract.

We are of opinion that the case of *Crier* v. *Innes*, 160 U. S. 103, is, as respects the case at bar, inconsistent with that in the 31st Fed. Reporter, and must be held to have to that extent overruled it. We do not think that it would be profitable to cite the many other cases which touch the question before us more or less closely, or to seek to point out the differences between them and this, or to notice all the general expressions which are to be found in them.

We are of opinion that the Supreme Court of Kansas did not err, and its judgment is

Affirmed.

KOMADA & CO. *v.* UNITED STATES.

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

No. 220. Argued November 29, 30, 1909.—Decided January 3, 1910.

The construction given by the Department charged with executing a tariff act is entitled to great weight; and where for a number of years a manufactured article has been classified under the similitude section this court will lean in the same direction; and so held that the Japanese beverage, sake, is properly dutiable under § 297 of the tariff act of July 24, 1897, c. 11, 30 Stat. 151, 205, as similar to still wine and not as similar to beer.

After a departmental classification of an article under the similitude section of a tariff law, the reënactment, by Congress, of a tariff law without specially classifying that article may be regarded as a qualified approval by Congress of such classification.

THIS case is before us on a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. The question is the proper classification, under the tariff act of July 24, 1897, 30 Stat. 151, c. 11, of a Japanese beverage known as "sake." "Sake" is not named in that act, but § 7 (p. 205), frequently spoken of as "the similitude section," reads as follows:

"That each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied on such non-enumerated

article the same rate of duty as is chargeable on the article which it resembles paying the highest rate of duty."

In November, 1904, petitioner imported some sake at the port of San Francisco, and, following prior rulings, the collector, under the similitude section, held it similar to still wine containing more than fourteen per cent of absolute alcohol, and dutiable accordingly at fifty cents per gallon, under paragraph 296 (p. 174). The petitioner protested and claimed that it was either a non-enumerated manufactured article, dutiable at twenty per cent ad valorem, under § 6 (p. 205), or, by reason of similitude to ale, porter or beer, at twenty cents per gallon under paragraph 297 (p. 174). Both the board of general appraisers and the Circuit Court sustained the protest, feeling themselves constrained by the decision of the Circuit Court for the Southern District of New York (*Nishimiya* v. *United States*, 131 Fed. Rep. 650) and that of the Circuit Court of Appeals for the Second Circuit, (*United States* v. *Nishimiya*, 137 Fed. Rep. 396; *S. C.*, 69 C. C. A. 588). On appeal, the United States Circuit Court of Appeals for the Ninth Circuit reversed the decision of the Circuit Court and sustained the classification made by the collector.

Mr. Thomas Fitch and *Mr. W. Wickham Smith*, with whom *Mr. John M. Thurston* was on the brief, for petitioner:

Under the similitude section of the tariff act the similitude must be substantial. *Arthur* v. *Fox*, 108 U. S. 125; *Murphy* v. *Anderson*, 96 U. S. 131.

In cases of doubtful classification of articles the construction is to be in favor of the importer. *Powers* v. *Barney*, 5 Blatchf. 202; *Adams* v. *Bancroft*, 5 Sumner, 384; *Hartranft* v. *Wiegmann*, 121 U. S. 609; *Am. N. & T. Co.* v. *Worthington*, 141 U. S. 468; *United States* v. *Wiggleworth*, 2 Story, 369; *United States* v. *Davis*, 54 Fed. Rep. 147; *Matheson & Co.* v. *United States*, 71 Fed. Rep. 394; *Hempstead & Sons* v. *Thomas*, 122 Fed. Rep. 538.

While the highest rate of duty will be imposed where the

similitude is equal, yet, in determining whether there is or is not an equality, the doubt will be resolved in favor of the importer. *Tiffany* v. *United States*, 112 Fed. Rep. 672; *Re Guggenheim Smelting Co.*, 112 Fed. Rep. 517; *United States* v. *Dana*, 99 Fed. Rep. 433; *Re Herter Bros.*, 53 Fed. Rep. 913; *Mandell* v. *Seeberger*, 39 Fed. Rep. 760. And see also *United States* v. *Wotton*, 53 Fed. Rep. 344; *United States* v. *Schoverling*, 146 U. S. 76; *Von Bernuth* v. *United States*, 146 Fed. Rep. 61; *Hahn* v. *United States*, 100 Fed. Rep. 635.

Methods of manufacture are to be considered in determining similitude. *Weilbacher* v. *Merritt*, 37 Fed. Rep. 85; *Greenleaf* v. *Goodrich*, 101 Fed. Cas. 1168; aff'd 101 U. S. 278.

There is no force in the suggestion that the decision in the *Woozens Case*, G. A. 2786, establishes any rule of construction. That rule can only be invoked after long continued practice in the same case. *Merritt* v. *Cameron*, 137 U. S. 542; *United States* v. *Johnson*, 173 U. S. 363, 377; *Cross* v. *Burke*, 146 U. S. 82, 87.

The doctrine of commercial designation does not apply, and if it did the weight of evidence is against the Government.

That sake is not a spirituous beverage is shown by numerous decisions, six of state, two of Federal, courts besides one of this court. The testimony of five importers and two Government appraisers shows that sake is not a wine by commercial designation. Statistics of Japanese immigration show that the commercial world has never acquiesced in its classification as a wine. The rulings of the internal revenue department show that there it has for years been classed and taxed as a beer. The customs laws show that the quantity of alcohol in a beverage is not the test by which it is classified. The evidence conclusively shows that in material from which made, in process of manufacture, in chemical composition, in stability, in taste and in manner of use there are wide dissimilitudes between sake and still wine.

The sole similitude between wine and sake is in alco-

holic strength. The General Board of Appraisers, the United States Circuit Court for the Southern District of New York, the United States Circuit Court for the Second Circuit and the United States Circuit Court for the Northern District of California all decided that the one similitude in alcoholic strength was not sufficient as against the many dissimilitudes to establish a substantial similitude between sake and wine. The United States Circuit Court of Appeals for the Ninth Circuit decided that the one similitude of alcoholic strength overcomes all dissimilitudes.

Mr. J. C. McReynolds, Special Assistant to the Attorney General, with whom *The Attorney General* was on the brief, for the United States:

The action of the collector is presumptively correct and the burden is on the importers to establish their contention; the judgment of the Circuit Court of Appeals should be approved, therefore, even though this court should think the weight of evidence against that conclusion. *Arthur* v. *Unkart*, 96 U. S. 118; *Earnshaw* v. *Cadwalader*, 145 U. S. 247, 262; *Erhardt* v. *Schroeder*, 155 U. S. 124; *United States* v. *Ranlett*, 172 U. S. 133, 146. Similarity is a question of fact. *Herman* v. *Miller*, 127 U. S. 363, 370.

As this classification has existed since 1894 no hardship whatever has been imposed on the importer. *United States* v. *Hermanos*, 209 U. S. 337. And see *Robertson* v. *Downing*, 127 U. S. 607; *United States* v. *Healy*, 160 U. S. 136; *United States* v. *Falk*, 204 U. S. 143; *Hill Bros.* v. *United States*, 151 Fed. Rep. 476; *Morningstar* v. *United States*, 159 Fed. Rep. 287.

The similitude clause has long been a part of tariff legislation. See tariff act of 1842 and all subsequent ones. *Stuart* v. *Maxwell*, 16 How. 150, 160. As to the construction of that clause see *Arthur* v. *Fox*, 108 U. S. 125; *United States* v. *Roessler Co.*, 137 Fed. Rep. 770; *Greenleaf* v. *Goodrich*, 101 U. S. 278, 283; *Weilbacher* v. *Merritt*, 37 Fed. Rep. 85; *Mandell* v. *Seeberger*, 39 Fed. Rep. 760; *Keary* v. *Magone*, 40 Fed.

Rep. 873; *Re Herter Bros.*, 53 Fed. Rep. 913; *United States* v. *Dana*, 99 Fed. Rep. 433; *Hahn* v. *United States*, 100 Fed. Rep. 635; *Tiffany* v. *United States*, 112 Fed. Rep. 672; *Re Smelting Co.*, 112 Fed. Rep. 517; *Waddell & Co.* v. *United States*, 124 Fed. Rep. 301; *Rich* v. *United States*, 177 Fed. Rep. 293.

Sake is similar to still wines as measured by use, quality and material, and although there may be some similarity to beer there is a greater similarity to still wine.

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

Something can be said on both sides of the question of similarity, and if the case turned simply upon that question it might be difficult to reach a satisfactory conclusion. In such a case the construction given by the Department charged with the execution of the tariff acts is entitled to great weight. As said by Mr. Justice McKenna, delivering the recent opinion of the court in *United States* v. *Hermanos*, 209 U. S. 337, 339:

"We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution. *Robertson* v. *Downing*, 127 U. S. 607; *United States* v. *Healey*, 160 U. S. 136. And we have decided that the reënactment by Congress, without change, of a statute which had previously received long continued executive construction is an adoption by Congress of such construction. *United States* v. *Falk*, 204 U. S. 143, 152."

In the decision of this case Mr. Justice White and Mr. Justice Peckham concurred solely because of the prior administrative construction.

Prior to 1894 sake was classified by similitude to distilled liquor and subjected to a duty of $2.50 per proof gallon under paragraph 329, act 1890, 26 Stat. 567, 589, c. 1244, and $2 under Schedule A, act 1883, 22 Stat. 488, 494, c. 121.

In July, 1894, Y. Woozeno protested against this classification, claiming the liquor was dutiable under the act of 1890 by similitude to still wine. He was sustained by the Board of General Appraisers in opinion dated October 4, 1894 (T. D. 15392, G. A. 2786). The Treasury Department acquiesced, and has acted accordingly until the present time; no protest against the practice was entered until March, 1902. Three years after the ruling in the Woozeno case, Congress passed the tariff act of 1897, which in no way modified the provisions upon which the appraisers had previously based their decision. This in effect confirmed their action. In March, 1902, Hackfeld & Co., Honolulu, protested against the classification of "sake" by similitude to still wine, but the prior ruling was sustained by the appraisers and the importer acquiesced in the decision. In the tariff act of 1909 sake is specially enumerated with still wine, (paragraph 307):

"Still wines, including ginger wine or ginger cordial, vermuth, and rice wine or sake, and similar beverages not specially provided for in this section, . . . if containing more than fourteen per centum of absolute alcohol, sixty cents per gallon." 36 Stat. 11, 40, c. 6.

In April, 1903, Nishimiya imported some sake at New York, and protested against the classification by similitude to still wine. The board of appraisers sustained the collector, but on appeal to the Circuit Court for the Southern District of New York the Circuit Judge thought that sake was not sufficiently like either wine or beer to be classified by similitude, and held it to be a non-enumerated manufactured article. This conclusion was sustained by the Circuit Court of Appeals for the Second Circuit. *United States* v. *Nishimiya, supra.*

Thus it appears that prior to 1894 sake was classified by similitude to distilled liquor, and then on a protest by an importer it was classified by similitude to still wine, and that ruling has been followed from that time to the present, receiving in the meantime at least a qualified approval by

Congress. It was accepted without challenge until 1902. Then, a protest against it having been overruled, it remained unchallenged for another year. After this, and in the latest tariff act, Congress has in terms put sake in the category with still wines.

Under these circumstances we think the intent of Congress in respect to the classification of sake is clearly manifested, and the judgment of the Court of Appeals is

Affirmed.

ELIAS *v.* RAMIREZ.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 30. Submitted November 5, 1909.—Decided January 3, 1910.

In this case this court, reviewing the evidence, reverses the territorial court and finds that there is evidence to show, with sufficient certainty, that an extraditable crime was committed by the person benefited thereby, and thus to satisfy the extradition procedure statute and justify the order of the commissioner committing the accused to await the action of the Executive Department on a requisition made for forgery under the extradition treaty with Mexico.

Although the statements of certain witnesses were unsworn to and therefore might not, under the state law, be admissible before a committing magistrate, under the extradition statute they are receivable by the commissioner to create a probability of the commission of the crime by the accused.

90 Pac. Rep. 323, affirmed.

THE facts are stated in the opinion.

Mr. A. C. Baker, for appellant.

Mr. William Herring, for appellee.

Mr. Justice McKenna delivered the opinion of the court.

Appellee was arrested as a fugitive from justice in pursuance of the provision of a treaty of extradition between Mexico and the United States, and, after a hearing before John H. Campbell, judge of the district court of the first judicial district of Arizona, sitting as a commissioner in extradition proceedings, he was committed, on the charge of forgery and the utterance of forged papers, to the custody of the United States marshal for Arizona, to abide the order of the President of the United States in the premises. Upon his petition to the Supreme Court of the Territory for *habeas corpus* he was discharged from custody, and from the judgment of the court the case is here on appeal.

The court decided that the offense charged is within the terms of the treaty between the United States and Mexico, "that the committing magistrate had jurisdiction of the subject-matter and the accused," and that the complaint was sufficient. The court, however, held that there was not sufficient legal evidence to establish the fact of forgery, and that, therefore, "the judge of the district court exceeded his jurisdiction in holding the petitioner (appellee) for extradition." This ruling constitutes the question in the case.

The complaint, summarized, is that Ramirez forged certain railroad wheat certificates, which purported to have been issued by the Southern Pacific Company to show the true weight of certain carloads of wheat shipped from the United States to Mexico, and had the further purpose to show the amount of custom duties to be paid to Mexico. The certificates, in order to appear authenticated, it is alleged, purported and were intended to show, that they were signed or sealed or stamped by the railroad company with a seal or stamp containing the words "Gross Weight, Tare, Net Weight," and that the true gross, tare and net weight of the wheat in each

of the cars were inserted by the company after those words, and that the certificates were initialed with the letters "G. W. B."

It is alleged that the certificates were not so authenticated by the company or any one in its employ, and did not show the weight of the wheat, but showed that there was much less than the true weight. It is alleged also, with the usual repetition, that Ramirez forged the stamp and seal and the initials "G. W. B.," and did "use and utter" the certificates and presented them "to the custom house of the government of Mexico and the officials thereof," at the town of Nogales, "as true and genuine wheat certificates of the said railroad company, and as showing the true weight contained in the said cars."

There were two importations of wheat from Nogales, Arizona, to Nogales, Mexico, in the name of E. Ramirez. The manifest or request for importation was made to the proper officers at Nogales, Mexico, in the name of and for E. Ramirez. It was the duty of the Mexican inspectors of customs to inspect and weigh the wheat, in order to compute the proper amount of duties. One of the importations was inspected by one Manuel Rosas, the other by one Francisco Enriquez, both of whom were implicated in the prosecution in Mexico for the crimes of fraud against the Federal treasury and forgery of private seals.

Rosas testified that he examined the interior of the cars in a superficial manner, "satisfying himself by opening a sack that said cars contained the merchandise represented." He did not weigh the merchandise, because it came billed in carload lots, and "did not come designated as to so many bundles, and also because the custom house lacked the proper scale facility." He testified that "the railroad of Sonora issued to the applicants a ticket with the seal of the office without any signature, bearing thereon, indicated in lead pencil writing, the number of the respective cars, the net weight, and the gross weight. It was so done in this case,

that he compared the data upon the tickets with reference notes with those presented by the customs agent, and, finding them to correspond with each other, he had no objection in authorizing, over his own signature, the correctness of the same and order it 'dispatched.'" As soon as the tickets, he further testified, are compared with the applications they are destroyed, and that he did not know what had become of them in this case. He further testified that the applications were delivered to him by the custom house collector, which applications manifested the weight of the merchandise to be imported, and, "this being done, the manifest passed into the possession of the revisors, who solicit the railroad ticket from the interested parties for the purpose of verifying the respective comparisons." The person of whom he "asked for the tickets was Mr. Manuel Ramirez, who was in charge of the customs department of the house." Further testifying, he said that he did not know the origin of the tickets "by their form of writing;" that he did not find in any of them any erasures nor any trace of alteration, and could not tell "even vaguely the name of the employés who wrote the tickets;" that he did not know whether any person was present "when the corresponding tickets were delivered to him;" that he had no knowledge from "private sources or otherwise of Mr. Cerilo Ramirez's connection with the customs agency that operates under his name." He recognized, from the books of the railroad exhibited to him, the seals to be the same used by the company to express the weight, not recollecting having personally seen the books. Explaining how he "erred," he testified that it was because he did not go personally to the offices of the railroad to compare the true weight at those offices, but instead relied on the tickets presented by Manuel Ramirez, "which were forged, in the sense that the said Ramirez personally or in accord with some employé of the railroad" forged the tickets, "making use of the seals of the railroad."

Francisco Enriquez testified substantially to the same

effect, though in some parts more fully. He testified that the tickets came approved by Mr. G. W. Bowman, chief of the station of the Sonora Railroad. He, however, did not know, he said, the handwriting of Bowman "to the extent of being able to identify the same to a certainty," because "the tickets in question only bring numbers, made in great haste, setting forth the number of the car, the gross weight, the net weight, and the tare calculated in pounds," of which he "made the computation into kilos."

Ignacio Alleo testified that he was a private employé of the firm under investigation, and served for five years as freighter for the firm or house; that his duty was to receive the loose freight from the American side, delivered to him at Nogales, Arizona, to place the same in the cars which convey it south; that in doing so he takes note of the number of bundles, marks, countermarks, weights and other memoranda which serve to form the applications for shipment; that said data are made on loose papers, which he delivers to Manuel Ramirez, who makes out the applications for shipment; that "Ramirez is also occupied in making the applications for exportation, reimportation, more properly exportation;" that he, the witness, had no other connection with the direct importation than to copy some applications for shipment; that when he came to the house, five years ago, Manuel Ramirez had been serving the house for a long time, and that Ramirez had "personal charge of the dealings with the employés of the custom house, all relative to importations;" that the head person in charge of the office "was Eduardo Ramirez, who had full power to act from the owner of the business, Cerilo Ramirez; that up to three years ago Alberto Masarenas kept the accounts of the house, since then he did not know who had, but that the cash accounts, he understands, were kept by Mr. Escobara."

Ignacio Escobara had testified before, but he would not ratify his former testimony in all respects, he said, because it was given "under the belief that his gratitude towards his

employer compelled him to do so," and that after mature consideration he realized that he was not required "to tell an untruth in a proceeding which may stain his honor, and for that reason he was disposed to tell the truth." And he testified that from the beginning of the proceeding against Messrs. Campello he noticed the greatest uneasiness, excitement and fear in Eduardo Ramirez, Luis Bartning and Cerilo Ramirez; from that time they began to prepare themselves, "fearing to become involved in the same manner as Messrs. Campello and associates; that he plainly noticed the attitude of the above gentlemen and the danger in which they were." He further testified that "he saw and noticed their conduct, as well as listening to their conversation," and that "the manner of preparing themselves consisted in making up packages of correspondence and documents carefully selected and packed in a wooden box which stood in a patio or court during the day and disappeared at night without" his knowing what became of it; that he was under the impression that it was taken to the American side, not being able to tell "from whom he heard it in the office of the firm," but he believed that he "heard it said there in conversation."

He further testified that the books of account and the copy books of statement of expenses "appeared and disappeared successively, being carried to and fro by Bartning personally, who was the bookkeeper;" that at the beginning of Campello's investigation, Alleo confessed to him that the house was very much involved in the same manner as were Messrs. Campello; that the person in charge of all transactions was Manuel Ramirez; that Bartning is the brother-in-law of Ramirez, "with whom he is strongly tied in business; the head of the institution is Cerilo Ramirez, who commands as supreme principal and owner of the establishment, and as such daily attends said office, watching carefully the affairs and progress of the house; during the absence of Cerilo his brother Eduardo directs the house and is recognized by all as second chief, and as Cerilo was tried for smuggling and his signature is not

accepted in custom house dealings, all official documents are signed by Eduardo Ramirez in his own name or through an agent representing himself in the documents as a custom house broker." He testified further that he "was told from the beginning that the cause of fear of Cerilo Ramirez and his associates in the present case proceeded from a fraud committed by them upon the Federal Treasury in like manner as that committed by Messrs. Campello, that is, by false and forged manifests of the weight of carloads of wheat imported by said house one year ago."

The record shows that Cerilo Ramirez, "being present for the purpose of undergoing a suppletory confrontation with Ignacio Escobara," and with "that of said Ramirez," referring apparently to some deposition or statement made by himself which is not in the papers, stated that he was "absent from Nogales, living in Lower California, and for that reason could not have been present after the detention of Campello," and stated further that he was "therefore ignorant of what disposition had been made of the books of account, correspondence and documents of the establishment of 'C. Ramirez,' to which Escobara" referred. He denied that he was recognized as agent of the house, and said that "if he left the name of C. Ramirez in the business it was with the object of not impairing the credit of the house, and on account of his brother being concerned, . . . which business he transferred to his brother Eduardo, without executing in this case any special instrument." And he denied having had "previous knowledge of the fraud upon the Federal Treasury."

Manuel Ramirez was also put in "suppletory confrontation" with Escobara, whose testimony was read to him, as was that of C. Ramirez, and being "apprised of the discrepancies of both depositions," said that what Escobara said was "not exact" when he said that he, Ramirez, was "in collusion with the other, Messrs. Ramirez, in trying to conceal the books and correspondence of the business." The rest of his testimony is as follows: "He does not know where they (the books and

correspondence) are and says that their chief was Mr. Eduardo Ramirez, ignoring (?) to date if the payment has been made in full of the duties upon the importation of wheat, because his duties were only to draw the papers for the importation through the custom house."

He was called upon a second time to testify and he was asked if he personally copied the tickets or memoranda of the weight of the cars of wheat from the sheets in which the employés of the railroad noted the weight of bundles. He answered that sometimes he did, but not in the present case, he did not remember; that his brother Eduardo Ramirez attended to the loading and giving of weights, but that he in his brother's absence would sometimes attend to this branch. And further, that he could not explain the discrepancy between the weights of the bundles in question and those shown in the respective books of the railroad company.

It appears that the frauds upon the revenue charged to E. Ramirez amounted to $11,944.94. The depositions were taken in proceedings instituted in Mexico under its laws as the basis for an application for the extradition of Eduardo Ramirez, and were attested by the officers of the tribunal to whom the case was assigned, and that tribunal, after citing the applicable law and its conclusion, and considering that "the *corpus delicti* of fraud against the Federal Treasury and undue use of private seals" had been proved, and that it constituted forgery under the laws of Mexico, and was within the provisions of the treaty between that country and the United States, concluded as follows: "Let a petition issue with the proper evidence to the Secretary of State and Foreign Affairs, so that through the conduct of the diplomatic agents accredited in the neighboring republic, steps be taken for the extradition of Eduardo Ramirez, and obtaining the same, to place at the disposal of this tribunal."

Appellant was commissioned by the Mexican ambassador as a proper person to present to the authorities of the United States of America a copy of the warrant of arrest in the

United States of Mexico and of the depositions upon which the warrant was issued, and, as agent of Mexico, to "receive the said Eduardo Ramirez from the proper authorities of the United States of America." We shall not further quote from the papers, as there is no question but that requisition had been duly made for the extradition of Ramirez. The evidence before the district judge consisted of the depositions, together with oral testimony that they would be admissible in evidence in the courts of Mexico, and in addition the ambassador to Mexico and the chargé d'affaires certified that they were "properly and legally authenticated, so as to entitle them to be received for similar purpose by tribunals of Mexico, as required by the act of Congress of August 3, 1882." There is also in the record a paper headed "Statement of the weight of the carloads of wheat imported by Eduardo Ramirez, made by this Federal tribunal by virtue of the data shown in the books of the railroads," and a large number of exhibits.

The district judge committed Ramirez to the custody of the United States marshal for the Territory of Arizona, to abide "the order of the President of the United States of America in the premises." The writ of *habeas corpus* under review was then issued by the Supreme Court of the Territory and appellee discharged from custody. It was ordered, however, that if an appeal should be taken to this court he should be remanded to the custody of the marshal, to be released upon giving bail in the sum of $25,000, under the provisions of rule 34. Bail was subsequently given and the appellee discharged from custody.

The Supreme Court of the Territory expressed the view that the writ of *habeas corpus* could not be made to perform the office of a writ of error, and that, therefore, if the district judge had jurisdiction of the subject-matter and of the accused and the offense charged was within the terms of the treaty of extradition, and there was before him "competent legal evidence on which to exercise his judgment as to whether

the facts are sufficient to establish the criminality of the accused for the purpose of extradition, such decision cannot be reviewed on *habeas corpus*." The court cited *Ornelas* v. *Ruiz*, 161 U. S. 502, 508, and *Bryant* v. *United States*, 167 U. S. 104. And considering further the extent of a court's power of review over the judgment of the committing magistrate upon the facts, said, "but such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion," citing *In re Stupp*, 12 Blatch. 501; *Ornelas* v. *Ruiz*, *supra*, and *Terlinden* v. *Ames*, 184 U. S. 270. The cases cited establish the propositions expressed by the court, but the learned court's application of them to the facts of this record is challenged. The court expressed the opinion that all of the conditions of commitment were established, except that there "was no competent legal evidence of the fact of forgery itself of the documents in question." That is, that there was no legal evidence of the forgery of what are called in the complaint "railroad wheat certificates" and "tickets" in the depositions of the witnesses. We are unable to agree to this conclusion. They were either forged or issued by mistake, and the supposition of a mistake is precluded by the evidence. The books of the railroad showed the true weights; the mistake or forgery was in the certificates or tickets. Exclude the former and forgery is established. If a mistake was made, it is certainly strange that it should have escaped notice until the Mexican treasury had been defrauded of $11,944.94. Besides, the reparation for a mistake was payment of the amount in default, not by flight from the accusation of forgery and crime. Then, too, ample opportunity was given in Mexico to explain the certificates, but explanation was not attempted. It was not attempted in Arizona, and from these negative circumstances, as well as from the positive testimony of the witnesses, it certainly cannot be said that there was substantially no evidence to justify the judgment of the commissioner that a crime had been committed, and as little can it

be said that there was not probable cause to believe that the accused had committed it. We have set out the evidence somewhat fully. It shows that the Mexican treasury was defrauded by the "House of Ramirez" of $11,944.94, and that appellee was "second chief" of the house and the one to whom C. Ramirez had transferred it. It appears, therefore, that he was the principal, if not the only beneficiary, of the fraud. It is true that Manuel Rosas and Francisco Enriquez, the custom house revisors, stated that they received the "tickets" from Manuel Ramirez; but from the testimony of the latter and other evidence it may be reasonably concluded that accused acted in conjunction with him, in fact, prepared and directed the whole affair. It is certainly not out of the bounds of reason to suppose that he who was benefited by the fraud contrived and executed it, and not his subordinate or employé. It is, however, objected that there is no evidence in the record "tending in any way to prove that any of the alleged certificates were forged or altered or changed by any person whatsoever." Indeed it is asserted by the appellee "that the evidence, so far as it proves or tends to prove anything, proves that the certificates were genuine certificates issued by G. W. Bowman, chief of the station of the Sonora Railroad." To complete these contentions a reference is made to the complaint, in which it is alleged that the certificates, in order to appear authenticated, purported to show that they were signed, sealed or stamped by the railroad, containing the words gross weight, tare, net weight, and initialed with the letters "G. W. B.," and if so worded and initialed would have been so authenticated as to have shown true weight of the wheat in the cars. There is no evidence, it is said, of these allegations, or that it was the duty of the custom house officer to accept any so-called weight certificates as evidence of the true weight of the wheat to be imported. It is probable that the Supreme Court of the Territory yielded to these contentions, and that they were the basis of its decision that there was no legal evidence before the commissioner of "facts tend-

ing to prove the commission of the offense charged, to wit, the crime of forgery, . . ."

We, however, cannot concur in these contentions, and, without going over the evidence to show a precise or technical adaptation of it to the allegations, it is enough to say that we think the evidence shows not only that a crime was committed, but shows its character and by whom committed with sufficient certainty and strength to satisfy the statute and to justify the order of the commissioner committing the accused to await the action of the executive department.

It is further contended that the statements of Rosas and Enriquez were unsworn to, and because unsworn to were not admissible in evidence; that "under the common law and the law of Arizona the unsworn statement of no witness is competent upon a preliminary hearing before a committing magistrate," and would not justify a commitment for trial in Arizona. It is hence contended that it was not sufficient to justify the extradition of the appellee. *In re Egita,* 63 Fed. Rep. 972; *In re McPhun,* 30 Fed. Rep. 57; *Benson* v. *McMahon,* 127 U. S. 457, are adduced to sustain the contention. The answer to the contention is that the statute providing for extradition makes the depositions receivable in evidence and provides that their sufficiency to establish the crime shall be such as to create a probability of the commission by the accused of the crime charged against him. This is the principle announced by the cases cited by the appellee.

Other contentions are made but we do not think that they need special mention.

Order reversed and the cause remanded with directions to proceed in accordance with this opinion.

TIGLAO *v.* INSULAR GOVERNMENT OF THE PHILIPPINE ISLANDS.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 37. Argued November 1, 1909.—Decided January 3, 1910.

Writ of error and not appeal is the proper method to bring up to this court a judgment of the Supreme Court of the Philippine Islands in a case affecting title to land in Court of Land Registration. *Cariño* v. *Insular Government*, 212 U. S. 449.

In this case the grant involved was made without authority by subordinate officials, was void *ab initio*, and conveyed no title to the original grantee or those holding under him.

A man cannot take advantage of his ignorance of the law, and where all that is done to give him a title is insufficient on its face, the grantee is chargeable with knowledge, does not hold in good faith, and in such a case prescription does not run from the date of the instrument under which he claims.

THE facts are stated in the opinion.

Mr. Aldis B. Browne, Mr. Alexander Britton, Mr. J. H. Blount and *Mr. Evans Browne* for plaintiff in error and appellant:

The concession of 1873 made by the Municipal Board of Mabalacat did transmit to plaintiff in error's grantor certain rights. Book 4, Title 12, Law 1 of the compilation of Spanish Colonial Laws printed in 1828 in House Doc. No. 121, 20th Cong., 2d Sess., p. 38; see also 3 Philippines, 540; Law 8, Book 4, Title 12, Laws of the Indies permitting applications for land grants in townships where there is a court. As to occupation ripening into title, see Solicitor General's brief in *Cariño Case*, 212 U. S. 449.

Evangelista v. *Bascos*, 5 Philippines, 255, which holds otherwise to contention of plaintiff in error is unsound. Possession under the circumstances of this case confers title by prescription as against the State. See *Cariño* v. *Insular Government*, 212 U. S. 449; Book 4, Title 12, Law 14, Recopilacion de Leyes de las Indias; 3d Partida, Title XXIX, Law 18; § 1957, Spanish Civ. Code War Department, transl. 1899; Mortgage Law of 1893. The Philippine Government Act of July 1, 1902, was meant to carry out in good faith Art. VIII of the treaty of 1898, and all legislation of the United States concerning the Philippines indicates a policy to protect all property rights in land, complete or inchoate, existing at the time of the treaty and held in good faith. As to good faith, see § 1950, Spanish Civil Code for Cuba, Porto Rico and the Philippines. In this case good faith cannot be questioned. See 3 Philippines, 540; and royal order of 1862, cited in 5 Philippines, 548.

The original grantor took under a valid grant and cultivated the land in dispute and some interest or title must have vested by his occupation. In appropriating this land for military purposes, supposing that it was for this land, the authorities made a mistake and that fact cannot affect the owner's interest.

Under the laws for town government as stated in 1 Census Report Phil. Ils. 365, disposition of pueblo lands when approved by the Parish Priest was sufficient to protect title.

The Solicitor General and *Mr. Paul Charlton*, Law Officer, Bureau of Insular Affairs, for defendants in error and appellees:

This court has no jurisdiction of the appeal. Writ of error is the proper method of bringing to this court a case instituted in the Court of Land Registration for registration of ownership. *Cariño* v. *Insular Government*, 212 U. S. 449, 456. The case being here only upon writ of error, the facts must be accepted as found below.

This land was royal domain when the Gobernadorcillo and

Principales of the pueblo of Mabalacat attempted to convey it to Lacson. There is no evidence of proprietorship of any part of the land by the pueblo of Mabalacat. Under Spanish law a pueblo did not become the owner of any part of the royal domain unless special grant was made to it and the extent and boundaries of the grant were specially designated by the proper granting authority, *United States* v. *Santa Fe*, 165 U. S. 675, 691; *United States* v. *Sandoval*, 167 U. S. 278; and even when the lands were specially set apart for a pueblo the fee remained in the King.

Law 1 of Book 4, Title 12, of the Laws of the Indies did not authorize the grant of 1873 to Lacson. That law relates only to grants to new settlers from such lands as have been assigned for the new settlement as a whole by the viceroy, governor of the colony or other representative of the King. It cannot authorize a grant attempted long after a town had come into existence and without any connection with its foundation or early settlement. The attempted grant to Lacson was made 200 years or more after the island of Luzon was made a Spanish colony and an indefinite time after the town of Mabalacat arose. There is no proof that Mabalacat is a town of Spanish foundation or that it ever had any grant of land from which such distribution could be made to individual settlers under Law 1 of Title 12. This law does not contemplate or authorize a grant of 1,200 hectares (some 3,000 acres) such as was made to Lacson. If Law 1, Title 12, can apply at all to this case, it was necessary that the grant to Lacson should be made by the "viceroy or governor thereto authorized by" the King. It did not authorize a grant by the gobernadorcillo and principales. The fact that the Gobernadorcillo and Principales of Mabalacat assumed to make the grant to Lacson can raise no presumption of their authority to make it. *Hayes* v. *United States*, 170 U. S. 637, 647; *Chavez* v. *United States*, 175 U. S. 552, 558. That the viceroy or governor of the colony was the proper granting authority under Spanish law, see *United States* v. *Arredondo*,

6 Pet. 691; *United States* v. *Percheman,* 7 Pet. 50; *United States* v. *Clarke,* 8 Pet. 436; *United States* v. *Segui,* 10 Pet. 306; *United States* v. *Chaires,* 10 Pet. 308; *United States* v. *Seton,* 10 Pet. 309; *United States* v. *Sibbald,* 10 Pet. 313; *United States* v. *Rodman,* 15 Pet. 130; *United States* v. *Acosta,* 1 How. 24; *United States* v. *Peralta,* 19 How. 343; *United States* v. *Workman,* 1 Wall. 745; *Serrano* v. *United States,* 5 Wall. 451.

Law 8 of Book 4, Title 12, of the Laws of the Indies did not authorize the Gobernadorcillo and Principales of Mabalacat to make the grant to Lacson. This law relates only to grants where the royal audiencia sits. That was only at Manila, until February 26, 1886, when a second audiencia was established at Cebu. Law 8 is also limited to grants of land in a ciudad (city) or a villa. Mabalacat, as a pueblo, was neither a ciudad nor a villa. Law 8 requires that the grant be signed by the viceroy or president and deputies "in the presence of the clerk of the cabildo (council)." The grant to Lacson had no such signature. This law also requires that the grant under it "be recorded in the book of the council." The grant to Lacson is not shown to have been recorded anywhere. Concerning the effect of absence of record of a grant, see *United States* v. *Teschmaker,* 22 How. 392, 405; *Luco* v. *United States,* 23 How. 515, 543; *Palmer* v. *United States,* 24 How. 125, 128; *Peralta* v. *United States,* 3 Wall. 434, 439; *Hays* v. *United States,* 175 U. S. 248, 257, 258; *United States* v. *Ortiz,* 176 U. S. 422, 426.

If either Law 1 or Law 8 authorized town officials to grant royal lands, it was superseded by the royal decrees of October 15, 1754, and December 4, 1786,—at least as to agricultural lands such as comprised the attempted grant to Lacson. These decrees provided a systematic method of disposing of royal lands, and the decree of 1786 gave exclusive jurisdiction in such matters to the intendants or perhaps to the viceroy or other governor of the colony as head of the treasury or personal representative of the King.

Appellant acquired no title by prescription. The grant to Lacson in 1873 did not give just title, for the Gobernadorcillo and Principales had no authority to make the grant; and possession cannot be deemed to be in good faith when it is under a grant void by operation of law. *Hayes* v. *United States*, 170 U. S. 637, 650.

Mr. Justice Holmes delivered the opinion of the court.

This case comes by writ of error and appeal from a judgment of the Supreme Court of the Philippine Islands, affirming a judgment of the Court of Land Registration, which denied registration of a tract of land. It is admitted that the facts as found by the two courts may be assumed to be true, *Reavis* v. *Fianza, ante,* p. 16; but apart from the concurrence of the courts below the proper proceeding in a case of this kind is by writ of error, and therefore the appeal is dismissed. *Cariño* v. *Insular Government*, 212 U. S. 449. So much being established, the grounds on which the plaintiff in error can claim title may be stated in a few words. On July 13, 1873, the Gobernadorcillo and Principales of the town of Mabalacat in the Province of Pampanga, Luzon, executed an instrument, marked O. K. by the Parish Priest, purporting to grant the land, with qualifications not needing to be noticed, to one Rafael Lacson, under whom the plaintiff in error claims. Possession was held until 1885 and since then has been abandoned. The land was public land. The questions brought here were whether the original grant was valid, or, if not, whether the possession that followed it without interruption for ten years and more conferred title by prescription under the royal decree of June 25, 1880. This decree states the rule of prescription in the usual terms of the civil law. It confers ownership on those who shall establish that they have possessed the lands in question for the requisite time under just title and in good faith. See Civil Code. Arts. 1952, 1953, 1957.

As we understand the later briefs filed in behalf of the plaintiff in error, the vain attempt to justify the grant under the Recopilacion de Leyes de las Indias, Book 4, Title 12, Law 1, is given up, and therefore we shall spend no time upon that. There is, however, an effort to support it under a decree of January 4, 1813. 1 Reynolds, Spanish & Mexican Land Laws, 83. This was a scheme of the Cortes to reduce public and crown lands to private ownership, after reserving one-half for the public debt. When certain preliminaries had been accomplished, as to which we have no information, the other half was to be allotted in the first place to retired officers and soldiers who had served in the present war, &c., as a patriotic reward. Of the remaining land there was to be given, gratuitously and by lot, to every resident of the respective towns who applied, a tract, under certain limitations. The proceedings on these grants were to be had by the constitutional common councils, and the provincial deputations were to approve them. Although this decree purported to apply to crown lands 'in the provinces beyond the sea' as well as to those in the peninsula, it would seem, on the face of it, to have been intended for Spaniards, and to have had but doubtful reference to the natives of conquered territory.

But there are other answers to the suggestion that are free from doubt. The decree has been said to have been repealed in the following year. *United States* v. *Clarke*, 8 Peters, 436, 455. Hall, Mexican Law, 48. But compare *United States* v. *Vallejo*, 1 Black, 541. *Hayes* v. *United States*, 170 U. S. 637, 653, 654. But even if it be assumed, as it is by the argument for the plaintiff in error, that either that or later legislation to similar effect instituted a working system in the Philippines, a large assumption, it is admitted that the conditions of the supposed gratuity were not fulfilled. Our attention has not been called to any law giving authority to the ill-defined body that attempted to make the grant. The land was not distributed by lot, and the essential requirement of approval

by a higher authority was wholly neglected. In view of the admission to which we have referred we find it unnecessary to follow the learned and able argument of the Solicitor-General. There is a hint, to be sure, that the grant may be presumed to have satisfied native custom and may be sustained upon that ground. But such a notion would be a mongrel offspring of Spanish law and ignorance, and no reason is given for making the presumption other than a guess. Unauthorized grants of public lands by subordinate officials seem to have been a noticeable feature in other Spanish colonies. *Whitney* v. *United States*, 181 U. S. 104, 114, 115. The real object of the reference to the decree of 1813 is to found a claim of prescription by showing a just title for the possession which is proved to have been maintained for ten years.

Lacson, the original grantee, held the land until 1881, when he conveyed it to Pedro Carrillo and his wife. Possession was abandoned in 1885 without further change of title. Therefore the only 'just title' to which the possession can be referred is the original grant. The phrase *justo titulo* is explained to mean a title such as to transfer the property, Schmidt, Civil Law of Spain and Mexico, 289, 290; see Partidas, l. 18, T. 29, P. 3; or as it is defined in the Civil Code of a few years later than the decree of 1880, "that which legally suffices to transfer the ownership or property right, the prescription of which is in question." § 1952. Of course this does not mean that the *titulo* must have been effective in the particular case, for then prescription would be unnecessary. We assume, for instance, that if a private person in possession of crown lands, seeming to be the owner, executed a formally valid conveyance under which his grantee held, supposing his title good, possession for ten years might create an indisputable right. But if the public facts known by the grantee showed that the conveyance to him was void, we understand that it would not constitute a starting point for the running of time, and that the grantee's actual belief

would not help his case. Indeed, in such a case he would not be regarded as holding in good faith, within the requirement of the decree, because a man is not allowed to take advantage of his ignorance of law. The subject is fully expounded in *Hayes* v. *United States*, 170 U. S. 637, 650 *et seq.*

All that was done to give Lacson a lawful title was insufficient on its face. Therefore, on the facts known to him he was chargeable with knowledge that he had acquired no legal rights, and it was impossible that the period of prescription should begin to run from the date of the instrument under which he claimed. The possession of Carrillo and his successors, after the conveyance to him in 1881, was not maintained for ten years, and therefore the claim of the plaintiff in error must fail.

Judgment affirmed.

CITY OF MINNEAPOLIS *v.* MINNEAPOLIS STREET RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 46. Argued December 2, 3, 1909.—Decided January 3, 1910.

This court will consider the nature of a corporation organized under a state law only so far as may be necessary to determine Federal rights.

Franchises to public service corporations will not be extended by implication, but whatever is plainly and legally granted is protected by the contract clause of the Constitution.

Where the corporate existence has been recognized after the expiration of the shorter period and the State has not moved in *quo warranto*, a franchise legally granted by municipal ordinance and legislative enactment for the life of the charter of a public service corporation cannot be impaired during the term specified in the charter filed before the grant was made, although such term be longer than that allowed by the act under which the corporation was organized.

A franchise contract may extend beyond the life of the corporation to which it is granted; at the end of the corporate life it is a divisible asset.

An ordinance enacted before electricity was used as motive power prohibiting any power that would be a public nuisance will not be construed as excluding electricity; and a public service corporation accepting an ordinance permitting change from horse to electric power does not abandon its rights under the original ordinance so that they are no longer protected by the contract clause of the Constitution.

Where all that is necessary is to determine whether a right under a state charter is now in existence, the decree should be confined thereto, and should not attempt to determine the further duration of the charter under state statutes.

Waiver to a reasonable extent of certain privileges under a franchise does not withdraw the other privileges from the protection of the contract clause of the Constitution.

The ordinance granted by the city of Minneapolis, in 1875, to the Minneapolis Street Railway for the life of its charter continues for fifty years from 1873, when the corporation was organized, and the fare cannot be reduced during that period below five cents; and the ordinance of 1907, directing the sale of six tickets for twenty-five cents is void under the contract clause of the Constitution.

THE facts, which involve the franchise of the Minneapolis Street Railway Company and whether the obligation of its contract was impaired by a subsequent ordinance, requiring it to sell six tickets for twenty-five cents, are stated in the opinion.

Mr. William A. Lancaster, with whom *Mr. Frank Healy* and *Mr. John F. McGee* were on the brief, for appellants:

The corporation was organized in 1873 under Title II and not Title I of Ch. 34, Minn. Revision of 1866, as amended in 1868 and 1873; the life of the charter was necessarily limited to thirty years, and contract rights, if any existed, terminated in 1903, as they were limited to the term of the charter. In fact, the provisions of Title I repel the idea that § 1 was intended to authorize the formation of street railway corporations.

The word "railroad" or "railway" as used in Title I includes only commercial steam railroads and does not include street railways which fall under the head of transportation as used in Title II. *Manhattan Trust Co.* v. *Sioux City Cable Ry.*, 68 Fed. Rep. 82; *Williams* v. *Railway Co.*, 41 Fed. Rep.

556; Chap. 5, McClain's Iowa Code; *Sears* v. *Marshalltown St. Ry. Co.*, 65 Iowa, 742; *Fidelity Trust Co.* v. *Douglass*, 73 N. W. Rep. 1039; *Mass. Trust Co.* v. *Hamilton*, 88 Fed. Rep. 588; Sutherland on Stat. Con., § 241; *Freiday* v. *Sioux City Co.*, 60 N. W. Rep. 656; *Thompson* v. *Simon*, 20 Oregon, 60.

A general term will be given a restricted construction when other provisions in the same section point unmistakably thereto. *Dieler* v. *Estill*, 22 S. E. Rep. 622; *Railway Co.* v. *Cedar Rapids*, 76 N. W. Rep. 728; *Trust Co.* v. *Warren*, 121 Fed. Rep. 323.

The ordinances of 1875, and 1878, as ratified by the legislature in March, 1879, do not constitute a contract for the life of the charter that the street railway company can always charge five cents whether operated as a horse or an electric road. That right only extended so long as it was operated as a horse railroad. *Omaha Horse Ry.* v. *Cable Co.*, 30 Fed. Rep. 324. Grants of this nature are construed strictly for the public interests. *Perrine* v. *Canal Co.*, 9 How. 172; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 422; *Bridge Proprietors* v. *Hoboken*, 1 Wall. 116; *Indianapolis Cable Ry.* v. *Citizens' Ry.*, 127 Indiana, 369; *Railway* v. *Denver City Ry.*, 2 Colorado, 673; *Third Ave. Ry.* v. *Newton*, 1 N. Y. Supp. 197; *North Chicago Ry.* v. *Lakeview*, 105 Illinois, 207; *Stein* v. *Bienville Water Co.*, 34 Fed. Rep. 145; affirmed, 141 U. S. 67; *Gas Light Co.* v. *Saginaw*, 28 Fed. Rep. 529; *Water Co.* v. *Knoxville*, 189 U. S. 434; *Slidell* v. *Grandjean*, 111 U. S. 412; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550; *Stanislaus County* v. *Irrigation Co.*, 192 U. S. 201; *Owensboro* v. *Waterworks Co.*, 191 U. S. 358; *Telephone Co.* v. *Los Angeles*, 211 U. S. 265; *Gaslight Co.* v. *Chicago*, 194 U. S. 1; *Minn. & St. L. Ry.* v. *Gardner*, 177 U. S. 332; *Turnpike Co.* v. *Sandford*, 164 U. S. 578; *Teachout* v. *Street Railway Co.*, 38 N. W. Rep. 145. These cases hold that a horse street railway and an electric street railway are separate and distinct; that there was reserved to the city full power to grant to any other corporation the right to build and operate an electric road; and that as the ordinance

of 1907 related to an electric road it does not impair the contract, if any, with the company operating a horse railroad.

The right to make such ordinance was under the general reserved power of the city and State, and all such grants are to be construed liberally for the public under the reserved powers. *Water Co.* v. *Freeport*, 180 U. S. 587. Corporations accept such grants subject to all reservations. *Telephone Co.* v. *Richmond*, 98 Fed. Rep. 671; *S. C.*, 103 Fed. Rep. 31; *Detroit* v. *Railway Co.*, 185 U. S. 388; *Fath* v. *Tower Grove Ry.*, 16 S. W. Rep. 913; *General Ry. Co.* v. *Chicago*, 52 N. E. Rep. 880; *Blair* v. *Chicago*, 201 U. S. 487; *Jackson Ry. Co.* v. *Interstate Ry. Co.*, 24 Fed. Rep. 306; *Commonwealth* v. *Railway*, 27 Pa. St. 339. And see 21 Pa. St. 22; *Farrell* v. *Railway Co.*, 61 Connecticut, 127; Endlich on Interpretation, § 354.

Public policy does not permit unnecessary inference of authority to make a contract which affects the continuance of the sovereign power and duty to make such laws as public welfare may require. *Long* v. *Duluth*, 49 Minnesota, 281; *Georgia Banking Co.* v. *Smith*, 128 U. S. 174; *Stone* v. *Trust Co.*, 116 U. S. 307, 326. See also *Fanning* v. *Gregoire*, 16 How. 530; *Gaslight Co.* v. *Middletown*, 59 N. Y. 229; *Minturn* v. *Larue*, 23 How. 435; *Hoffmann* v. *Quincy*, 4 Wall. 435; *Alcott* v. *Supervisors*, 16 Wall. 678; *Water Co.* v. *Syracuse*, 116 N. Y. 167; *Indianapolis Ry. Co.* v. *Street Railway Co.*, 127 Indiana, 369; Elliott on Roads and Streets, 2d ed., § 736; *Electric Ry. Co.* v. *Cleveland*, 204 U. S. 116.

The burden is on appellee to show the existence of the contract.

Mr. M. B. Koon, with whom *Mr. N. M. Thygeson* and *Mr. M. D. Munn* were on the brief, for appellee.

Mr. Justice Day delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the District of Minnesota, enjoining the city

of Minneapolis from enforcing, as against the Minneapolis Street Railway Company, appellee, a certain ordinance of the city of Minneapolis, passed February 9, 1907, prescribing the rate of fare for the transportation of passengers over any street railway line, or lines, of the company in the city of Minneapolis.

The case was tried upon amended bill and answer. The ground alleged for injunction in the amended bill was in substance that the ordinance of February 9, 1907, violated the terms of a previous and subsisting contract, prescribing the rates of fare to be charged by the company in the city of Minneapolis. It appears in the record that the railway company was organized on July 1, 1873, and that its alleged contract arises from an ordinance of the city of Minneapolis passed July 9, 1875, ratified by an act of the legislature of the State of Minnesota passed March 4, 1879. We shall have occasion later on to deal more specifically with this ordinance and ratifying act.

It is sufficient for the present purpose to say that it is the contention of the company that by the ordinance of July 9, 1875, and the ratifying act, it became the owner of an irrepealable contract for the term of fifty years from the date of its organization, by the terms of which it had the right to charge a fare not exceeding five cents for each person carried on any continuous line which might be designated by the city council of the city, such continuous line, however, not to exceed three miles in length. The contract, it is alleged, is violated by the ordinance of February 9, 1907, requiring the sale of six tickets for twenty-five cents.

The existence of the alleged contract is denied by the city upon several grounds. It is urged that the complainant company was so organized that its charter, and consequently its corporate life, expired thirty years after the date of its incorporation, that is, on July 1, 1903, and, therefore, its contract rights, ceased and terminated at that time. This contention is based upon the incorporation of the company, which,

it is insisted, could only be under Title IV of the laws of Minnesota, which includes transportation and other lawful business, and limits corporations organized thereunder to a continuation for not more than thirty years. Bissell's Stats. of Minn. 1873, p. 443.

It is the contention of the company that it was organized under Title I of the laws of Minnesota (Bissell's Stats. 1873, p. 419), for a term of fifty years. Title I is headed "Of corporations empowered to take private property for public uses," and includes corporations "for the purpose of building, improving and operating railways, . . . and all works of internal improvement which require the taking of private property or any easement therein." Pertinent provisions of Title I as to incorporation are given in the margin.[1]

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[1] Title I.

Of corporations empowered to take private property for public uses.

SEC. 1. Any number of persons, not less than five, may associate themselves and become incorporated for the purpose of building, improving, and operating railways, telegraphs, canals, or slackwater navigation, upon any river or lake, and all works of internal improvement which require the taking of private property or any easement therein.

SEC. 2. They shall organize by adopting and signing articles of incorporation, which shall be recorded in the office of the register of deeds of the county where the principal place of business is to be, and also in the office of the Secretary of State in books kept for such purposes.

SEC. 3. . . .

Said articles shall contain:

First. The name of the corporation, the general nature of its business, and the principal place, if any, of transacting the same.

Second. The time of commencement and the period of continuance of said corporation.

Third. The amount of capital stock of said corporation, and how to be paid in.

Fourth. The highest amount of indebtedness or liability to which said corporation shall at any time be subject.

Fifth. The names and places of residence of the persons forming such association for incorporation.

Title II is "Of corporations for pecuniary profit other than those named in Title I." The pertinent parts of that title are given in the margin.[1]

Sixth. The names of the first board of directors, and in what officers or persons the government of the corporation and the management of its affairs shall be vested, and when the same are elected.

Seventh. The number and amount of the shares in the capital stock of said corporation. . . .

SEC. 4. When articles are filed, recorded and published, as aforesaid, the persons named as corporators therein become a body corporate [provisions follow in this section as to management of business, amendment of articles of incorporation, etc.].

SEC. 5. No such corporation shall be formed to continue more than fifty years in the first instance, but it may be renewed from time to time for periods not longer than fifty years: Provided, that three-fourths of the votes cast at any regular election for the purpose are in favor of such renewal, and those desiring a renewal purchase the stock of those opposed thereto at its current value.

[1] Title IV. (This is Title II of Chapter XXXIV of the Statutes of 1866.) Of corporations for pecuniary profit other than those named in Title I.

Sec. 98 (45, as amended by act of March 10, 1873). Any number of persons not less than three, who have or shall, by articles of agreement in writing, associate according to the provisions of this title under any name assumed by them for the purpose of engaging in and carrying on the business of mining, smelting or manufacturing iron, copper, or other minerals, or for producing the precious metals, or for quarrying and marketing any kind of ore, stone, slate or other mineral substance, or for constructing, leasing or operating docks, warehouses, elevators or hotels, or as a mutual savings fund, loan or building association, manufacturing gas, or for any kind of manufacturing, lumbering, agricultural, mechanical, mercantile, chemical, transportation or other lawful business, and who have or shall comply with the provisions of this title, shall, with their associates, successors, and assigns, constitute a body corporate and politic under the name assumed by them in their articles of agreement; *provided*, no company shall take a name previously assumed by any other company. Any mutual saving fund, loan or building association, is authorized to loan funds and to secure such loans by mortgage or other security, and any premiums taken by any such association for the preference or priority of such loans, shall not be deemed interest within the meaning of section one of chapter twenty-three of the general statutes. Any such association is

Much of the elaborate briefs of counsel in this case is devoted to a discussion of the question of the organization of this corporation, and as to whether it was under the one title or the other. This is not a proceeding in *quo warranto*, and the jurisdiction of the Federal court rested upon the contention that the company has a contract right protected from impairment by a legislative act of the State. It is only necessary to examine the question of the incorporation and organization of the company so far as is required to determine whether or not this alleged contract right exists, and whether it has been violated by the ordinance of the city of Minneapolis, attacked in the amended bill.

There can be no question that the attempted incorporation of this company was under Title I of the statutes already referred to. It was incorporated by five persons. It states the business for which it was formed, "to construct and operate

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authorized and empowered to purchase at any sheriff's or other judicial sale, or at any other sale, public or private, any real estate, upon which such association may have or hold any mortgage, judgment, or lien, or other incumbrance, or in which such association may have an interest, and the real estate so purchased, to sell, convey, lease, or mortgage at pleasure, to any person or persons whatsoever.

SEC. 99 (46, as amended by act of February 28, 1870). The provisions of sections two, three, four, seven, eight, nine, ten, eleven, forty-two, and forty-four of title one shall apply to and be observed by corporations organizing under this title.

SEC. 100 (47, as amended by act of February 27, 1873). The amount of capital stock in any such corporation shall in no case be less than ten thousand dollars nor more than five hundred thousand dollars, and shall be divided into shares of not less than ten dollars nor more than fifty dollars each, except that the capital stock of mutual building and loan associations may be divided into shares of two hundred dollars each, but the capital stock and number of shares may be increased at any regular meeting of the stockholders; provided, the capital stock when so increased shall not exceed five hundred thousand dollars.

* * * * * * * *

SEC. 105 (52). No corporation shall be formed under this title to continue more than thirty years.

railways in the streets and highways of the city of Minneapolis and its suburbs in the county of Hennepin, State of Minnesota." It states the time of the commencement of the corporation to be the first of July, 1873, and the period of continuance thereof to be fifty years thereafter. The shares of capital stock are twenty-five hundred at $100 each.

Under Title II the corporate life is limited to not more than thirty years, and the shares of capital stock are to be not less than $10 or more than $50 each.

The corporation has continued to act since the expiration of the thirty years which would have been its corporate life had it been organized under Title II. There have been no proceedings, so far as the record shows, to inquire into its corporate existence since the expiration of the thirty years, and this record discloses that a number of ordinances have been passed by the city of Minneapolis since July 1, 1903, requiring of the corporation the construction of additional lines of railway upon certain of the streets of the city of Minneapolis, and to otherwise discharge its duties as a continuing corporation.

This record therefore shows that the company undertook to organize under Title I, for the period of fifty years, has continued to act as such corporation, and was so acting at the time of the passage of the ordinance of February 9, 1907.

We proceed to examine the question, Did the ordinance of July 9, 1875, together with the ratifying act of 1879, make a contract between the city of Minneapolis and the street railway company, which would endure for the period of fifty years? Section I of the ordinance of July 9, 1875, provides:

"SEC. I. That the Minneapolis Street Railway Company be and is hereby granted, during the term of its charter, the exclusive right and privilege of constructing and operating a single or double track for a passenger railway line, with all necessary tracks for turnouts, sidetracks and switches, in such streets of said city as the city council may deem suited to street railways, subject to the terms, conditions and forfeitures hereinafter contained; provided, that the city council reserves the

right to limit the said company to the construction of a single track upon such street or streets as it may deem proper.

Section VIII of the same ordinance provides:

"SEC. VIII. The said company may regulate and establish from time to time such rates of fare for the transportation of passengers and freight over its lines of railway as it may deem proper; provided, that the charge for carrying a person, including hand baggage, from one point to another within the city limits, whether by one or more lines operated by the same company shall not exceed five cents on any one line; provided, further, that the city of Minneapolis hereby reserves the right to alter and regulate the rate to be charged by the said companies, their successors and assigns, for the transportation of passengers and freight at the expiration of five years from the approval of this ordinance, and every five years thereafter, fixing the same at such rates as the city council of said city may deem just and reasonable; provided, that the city shall not reduce the passenger's fare below five cents, over any one continuous line, and what shall be considered a continuous line may be designated by the city council of the said city, but that said council shall not designate any such continuous line to be more than three miles in length."

Section XVII of the ordinance provides:

"SEC. XVII. Within thirty days from the publication of this ordinance said company shall file with the city clerk a written acceptance of the grants hereinabove made, with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company, and when so accepted this ordinance shall operate as a contract between the city and said company, and upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges or franchises whatsoever."

It also appears that the company filed its acceptance in writing of the ordinance on August 18, 1875.

In considering the terms of this ordinance and what it undertook to accomplish on its face, we are to bear in mind that public grants of this character are not to be extended by implication, and that all that is granted must be found in the plain terms of the act. This principle has been so frequently and recently announced in this court that it is unnecessary to cite the cases which have established it. Recognizing this principle, it must also be remembered, that grants of the character of the one under consideration here, when embodying the terms of a contract, are protected by the Federal Constitution from impairment by subsequent state legislation, and notwithstanding the principle of strict construction, whatever is plainly granted cannot be taken from the parties entitled thereto by such legislative enactments. Statutes and ordinances of this character are not to be extended by construction, nor should they be deprived of their meaning, if it is plainly and clearly expressed.

Examining this ordinance in the light of these principles, there is no ambiguity in section VIII, which gives to the city the right to regulate the fares to be charged, provided the same are not reduced below five cents for each passenger over any one continuous line, to be designated by the city, of not more than three miles in length. By § I of the same ordinance the right and privilege of constructing and operating a railway line subject to the terms, conditions and forfeitures named in the ordinance is granted to the street railway company "during the term of its charter."

What did this mean? The company had undertaken to organize, and filed its certificate of incorporation—which is its charter under the laws of Minnesota—and had therein stated its term of existence to be for fifty years from the first day of July, 1873. There was a positive requirement of the law that this period of duration should be stated in the certificate filed for the purpose of procuring incorporation, and it was there found, and was duly filed, recorded and published as required by law.

It is unreasonable to suppose that the city and the company at that time entered into any inquiry or controversy as to whether the company could lawfully incorporate for more than thirty years. The charter referred to in the ordinance could not have been anything else than the certificate of incorporation required by law. Of this the city was bound to take notice, and when it granted the privileges "during the term of the charter," it could have meant nothing less than during the period named in the charter. As was declared by the Supreme Court of Minnesota in *City of Duluth* v. *Duluth Gas and Water Company*, 45 Minnesota, 210, 214, a case involving the extent of rights conferred upon a water company by a city ordinance, "The council must be held, when dealing with defendant, to know its character, its purposes, and powers, as disclosed by its articles of incorporation."

We come now to the terms of the ratifying act of March 4, 1879. Laws of Minn., 1879, p. 410, c. 299. This act is as follows:

"An act to confirm the grant of the city of Minneapolis to the Minneapolis Street Railway Company.

"Be it enacted by the Legislature of the State of Minnesota:

"SEC. I. That whereas, the city of Minneapolis did, by an ordinance entitled 'An ordinance authorizing and regulating street railways in the city of Minneapolis,' passed by the city council of said city on the ninth (9th) day of July, one thousand eight hundred and seventy-five (1875), and approved by the mayor of said city on the seventeenth (17th) day of July, one thousand eight hundred and seventy-five (1875), and by an ordinance passed July third (3d), one thousand eight hundred and seventy-eight (1878), and amended July eighth (8th), one thousand eight hundred and seventy-eight (1878), and approved July tenth (10th), one thousand eight hundred and seventy-eight (1878), grant to the Minneapolis Street Railway Company the right to construct and maintain a street railway through the streets of

said city, with certain rights and privileges in said ordinance particularly set forth. Now the said right to construct and maintain said street railway through the streets of said city, with the rights and privileges as set forth and qualified in said ordinance, is hereby legalized and granted to said company.

"SEC. 2. This act shall take effect and be in force from and after its passage."

The ordinances of July, 1878, referred to in the ratifying act, concerned certain streets in the city of Minneapolis, and are not important to be considered in this connection.

It has not been suggested in the elaborate briefs presented by the learned counsel for the city, that the state legislature at that time had not the constitutional right to pass this ratifying act.

In *Green* v. *Knife Falls Boom Corporation*, 35 Minnesota, 155, the Supreme Court of Minnesota sustained a special law conferring new, and independent franchises, and enlarged powers upon the boom company, a corporation organized under Title II, and, originally not having the power of eminent domain, nor to take tolls, nor to obstruct the navigable portions of the St. Louis River.

By the special act the corporation was given power over the navigation and use of the river as respects the passage of logs, the power to exercise the right of eminent domain was conferred upon it, the right to charge toll upon all logs passed through their works, and to receive and take entire charge and control of timber which might run or be driven through the same, and to boom, scale and deliver such timber, as provided in the act, with a lien upon all such logs, which might be enforced by sale.

It was held that, by a long course of legislation and practical construction, such legislation was justified and ought not to be disturbed. The constitutional amendment of 1881, it was said, made such legislation impossible thereafter, because the legislature is therein prohibited from enacting any special,

or private laws, in the following cases: ". . . For granting corporate powers, or privileges, except to cities." In this case the court referred to *Ames* v. *Lake Superior & Miss. R. R. Co.*, 21 Minnesota, 241, in which it seems to be held that under the former constitution, prohibiting the formation of corporations, except for municipal purposes, under special acts, such special acts stopping short of creating new corporations, might be passed by the legislature. See opinion upon rehearing, pages 284, 285.

Looking to the terms of the act of March 4, 1879, we find that the right to construct and maintain the street railway upon the streets of the city, with the rights and privileges as set forth and qualified in the ordinance, is "legalized and granted to said company." Language could scarcely be plainer, and, if we are correct in construing the ordinance, as granting the right and privilege of maintaining railways in the streets of Minneapolis, for the charter term of fifty years, upon the terms therein mentioned, a vital part of which concerns the right of the company to charge a certain fare for passengers carried, it follows that this privilege, with the others, was vested in the company by the legislature of the State of Minnesota.

We may note in this connection that the mere fact that a contract may extend beyond the term of the life of a corporation does not destroy it. This principle was recognized by this court in *Detroit* v. *Detroit Citizens' Street Railway Co.*, 184 U. S. 368, in which it was held that a city ordinance granting the use of the streets of the city for a term which would extend the grant for sixteen years beyond the life of the corporation did not invalidate it. It was held that the limitation upon the corporate life of the company did not prevent it from taking franchises, or other property, the title to which would not expire with the corporation itself; and further, that at the end of its corporate life, if such property were still in existence, it would be an asset divisible among the shareholders after the payment of debts, or it might, if

assignable, be transferred to any other person, or company, competent to hold it.

The ratifying act, being within the power of the legislature, vested this contract right in the company, notwithstanding the want of power in the city to make it at the time it was entered into. *Nash* v. *Lowry*, 37 Minnesota, 261.

The principle is well stated by Morawetz in his work on Corporations, vol. 1, § 319, 2d ed.:

"Where the legislature, by statute, recognizes and acquiesces in the existence of a corporation which was formed by the corporators without the proper authority, it thereby invests the association with the right of continuing to act in a corporate capacity for the purposes and in the manner that it publicly assumed to act. And if rights or franchises are conferred upon an association claiming to be incorporated, it thereby becomes authorized to exercise the powers expressly conferred, and such others as the legislature appears to have imputed to it."

See as to effect of validating acts, *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558; *Blair* v. *Chicago*, 201 U. S. 400, 454.

But, it is contended, if a contract is found to exist, its rights were lost by virtue of the ordinance of September 19, 1890, authorizing the street railway company to change its mode of operation from the use of horse power to electricity. It is insisted that by the acceptance of the electrical power ordinance the company abandoned any rights it had under the ordinance of 1875 and the ratifying act of 1879; and, furthermore, that by the express terms of the ordinance of September 19, 1890, the right to control the future rates of fare was thereby vested in the city to an extent unlimited, except by constitutional inhibitions against confiscatory legislation.

As to the termination of the rights of the company by reason of the substitution of electricity for horse power, is there such abandonment of the rights originally secured that they no longer exist? It is contended that the original ordinance

was limited to the right to operate street railways by horse or pneumatic power, and that when the ordinance of September 20, 1890, was passed conditions were entirely changed, and a new and different mode of operation was substituted, and rights existing under the original ordinance were terminated and abandoned.

Let us see if the ordinance of 1875 was limited to the use of animal or pneumatic power. Section IV of that ordinance provides:

"SEC. IV. The cars to be used upon such tracks shall be propelled with either animal or pneumatic power, as the said company deem advisable, provided that no propelling power or machinery of any sort shall be used after it shall prove to be a public nuisance, and said company may connect with any other railway upon which power is used similar to that authorized to be used on street railways by the city council; but no locomotive, freight or passenger car, such as are usually run over the general railways of this State for the transportation of freight and passengers, shall be used upon any of said tracks, unless authorized by the city council; provided, that the said Minneapolis Street Railway Company, and any other street railway company which the council may charter under section 3 of this ordinance, shall each allow the other to connect with and jointly use such portions of the track belonging to each as the convenience of the traveling public may require, upon such equitable terms as may be agreed upon by the said companies, or as may be determined by the District Court of Hennepin County."

There can be no doubt that, in the then state of the art, the use of electric power as the means of operating the cars of the company was not specifically in contemplation. While pneumatic power is also suggested, there does not seem to be any means of operation by that method. That the use of other motive power might be developed in the progress of street railway operation, we think, was clearly indicated in the ordinance itself. For while animal or pneumatic power is

named, it is provided that no propelling power shall be used after it shall be proved a public nuisance, and that the company might connect with other street railroads upon which power is used similar to that authorized to be used by street railways by the city council, but steam power cars, such as are in common use, should not be used upon the city tracks, unless so authorized by the city council.

In these terms of the ordinance it is evident that the parties had in mind that other propelling power might be developed, and it was the purpose of the city council to keep control of its use so as to prevent it from becoming a public nuisance in the streets. There was no positive limitation to animal power and the possible progress and improvement in the means of propelling cars, contemplated by the parties, was carried into effect when the city passed, and the company accepted, the ordinance of September 19, 1890. By that ordinance the railway company was authorized to operate all its existing lines, and all its lines to be thereafter constructed in the city, by electricity as the motive power.

Section VIII of that ordinance provides:

"SEC. VIII. In the construction, maintenance and operation of said lines of street railway, said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance entitled 'An ordinance authorizing and regulating street railways in the city of Minneapolis,' passed July 9, 1875, and approved July 17, 1875, as the same has been amended and is now in force, and all other ordinances of said city now in force or hereafter adopted, so far as applicable."

It is the contention of the city that by the terms of this ordinance the street railway company became subject to regulation by the ordinances of the city then in force, or thereafter adopted, including the right to regulate and control the amount to be charged for fares for the transportation of passengers.

In construing this section we must bear in mind that the company then had, as we have heretofore said, a contract upon the subject of fares, which limited the city in its right to regulate the same to a reduction not below five cents per passenger upon any one, continuous line. It needs no argument to demonstrate that the right to charge passenger fares is of the very essence of the contract, essential to the operation and success of the enterprise. *Detroit* v. *Detroit Citizens' Street Railway Co.*, 184 U. S. 368, 384.

In section VI of the ordinance of September 19, 1890, it is provided:

"SEC. VI. Passenger cars on all said lines shall run between extreme limits on all extensions to or near the intersection of Washington avenue with Hennepin avenue, without change to passengers traveling thereon, and after November 1, 1890, said street railway company shall issue transfer checks at the junction of said lines at Washington and Hennepin avenues, to any passenger on any of said lines, who shall pay one full fare, which transfer check shall entitle passenger so receiving the same to a continuous passage on either of said connecting lines; provided, that no passenger shall be entitled to more than one transfer check for one fare; and provided further, that said transfer check shall be used only by the person receiving the same for a continuous passage, and shall be used on the next car departing on the connecting line upon which it is to be used. And, if any of the lines of said railway do not connect at said Washington and Hennepin avenues, transfer checks shall be given at the point nearest to the crossing of Washington and Hennepin avenues, where such lines do connect with a line reaching said junction point at Washington and Hennepin avenues."

This is the only section which mentions the subject of fares, and it is therein provided that transfer checks may be issued at certain points to persons paying "one full fare," the transfer check to be used only by the person receiving the same, for one continuous passage.

The rate of fare had been fixed in the ordinance of July 9, 1875, and if it was intended to change it it would seem clear that the parties would have entered into new negotiations concerning it, and would have adopted, if that was desirable, some definite measure concerning it. The ordinance of July 9, 1875, was not attempted to be repealed, and is referred to in section VIII of the ordinance of September 19, 1890, "as the same as has been amended, and as now in force," and adopted, "so far as applicable," concerning the things mentioned in section VIII.

It is true that by the ordinance of July 9, 1875, there was no right to reduce the passenger fare below five cents over any one continuous line not more than three miles in length, to be designated by the city council. By the terms of the ordinance of September 19, 1890, transfers were to be allowed, so that, for one full fare, a passenger might receive a continuous trip very considerably exceeding three miles in length —it is stated in one of the briefs to include a trip of eleven miles. But we do not understand that the acceptance of this regulation had the effect to abrogate the contract as to the right to charge a fare of five cents over one continuous line, that is, for one continuous passage. Acquiescence in a regulation which may not have been deemed injurious, and may have been deemed wise and expedient, does not preclude a contest against the enforcement of regulations which are injurious and violative of contract rights. *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558, 579.

The right to future control under section VIII was to include the "construction, maintenance, and operation" of the lines of the street railway company. Did this undertaking have the effect to abrogate the contract right already existing, and to subject the company for the future as to the right to charge fares, to the discretion of the city council? Or, do the terms "construction, maintenance, and operation" have reference to the manner of carrying on the business of the road, the laying of its tracks, the use of the streets, the keeping up of

the equipment, the safety of the passengers and the public, and similar matters not involving the right to charge fares? We think these terms refer to the latter class of rights and privileges. Such is the import of the words used, and the subject of rates of fare is not mentioned. The case already referred to, *Detroit* v. *Detroit Citizens' Rwy. Co.*, 184 U. S. 368, is an instructive one upon this point. In that case it was held that a street railway company having a valid contract, giving it the right to charge five cents for the transportation of each passenger, did not lose that right by accepting the terms of an ordinance reserving the right to make such further rules, orders and regulations as to the city council may seem proper. *Wilson* v. *Standefer*, 184 U. S. 399.

We therefore reach the conclusion that when the ordinance complained of, that of February 9, 1907, was enacted by the city council, the company was the owner of a valuable contract right secured to it by the ordinance of July, 1875, ratified by the enactment of the legislature of the State of Minnesota on March 4, 1879, which secured to the company for fifty years from July 1, 1873, the contract right to charge five cents per passenger for one continuous trip. We think that the requirement of the ordinance, that the company should operate its roads by the sale of tickets six for a quarter, as required by the ordinance of February 9, 1907, was an enactment by legislative authority which impaired the obligation of the contract thus held and owned by the complainant company. We therefore reach the conclusion that the decree of the Circuit Court enjoining the execution of the ordinance, for the reasons stated, should be affirmed.

An examination of the decree, however, shows that it goes beyond the necessities of the case in specifically decreeing that the complainant company is a corporation organized under Title I of chapter 34 of the Statutes of Minnesota for the year 1866, with charter rights as alleged in the amended bill. It also decrees that the contract under the ordinances of July 9, 1875, and July 18, 1878, as ratified by the act of

March 4, 1879, constituted a contract for and during the term of complainant's charter, as alleged in the amended bill. In the amended bill it is alleged that the charter rights of the company were extended to March 1, 1937; this is undoubtedly averred because of the amendment to the charter which appears in the record, extending the term of the company's corporate life until that time. The decree as it stands might be construed as establishing a contract to endure until March, 1937.

All that was necessary to adjudge was that the company, by virtue of the ordinance of July 9, 1875, as amended in July, 1878, as ratified and confirmed by the act of the legislature of the State of Minnesota of March 4, 1879, constituted a valid contract for the term of fifty years from July 1, 1873, which is still so far in force as to prevent the city council from reducing the rate of fare below the sum of five cents for each passenger for one continuous passage, and enjoining the city from publishing and enforcing the ordinance of February 9, 1907, because the same impaired the obligation of the subsisting contract aforesaid.

The decree of the Circuit Court should be modified so as to meet these requirements, and, so modified,

Affirmed.

MECHANICAL APPLIANCE COMPANY *v.* CASTLEMAN.

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

No. 48. Argued December 3, 1909.—Decided January 3, 1910.

Whether defendant was subject to service of process at the place where served is one of the jurisdictional questions which may be brought directly to this court under § 5 of the Court of Appeals Act as amended January 20, 1897, c. 68, 29 Stat. 492. *Remington* v. *Central Pacific Railroad Co.*, 198 U. S. 95.

After removal from the state to the Federal court, the moving party has a right to the opinion of the Federal court not only on the merits, but also as to the validity of the service of process.

In Federal jurisdiction a foreign corporation can be served with process under a state statute only when it is doing business therein, and such service must be upon an agent representing the corporation in its business. *Goldey* v. *Morning News Co.*, 156 U. S. 518.

Notwithstanding the conformity act, § 914, Rev. Stat., decisions and statutes of States are not conclusive upon the Federal courts in determining questions of jurisdiction.

Even if by the law of the State the sheriff's return is conclusive and cannot be attacked, after removal into the Federal court, that court can determine whether a defendant was properly served; and if, as in this case, it appears that the corporation was not doing business in the State, the court should dismiss the bill for want of jurisdiction by proper service.

In such case, and on such a question, it is proper for the court to consider affidavits, it not appearing in the record that any objection was taken thereto.

THE facts, which involve the jurisdiction of the Circuit Court, are stated in the opinion.

Mr. Lee W. Grant, with whom *Mr. P. B. Kennedy* was on the brief, for plaintiff in error.

Mr. Benjamin T. Castleman, defendant in error, *pro se*.

MR. JUSTICE DAY delivered the opinion of the court.

This case comes here under § 5 of the Court of Appeals Act, as amended January 20, 1897, 29 Stat. 492, c. 68, upon a certificate from the Circuit Court of the United States for the Eastern District of Missouri, presenting a question of the jurisdiction of that court to entertain a suit brought by Benjamin T. Castleman, defendant in error, against the Mechanical Appliance Company, plaintiff in error, to recover for the breach of a certain alleged contract concerning the making and delivery of massage motors.

The action was originally brought in the Circuit Court of the city of St. Louis, in the State of Missouri, and the Mechan-

ical Appliance Company, a foreign corporation, then defendant, removed the case to the Circuit Court of the United States for the Eastern District of Missouri upon the ground of diverse citizenship. After the case reached the United States Circuit Court the bill of exceptions shows that a motion to quash the summons and certain affidavits were withdrawn, and a plea to the jurisdiction was filed.

The original service of summons in the state court had been made by the sheriff, who returned the summons as follows:

"Served this writ at the city of St. Louis, Missouri, on the within named defendant the Mechanical Appliance Company (a corporation) this 29th day of December, 1906, by delivering a copy of the writ and petition furnished by the clerk to Dudley Shaw, agent of the said defendant corporation, he being in said defendant's usual business office and in charge thereof. The president or other chief officer of said defendant could not be found in the city of St. Louis at the time of service."

In the plea to the jurisdiction, in the Circuit Court of the United States, the plaintiff in error set up:

"1. That it is a corporation, organized under the laws of the State of Wisconsin, that it has never taken out a license to do business in the State of Missouri, and that at the time of the alleged service of the writ of summons herein as set out in the return of the sheriff, to wit, 29th day of December, 1906, the defendant did not have any agent, office or place of business in the city of St. Louis or in the State of Missouri.

"2. That the person upon whom service was attempted to be had by the sheriff, and to whom a copy of the summons and petition was delivered, to wit, Dudley Shaw, was not and had not been for some time prior thereto an officer, agent or employé of this defendant. That said Dudley Shaw was not, at the time of the delivery of the summons herein to him by the sheriff, in charge of defendant's usual business office, or in defendant's usual business office in the city of St. Louis, for the reason that this defendant had, at said time, no busi-

ness office nor any other office in the city of St. Louis, State of Missouri."

Certain affidavits are set out in the bill of exceptions, and it is therein stated that they were filed. Two affidavits appear to have been filed in support of the plea to the jurisdiction, and one, by the plaintiff, in opposition thereto. In the certificate the learned Circuit Judge states:

"I hereby certify that in this cause the following question of jurisdiction arose: the defendant filed a plea to the jurisdiction of the court on the ground that it was a corporation organized under the laws of the State of Wisconsin, that it has no office, place of business, or agent in, and was not doing business in the State of Missouri at the time of the service of summons herein and that the person served with the process herein was not the agent of the defendant at the time of said service. Defendant filed affidavit in support of the plea. I overruled the plea on the ground that the facts stated in the return of the sheriff to the summons were conclusive on the defendant and could not be controverted by it. When the cause was called for trial the same objection was made by the defendant and overruled for the same reason. The question only of jurisdiction of the court is, therefore, hereby certified to the Supreme Court of the United States for its decision thereon."

It is settled that a question of this character involves the jurisdiction of the Circuit Court as a Federal court and may be brought here by writ of error under § 5 of the Court of Appeals Act of 1891 as amended in 1897. *Remington* v. *Central Pacific Railroad Company,* 198 U. S. 95.

It is contended by the defendant in error that the plea to the jurisdiction did not definitely state that the corporation defendant was not doing business in the State of Missouri at the time of the attempted service; and, furthermore, that the affidavits were not shown to have been offered in evidence, although the bill of exceptions states that the same were filed. The certificate of the judge, which is required by statute in

order to bring the case to this court, states that the defendant raised, by plea to the jurisdiction, the grounds of objection that it was a foreign corporation, having no office, place of business or agent in and was not doing business in the State of Missouri at the time of the service of summons, and that the person served with the process was not the agent of the defendant at the time of said service.

The certificate shows that the court did not consider the affidavits, and overruled the plea on the sole ground that the facts stated in the return of the sheriff to the summons were conclusive, and could not be controverted by the defendant. It is also stated in the certificate that when the case was called for trial the same objection was made and overruled for the same reason. In the light of this certificate and the statements of the bill of exceptions we think it must be regarded that the question was fairly before the court, notwithstanding the somewhat meagre allegations of the plea in this respect, and presented the question, which it is certified was decided, upon plea and objections attacking the jurisdiction of the court, because the corporation was not doing business in the State of Missouri, and the person attempted to be served was not its agent at that time.

In a memorandum opinion it is indicated that the learned judge, in the court below, followed a previous ruling in the same court; and it is stated that it is the law of Missouri, as held by its highest court, that in a case of this kind a return of this character is conclusive upon the parties. But it is well settled that, after removal from the state to the Federal court, the moving party has a right to the opinion of the Federal court, not only upon the question of the merits of the case, but as to the validity of the service of process. *Wabash Western Ry. Co.* v. *Brow*, 164 U. S. 271, 278.

It is equally well settled in the Federal jurisdiction that a foreign corporation can be served with process within the State only when it is doing business therein, and that such service must be upon an agent who represents the corporation

in its business. This subject underwent extensive consideration in the case of *Goldey* v. *The Morning News*, 156 U. S. 518, and the rule is there stated by Mr. Justice Gray, speaking for the court, as follows (p. 522):

" . . . service of mesne process from a court of a State, not made upon the defendant or his authorized agent within the State, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the Circuit Court of the United States after the removal of the case into that court, pursuant to the acts of Congress, unless the defendant can be held, by virtue of a general appearance or otherwise, to have waived the defect in the service, and to have submitted himself to the jurisdiction of the court."

In view of the principles thus determined, we think the return of the sheriff in the state court was not conclusive upon the question of service. For when the question was raised in the Circuit Court of the United States the jurisdiction of the court would fail if it appeared that the corporation attempted to be served was not doing business in the State of Missouri, and the attempted service was not upon one of its agents. *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406; *St. Clair* v. *Cox*, 106 U. S. 350; *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364; *Green* v. *C., B. & Q. Railway Co.*, 205 U. S. 530.

Defendant in error cites the case of *Smoot* v. *Judd*, 184 Missouri, 508, in which it was held that where a sheriff's return recited a personal service of process which was false, the remedy of the unserved defendant against whom judgment by default had been taken, in the absence of fraud on the part of the plaintiff in the suit, was in an action on the sheriff's bond for damages for the false return, and not by a suit to set aside the sheriff's sale and deed made in pursuance of the default judgment. It is to be noted, in this connection, that the attack upon the service in that case was made after judgment, and not, as in the present case, by a motion to set aside the

service of summons, or a plea to the jurisdiction over the person. Moreover, in cases which concern the jurisdiction of the Federal courts, notwithstanding the so-called conformity act, Revised Stats., § 914, neither the statutes of the State nor the decisions of its courts are conclusive upon the Federal courts. The ultimate determination of such questions of jurisdiction is for this court alone. *Western Loan & Savings Co.* v. *Butte & Boston Consolidated Mining Co.*, 210 U. S. 368, 369; *Mexican Central Railway Co.* v. *Pinkney*, 149 U. S. 194.

Defendant in error also relies upon the cases of *Walker* v. *Robbins*, 14 How. 584, and *Knox County* v. *Harshman*, 133 U. S. 152. Neither of these cases control the one under consideration. In *Walker* v. *Robbins*, *supra*, a bill in equity was filed to enjoin enforcement of a judgment at law, entered upon a false return of a marshal in the Circuit Court of the Mississippi District. This court held that a bill in equity would not lie for such purpose, and further, that the return was not false, and if it were, the defendant Walker waived the want of service by pleading to the merits of the action. It was there said by Mr. Justice Catron, delivering the opinion of the court (p. 585): "In cases of false returns affecting the defendant, where the plaintiff at law is not in fault, redress can only be had in the court of law where the record was made, and if relief cannot be had there, the party injured must seek his remedy against the marshal."

The case was decided upon the grounds which we have stated, and the language quoted, and relied upon by the defendant in error is very far from indicating that a party might not appear specially and object to service of summons, and move to set aside the same, and to dismiss the action upon the grounds which are involved in the case at bar.

In *Knox County* v. *Harshman* a bill in equity was filed for an injunction against the prosecution of a writ of mandamus to enforce the levy of a certain tax against the county. The bill alleged that neither the county court nor any of the judges thereof had any notice of the suit until after the end of the

term at which judgment was rendered, and that no service of summons was made upon Frank P. Hall, the county clerk, as was stated in the marshal's return. This court, in an opinion by Mr. Justice Gray, held that a court of equity would not interfere with the judgment, under the circumstances shown, and as to the officer's return of service of copy of the summons on the clerk, if false, no fraud having been charged or proved against the petitioner, redress must be sought in an action at law, and not by a bill in equity; and that if the questions of fact could be considered as open in the case, the proof at the hearing showed that service had, in fact, been made.

Neither of these cases involved the right of the defendant to appear upon attempted service in an action at law, and by motion, or plea for that purpose, raise the question of jurisdiction over his person. The case of *Wabash Western Railway Co.* v. *Brow*, 164 U. S. 271, is much closer in its analogy to the case at bar. In that case suit was commenced in the state court, in Michigan, against the Wabash Western Railway Company to recover in an action for damages. The service of summons and copy of the declaration was made upon one Hill as agent of the company. The case was removed to the Federal court for the Eastern District of Michigan. The railroad company thereupon appeared and moved to set aside the declaration and rule to plead, upon the ground of want of jurisdiction, and filed an affidavit showing that Hill, upon whom the service had been attempted, was the freight agent of the Wabash Railroad Company, a corporation which owned and operated a railroad from Detroit to the Michigan state line, and was not an agent of the Wabash Western Railway Company, the defendant in the suit; and, at the time of the attempted service, the defendant did not own, operate and control any railroad in the State of Michigan, had no place of business therein, and was not doing business within the State. The action was overruled by the Circuit Court, the objection to the jurisdiction was renewed when the defendant filed its

plea and before trial in the case, which resulted in a verdict and judgment in favor of Brow.

The Court of Appeals for the Sixth Circuit held that the filing of the petition for removal, in general terms, had effected the appearance of the Wabash Western Railway Company to the action. This court, in an opinion by Mr. Chief Justice Fuller, held that the record disclosed that the corporation at the time of the attempted service was neither incorporated nor doing business, nor had any agent nor property within the State of Michigan, and that the individual upon whom service had been attempted was not the agent or an officer of the corporation, and, therefore, no jurisdiction was acquired over the person of the defendant by the attempted service; and, further, that the petition for removal did not effect an appearance in the case, consequently reversing the judgment of the Circuit Court of Appeals and remanding the case to the Circuit Court, with directions to grant a new trial, and to sustain the motion to set aside the service and dismiss the action.

The Circuit Court should have considered the question upon the issues of fact raised, as to the presence of the corporation in Missouri and the authority of the agent upon whom service had been attempted. It is true, as suggested by the defendant in error, that the affidavits appearing in the bill of exceptions are stated to have been filed, and there is no definite statement that they were offered to be read in evidence, but we think it is apparent that they were filed for that purpose. No objection appears in the record to the filing of the affidavits; on the other hand, it appears that the plaintiff below also filed an affidavit. These affidavits are made part of the record by a bill of exceptions and we think they should have been considered upon the question of jurisdiction.

As we have already indicated, the learned Circuit Court was in error in holding that the return of the sheriff in the state court concluded the parties, and had it considered the affidavits exhibited in the bill of exceptions, as in our view it should have done, the conclusion would have been reached that the

weight of the testimony disclosed that the defendant corporation was not doing business in the State of Missouri at the time of the attempted service of process, and that the person named in the return of the sheriff was not at that time the duly authorized agent of the defendant corporation.

Holding these views, the judgment of the Circuit Court is reversed, and the cause remanded to that court with directions to dismiss the case for want of jurisdiction.

Reversed.

HAFFNER *v.* DOBRINSKI.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 35. Submitted November 12, 1909.—Decided January 10, 1910.

In order that specific performance may be decreed on the ground of part performance the acts done and relied on by the party seeking relief must be such that damages would not be adequate relief.

Specific performance rests in judicial discretion to be exercised according to settled principles of equity and with reference to the facts in the particular case, and it may be refused where, as in this case, the conditions do not appeal to equitable consideration, even in case of part performance.

The Supreme Court of Oklahoma did not err in refusing to decree specific performance in a case where complainant had funds in his possession sufficient to cover his damages, if any, and where that court held that the alleged contract was unreasonable in its provisions, lacked mutuality, and the part performance did not take the contract out of the statute of frauds.

17 Oklahoma, 438, affirmed.

THE Supreme Court of Oklahoma, from whose judgment affirming the decree of the District Court of Kingfisher County this appeal was prosecuted, stated the case as follows (17 Oklahoma, 438):

"This action was brought on the thirteenth day of May,

1902, by the plaintiff in error, John F. Haffner, against the defendants in error, for the specific enforcement of an oral contract for the sale of real estate. Thereafter, on January 14, 1903, upon the application of the plaintiff in error therefor, a restraining order was issued against the defendant in error Dobrinski, restraining him from prosecuting certain actions of forcible entry and detainer which he had brought against Haffner in the Probate Court of Kingfisher County after the filing of the petition in this case, and which involved the land in controversy herein. This order was made conditional upon Haffner giving bond in the sum of $500.00, which amount was later increased to $1,000.00. On March 9, 1903, the court overruled a motion to dissolve this restraining order, and, upon the hearing of a demurrer filed by Dobrinski to Haffner's petition, granted leave to the plaintiff in error to amend. On March 18, 1903, by leave of court, Haffner filed an amended petition, upon which the case was heard, which, in substance, is as follows:

"'That on and prior to September 4, 1901, Dobrinski was the owner in fee of the east half and lots 3 and 4 of sec. 31, twp. 17, range 9, west of the Indian Meridian, in Kingfisher County, Oklahoma, and also 1,668 bushels of wheat and 30 bushels of oats. That on said date Haffner and Dobrinski entered into a verbal contract for the sale and purchase of said land and personal property, for a total consideration of $3,820.00, of which $920.00 was for the oats and wheat. A payment of $1,020.00 was to be made on or before January 1, 1902, $600.00 of which was to be applied by Dobrinski on a mortgage then on the premises, and a warranty deed executed by Dobrinski to the plaintiff in error, Haffner. At the same time Haffner, upon the execution of said deed, was to execute to Dobrinski his note for $2,800.00, bearing 5 per cent interest per annum, payable in ten years, Haffner to bind himself to apply upon the said indebtedness all of the proceeds arising from the crops raised upon said land, over and above cost of raising the same. That in pursuance of said oral

contract Haffner paid Dobrinski $50.20, and on the day following, September 5, 1901, took peaceable possession of the premises and personal property, made minor improvements about the farm, planted about $60.00 worth of trees and sowed one hundred acres of the land to wheat and ten acres to oats.' "

"The petition then alleges that Dobrinski on November 30, 1901, conveyed the premises by warranty deed to one John A. Webber, for the consideration of $1,700.00, and that Webber later on, for a consideration unknown to the plaintiff Haffner, at the instance of Dobrinski, deeded the land to the defendant in error Shultz. Shultz, however, is alleged to have quit-claimed back to Dobrinski, and to have held in the interim in trust for Dobrinski. The petition then recites that prior to the first of January, 1902, at which time the payment of $1,020.00 was to be made, Haffner notified Dobrinski that he was ready and willing to make payment, and that he was at that time and ever since has been ready, willing and able to pay said sum, less the payment of $50.20 theretofore made, but that Dobrinski refused and still refuses to accept the same. That Haffner has at all times been able, ready and willing to comply with his contract, and offers to bring into court the said $1,020.00, less $50.20 paid, and to execute to Dobrinski his note for $2,800.00 secured by first mortgage on the real estate, and in addition thereto, to bring into court the sum of $458.76, which it is alleged is the proceeds of the farm, over and above outlay for help, while Haffner has held the same. Continuous possession of the premises on the part of Haffner since September 5, 1901, is then alleged, and the petition concludes in this language: 'That no just, fair or adequate assessment of damages could be made, and that the defendant Michael Dobrinski is not financially responsible for any adequate amount of damages, and that the plaintiff has no plain and adequate remedy at law,' followed by a prayer for an order directing Dobrinski to execute a warranty deed in accordance with the terms of the contract.

"To this amended petition, Shultz filed what is in effect a disclaimer. After various delays, occasioned by motions to strike out portions of the first answer, Dobrinski filed an amended answer in two paragraphs, and later withdrew the second paragraph, and stood upon the first alone. This paragraph of Dobrinski's amended answer admits his ownership of the premises and personal property on September 5, 1901, and admits that Shultz held the land in trust for him, and then contains a verified general denial as to all the other allegations in the amended petition. At the trial Dobrinski objected to the introduction of any evidence, 'for the reason,' as the record recites, 'that the petition did not state facts sufficient to constitute a cause of action against the defendant and in favor of the plaintiff.' This objection was by the court sustained, exception saved, motion for a new trial filed and overruled, and the case brought here for review.

"Error is predicated upon the sustaining of the objection to the introduction of evidence, and also upon the refusal of the court below to make perpetual the restraining order above referred to, and because of the fact that plaintiff in error was required to give bond when the order was obtained. In their brief, counsel for plaintiff in error enter into an extended argument to sustain their contentions, first, that oral contracts in general, relative to the sale of real estate, are not absolutely inhibited by our statute of frauds, and, second, that if the statute applies, the contract declared upon and sought to be enforced in this action is not within its scope, by reason of part performance thereof."

Mr. Watson E. Coleman, *Mr. L. O. H. Alward* and *Mr. D. W. Buckner* for appellant.

Mr. C. C. Flansburg for appellees.

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

The Supreme Court of Oklahoma held that there was no

error in excluding all the evidence because the petition did not state a cause of action in equity; that the doctrine is well settled that specific performance is never demandable as a matter of absolute right, but as one which rests entirely in judicial discretion, to be exercised, it is true, according to the settled principles of equity, but not arbitrarily and capriciously, and always with reference to the facts of the particular case.

The principles applied were announced in *Pope Manufacturing Company* v. *Gormully*, 144 U. S. 224, 236. As remarked by Mr. Justice Brown in that case: "To stay the arm of a court of equity from enforcing a contract it is by no means necessary to prove that it is invalid; from time to time immemorial it has been the recognized duty of such courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive or iniquitous contracts; and to turn the party claiming the benefit of such contract over to a court of law. This distinction was recognized by this court in *Cathcart* v. *Robinson*, 5 Pet. 264, 276, wherein Chief Justice Marshall says: 'The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. 10 Ves. 292; 2 Coxe's Cases in Chancery, 77. It is said that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific performance, by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation or any unfairness, are enumerated among the causes which will induce the court to refuse its aid.'" And see *Hennessy* v. *Woolworth*, 128 U. S. 438, 442; *Nickerson* v. *Nickerson*, 127 U. S. 668.

And the Supreme Court of Oklahoma further said (p. 443) that where it is disclosed by complainant himself that the contract upon which he bases his suit "is unreasonable in its

provisions, if not unconscionable, and void under the statute of frauds, and that the acts done and relied upon to warrant a decree on the ground of part performance are not of such a nature that damages would not be an adequate relief, but, on the contrary, that he has within his immediate control money and property more than sufficient to compensate him for any loss sustained, a case for equitable intervention is not shown, and upon such state of facts, a court of equity is justified in refusing specific performance."

In short, the court held that the trial court was fully warranted in refusing to require the alleged contract to be specifically performed as being so unreasonable in its provisions as to justify such refusal, and also for want of mutuality and not practically enforceable as to both parties, and as to the part performance relied on to take the contract out of the statute of frauds, that the contention was without merit. The doctrine is that in order that specific performance may be decreed on the ground of part performance, the acts done by the one seeking relief and relied on to warrant a decree, must be of such a nature that damages would not be an adequate relief. *Williams* v. *Morris*, 95 U. S. 444. But here, as the lower court pointed out, the plaintiff showed on the face of his petition that he had in his possession money belonging to the defendant adequate to cover any possible damages many times over. He had paid the merely nominal sum of $50.20 on the purchase price, entered into the possession of the property, done the repairing common to all farmers, expended $60 in improvements, and prepared 110 acres for crop. But he had in his own control the $920 derived from the sale of the wheat and oats, and in addition thereto the sum of $458.76, the first year's returns from the farm above the cost of obtaining it. In other words, he had lived on the farm free for over a year; had almost $1,400 of the other's money in his hands, and now complained in equity that fraud would be perpetrated upon him if the court does not enforce a contract which will allow him to remain nine years longer

in possession of the land, free from any obligations with which defendant can force him to comply until the expiration of that time. Such a condition of affairs did not appeal to equitable consideration. The action of the trial court was sustained as entirely justified. We concur in that conclusion, and nothing else calls for comment.

Judgment affirmed.

INTERSTATE COMMERCE COMMISSION *v.* ILLINOIS CENTRAL RAILROAD COMPANY.

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

No. 233. Argued October 15, 1909.—Decided January 10, 1910.

In determining whether an order of the Interstate Commerce Commission shall be suspended or set aside, power to make—and not the wisdom of—the order is the test and this court must consider all relevant questions of constitutional power or right, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to be made, and also whether even if in form it is within such delegated authority it is not so in substance because so arbitrary and unreasonable as to render it invalid.

In determining whether the action of the court below was or was not correct, this court does so irrespective of the reasoning by which such action was induced.

The equipment of an interstate railroad, including cars for transportation of its own fuel are instruments of interstate commerce and subject to control of the Interstate Commerce Commission.

The act to regulate commerce has delegated to the Interstate Commerce Commission authority to consider, where complaint is made on that subject, the question of distribution of coal cars, including the carrier's own fuel cars, in times of car shortage, as a means of prohibiting unjust preference or undue discrimination.

Under § 15 of the act to regulate commerce as amended June 29, 1906, c. 3591, 34 Stat. 585, the Interstate Commerce Commission has power

to deal with preferential and discriminatory regulations of carriers as well as with rates.

It is not beyond the power of the Interstate Commerce Commission to require a railroad in distributing its coal cars to take into account its own fuel cars in order not to create a preference of the mine to which such cars are assigned over other mines.

Where an order of the Interstate Commerce Commission is sustained by the court below in part and only the Commission appeals, the conclusions of the court below as to those portions of the order sustained are not open to inquiry in this court.

Even if commerce in regard to the purchase of coal at a mine on a railroad line by the railroad company which supplies its own cars may end there, the power to use the equipment of the railroad to move the coal is subject to the control of the Interstate Commerce Commission in order to prevent discrimination against, or undue preference of, other miners and shippers of coal.

THE facts, which involve the question of whether a duty rested upon the railroad company to obey an order made by the Interstate Commerce Commission in regard to the distribution of coal cars, are stated in the opinion.

Mr. Wade H. Ellis, Assistant to the Attorney General, and *Mr. Luther M. Walter*, Special Assistant to the Attorney General, with whom *Mr. L. A. Shaver* and *Mr. H. B. Arnold* were on the brief, for appellant:

Under §§ 12, 13, 14 of the Hepburn Act, June 29, 1906, 34 Stat. 584, the Interstate Commerce Commission has authority to examine into and decide whether or not a railroad company is violating any of the provisions of the Interstate Commerce Act with respect to furnishing cars, and to direct it to cease and desist from such violation and to prescribe just, fair and reasonable regulations with respect to such transportation.

The Commission clearly had power to deal with unjust, preferential and discriminatory regulations and practices of carriers under § 15 of the act as it stood prior to the Hepburn Act. Whether or not it still exists under § 15 of the amended act must be ascertained by examining the whole act as it now

stands, with a view to gathering the general intent and purpose of Congress, and then by examining the various provisions by which the general intent and purpose are sought to be made effective.

The general intent and spirit of the act, taken with the words themselves, show that the commission has the power. This court has held that the act should be interpreted reasonably to accomplish its great purpose, to wit, to secure just and reasonable charges, to prohibit unjust discriminations and to prevent undue and unreasonable preferences. *New Haven R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 261.

The phrase in § 15 should not be construed to mean only those practices which in some way increase or diminish the amount of freight charges, or directly affect rates.

An order of the commission issued in pursuance of the authority conferred upon the commission by the courts is a legislative act; it becomes the law, and cannot be set aside by the courts unless it clearly violates constitutional rights. *Knoxville* v. *Water Co.*, 212 U. S. 1, 8, 18; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226, 227; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 41; Noyes on American Railroad Rates, 203; *Steenerson* v. *Great Northern Ry. Co.*, 69 Minnesota, 353.

The order of the commission must stand unless it appears, either first that the commission failed to follow the procedure required by law, or second, that upon the face of the proceedings, enforcement of the order would amount to a confiscation of property. The so-called court review provided in the Hepburn Act was not designed to, and does not, give the Federal courts any larger or different powers to protect the railroads from an invasion of constitutional rights than such courts would have possessed without any declaration on the subject. The court review amendment merely confirms the jurisdiction of the court, specifically defines the venue and authorizes suits against the commission as an agency of the Government. The history of this legislation supports no other conclusion.

A suit to set aside an order of the commission is not a mere

appeal from an inferior to a superior tribunal. There is no authority for the substitution of the court's judgment for the commission's judgment. The only thing before the court, if the commission proceeded regularly under the statute, is the result reached. The courts cannot inquire into the steps by which the result was reached, nor consider the methods. They have the same and no greater power to review the reasons which control the commission as they would those of Congress.

When there is a shortage of cars, not enough for all, then the right of the shipper to the exclusive use of his private cars, and in addition to a full share of the system cars of the railroad company, must yield to the requirements of the law that all shippers shall have an equal right to have their goods transported.

The shipper furnishing private cars is not penalized for using them by a denial to him of a full share in addition of the system cars in times of car shortage, because at such times he is not entitled to a full share of system cars if to give him such full share prevents that equality in the transportation facilities of the railroad which the act to regulate commerce requires.

The cars claimed by the railroad to be private or devoted to a special use are in fact merely rented by the railroad company, and ought to be a part of its available equipment.

There is no difference in principle between a railroad company's own fuel cars and foreign railway fuel cars or private cars in so far as the duty exists to count all such cars against the distributive share of the mines receiving them. *Logan Coal Co.* v. *Pennsylvania Railroad Company*, 154 Fed. Rep. 497; *United States* v. *B. & O. Railroad Co.*, 165 Fed. Rep. 126; *Majestic Coal Co.* v. *Illinois Central Railroad Co.*, 162 Fed. Rep. 810.

The Ohio Railroad Commission and other state railroad commissions have held that it is the duty of the railroads to count their private fuel cars in apportioning the distributive shares of the available equipment to the mines. *Railroad*

Commission of Ohio v. *Hocking Valley Ry. Co.*, 12 I. C. C. Rep. 398; *Traer, Receiver*, v. *Chicago & Alton R. R. Co.*, 13 I. C. C. Rep. 451; *R. & R. Coal Co.* v. *Balt. & Ohio*, 14 I. C. C. Rep. 86.

Mr. Eldon J. Cassoday, and *Mr. Rush C. Butler* for Receivers of the Illinois Collieries Company submitted a brief by leave of the court:

The method of distribution of cars to be used in interstate commerce is within the provisions of the act to regulate commerce and within the jurisdiction of the Interstate Commerce Commission. Sections 1, 3, Act to Regulate Commerce; *United States ex rel. Pitcairn Coal Co.* v. *B. & O. R. R. Co.*, 154 Fed. Rep. 108; *B. & O. R. R. Co.* v. *United States ex rel. Pitcairn Coal Co.*, 165 Fed. Rep. 113; *S. C.*, 91 C. C. A., 147; *Logan Coal Co.* v. *Penn. R. Co.*, 154 Fed. Rep. 497; *United States ex rel.* v. *N. & W. Ry. Co.*, 143 Fed. Rep. 266; *S. C.*, 74 C. C. A. 404; *Kingwood Coal Co.* v. *W. Va. N. Ry. Co.*, 125 Fed. Rep. 252; *W. Va. N. R. Co.* v. *Kingwood Coal Co.*, 134 Fed. Rep. 198, 204; *S. C.*, 67 C. C. A. 220; *United States* v. *Oregon R. & N. Co.*, 159 Fed. Rep. 975; *Majestic Coal & Coke Co.* v. *Ill. Cent. R. R. Co.*, 162 Fed. Rep. 810; *Ohio R. R. Commission* v. *Hocking Valley Ry. Co.*, 12 I. C. C. Rep. 398, 404; *Traer, Receiver*, v. *C. & A. R. R. Co.*, 13 I. C. C. Rep. 451; *Royal Coal & Coke Co.* v. *Southern Ry. Co.*, 13 I. C. C. Rep. 440; *Rail & River Coal Co.* v. *B. & O. R. R. Co.*, 14 I. C. C. Rep. 86.

The practice of the appellees, in failing and refusing to charge against the percentage or distributive number of cars to which certain mines would be entitled, cars sent to said mines to be loaded with appellees' own fuel supply, is an unjust discrimination against the other coal mines on said lines of railroad and is a violation of the provisions of the act to regulate commerce. Section 3, Interstate Commerce Act.

The railroad company and a shipper do not stand on a footing of equality. *N. Y. C. R. R. Co.* v. *Lockwood*, 17 Wall. 357.

The right to use such cars is a matter separate and distinct from and not in any way dependent upon or affected by the counting or failure to count such cars. *Traer, Receiver,* v. *C. & A. R. R. Co.*, 13 I. C. C. Rep. 457.

The appellees use their practice of not counting such cars as a scheme or device to give an advantage to the mine owner from whom they buy their fuel, so as to influence and govern the price of such fuel. Report of Interstate Comm. Comm. to Congress, January 25, 1907.

The railroad companies cannot justify their practice of not counting such cars on the ground that, without it, they would be compelled to pay a higher price for their coal. *New Haven R. R. Co.* v. *Interstate Comm. Comm.*, 200 U. S. 361, 399; *Turnpike Road Co.* v. *Sanford*, 164 U. S. 578, 596; *Union Pac. R. Co.* v. *Goodridge*, 149 U. S. 680, *Smyth* v. *Ames*, 169 U. S. 466.

The rule or practice of counting or not counting cars has been before the court and the commission in a number of cases. Cases *supra*, and *Coffman* v. *N. & W. R. Co.*, 109 Fed. Rep. 831.

The contract and non-contract mines are similarly situated. *Logan Coal Co.* v. *Pennsylvania R. Co.*, 154 Fed. Rep. 497; *Majestic Coal & Coke Co.* v. *Illinois Central R. R. Co.*, 162 Fed. Rep. 810.

Such practice is only operative during times of car shortage and by it the railroad company is enabled by reason of its failure to furnish adequate equipment to obtain a reduction in prices and to give to its contract mines an undue advantage over non-contract mines.

Such cars even when in use by the railroad company in transporting its own fuel are still a part of the equipment of the road and within the terms of the Interstate Commerce Act.

The cars are engaged in a public use for the benefit of the public and not alone of the railroad company.

The hauling of the railroad's own fuel coal constitutes a "carriage." Section 1, Interstate Commerce Act.

Such cars are used to obtain coal with which to operate engines and trains which are engaged in interstate commerce

and are therefore an indispensable and necessary part of interstate commerce itself. *Johnson* v. *So. Pac. Ry. Co.*, 196 U. S. 1.

Even though such cars when transporting the railroad's fuel may not themselves be engaged in commerce, strictly speaking, the failure to count them directly affects the distribution of the remaining cars which are engaged in interstate commerce. *Galveston & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217; *Loewe* v. *Lawlor*, 208 U. S. 274; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *In re Debs*, 158 U. S. 564; *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328; *Employers' Liability Cases*, 207 U. S. 463; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Asbell* v. *Kansas*, 209 U. S. 251; *United States* v. *Wells, Fargo Express Co.*, 161 Fed. Rep. 606; *Inter. Comm. Comm.* v. *Baird*, 194 U. S. 25; *Swift & Co.* v. *United States*, 196 U. S. 375; *Montague* v. *Lowry*, 193 U. S. 38.

A comparison of the practice of the railroad companies, the plan proposed by the Circuit Judge and the practice provided for in the order of the commission, shows unjust discrimination in the two former methods. *Ill. Cent. R. R. Co.* v. *Interstate Comm. Comm.*, p. 52, No. 502, p. 60; *Traer, Receiver*, v. *C. & A. R. R. Co.*, 13 I. C. C. Rep. 451, 455, 457.

The practice of the railroad companies has a direct and immediate effect upon the distribution of cars engaged in interstate commerce and is an unjust discrimination in violation of the act to regulate commerce. *Majestic Coal & Coke Co.* v. *Illinois Central R. Co.*, 162 Fed. Rep. 810; *N. Y., N. H. & H. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361.

Mr. W. S. Kenyon and *Mr. Garrard B. Winston*, with whom *Mr. Robert Mather*, *Mr. F. S. Winston* and *Mr. J. M. Dickinson* were on the brief, for appellees:

The order of the Interstate Commerce Commission establishing a method to be pursued in the future by the appellees relative to the cars used for their own fuel supply is beyond the power of that commission.

The commission's rule of distribution is not a regulation of interstate commerce. *Inter. Comm. Comm.* v. *Chicago G. W. Ry. Co.*, 209 U. S. 108; *Express Cases*, 117 U. S. 1; *A., T. & S. F. R. R. Co.* v. *D. & New Orleans R. R. Co.*, 110 U. S. 667; *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279; *Central Stock Yards Co.* v. *Louisville & Nashville Ry. Co.*, 192 U. S. 568; *East and West India Dock Co.* v. *Shaw*, Law Rep. 39 Ch. Div. 524; *West* v. *London & Northwestern Ry. Co.*, Law. Rep. 5 C. P. 622; *Tex. & Pac. Ry. Co.* v. *Inter. Comm. Comm.*, 162 U. S. 197; *Inter. Comm. Comm.* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263; *Adair* v. *United States*, 208 U. S. 161.

Section 15 of the Interstate Commerce Act does not empower the Interstate Commerce Commission to make the order enjoined. *C., N. O. & Tex. Pac. Ry. Co.* v. *Inter. Comm. Comm.*, 162 U. S. 184; *Inter. Comm. Comm.* v. *C., N. O. & T. P. Ry. Co.*, 167 U. S. 479.

The order is a taking of private property prohibited by the Fifth Amendment to the Constitution of the United States. *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403.

By leave of the court, *Mr. Francis I. Gowen*, and *Messrs. Wayne MacVeagh, McKenney* and *Flannery* filed a brief on behalf of the Pennsylvania Railroad Company.

Mr. Justice White delivered the opinion of the court.

Whether a duty rested upon the Illinois Central Railroad Company to obey an order made by the Interstate Commerce Commission is the question here to be decided.

On the ground that preferences were created and discriminations engendered by regulations established by the railroad company concerning the daily distribution of coal cars to mines along its line in periods when the supply of such cars was inadequate to meet the demand upon it for the movement of coal, the order in question commanded the railroad company to desist from enforcing the regulations found to be preferential, and for a future period of two years to de-

liver cars to mines along its line in conformity with the rule announced by the commission.

A clearer perception of the questions to be considered will be afforded by giving a brief statement of the cause of car shortage referred to, accompanied with a mere outline of the steps generally taken by carriers to deal with the subject and the particular method applied by the Illinois Central Railroad Company prior to the date when the complaint was made against it, concerning which the order previously referred to was entered.

It is conceded in argument that bituminous coal mines, which are the character of mines here involved, must dispose of their product as soon as the coal is delivered at the surface, as it is not practicable for an operator to store such coal, and the amount that a mine will produce is therefore directly dependent upon the quantity that can be taken away day by day. As a result of this situation it is also conceded that railroads upon whose lines coal mines are situated pursue a system by which daily deliveries of cars, based upon requisitions of the respective mines, are made to such mines to permit of the removal of their available output for that day.

Notwithstanding full performance by railway carriers of the duty to have a legally sufficient supply of coal cars, it is conceded that unforeseen periods arise when a shortage of such cars to meet the demand for the transportation of coal takes place, because, among other things, *a*, of the wide fluctuation between the demands for the transportation of bituminous coal at different and uncertain periods; *b*, the large number of loaded coal cars delivered by a carrier beyond its own line for transportation over other roads consequent upon the fact that the coal produced at a particular point is normally distributed for consumption over an extensive area; and, *c*, because the cars thus parted with are subject to longer detentions than usually obtain in the case of shipments of other articles, owing to the fact that bituminous coal is often shipped by mining operators to distant points to be sold after

arrival, and is hence held at the terminal points awaiting sale, or because, owing to the cost of handling coal, and the difficulty of storing such coal, the car in which it is shipped is often used by the shipper or purchaser at the terminal points as a convenient means of storage or as an instrument for delivery, without the expense of breaking bulk, to other and distant points.

It is disclosed that the railroads of the United States generally, at various times, put in force regulations for the distribution of coal cars. Generally speaking, these regulations provide for fixing the capacity of coal mines in order to determine the number of cars to which each might normally be entitled to daily move its output of coal. And these regulations also provide for a method of determining the *pro rata* share of the cars daily allotted for distribution in times of car shortage. Neither the method by which capacity was to be ascertained nor the regulation for daily distribution upon the basis of such capacity in case of shortage was identical among the various railroad systems of the United States. The divergence, and even conflict, between those systems is illustrated by the cases of *Logan Coal Co.* v. *Pennsylvania R. R. Co.*, 154 Fed. Rep. 497; *United States ex rel. Pitcairn Coal Co.* v. *B. & O. R. R. Co.*, 165 Fed. Rep. 113; cases cited at pages 503 and 504 of the report of the Logan Coal Co. case, and the case of *Majestic Coal & Coke Co.* v. *Illinois Central R. R. Co.*, 162 Fed. Rep. 810.

In a general sense, however, all the regulations of the various railroads, either for ascertaining the capacity of coal mines or in order to determine the *pro rata* share for daily distribution of cars to the respective mines in case of shortage dealt with four classes of cars: 1, system cars, that is, cars owned by the carrier and in use for the transportation of coal; 2, company fuel cars, that is, cars belonging to the company and used by it when necessary for the movement of coal from the mines on its own line, and which coal had been bought by the carrier and was used solely for its own fuel purposes; 3, private cars, that is, cars either owned by coal mining companies or shippers or

consumers, and used for the benefit of their owners in conveying coal from the mines to designated points of delivery; 4, foreign railway fuel cars, that is, cars owned by other railroad companies and which were by them delivered to the carriers on whose lines mines were situated, for the purpose of enabling the cars to be loaded with coal and returned to the company by whom the cars had been furnished, the coal being intended for use as fuel by such foreign railroad companies.

The various regulations, irrespective of minor differences between them, fell upon one or the other side of this broad line of division. One system took into account class 2, the fuel cars of the carrier, class 3, the private cars, and class 4, the cars of foreign railroads, and deducted from the rated capacity of the mine the sum of coal delivered by that mine in such cars, and upon the basis thus resulting apportioned ratably in case of shortage the system cars, that is, those embraced in class 1. On the other hand the other class of regulation not only took no account of the cars in classes 2, 3 and 4, as a means of rating the capacity of the mine, but moreover did not charge against any mine, for the purpose of ascertaining the daily *pro rata* of the cars to which such mine was entitled, any car whatever furnished such mine on such day embraced within classes 2, 3 and 4, that is, any company fuel car, foreign railway fuel car or private car. By this system, therefore, where a mine was entitled daily to a given *pro rata* of the cars subject to general distribution it received its full share of such cars, and in addition on that day also received such of the company fuel cars, foreign railway fuel cars and private cars as might have been sent to it for loading on that day. This absolute disregard in the allotment of the company fuel cars, foreign railway fuel cars and private cars was not in all respects common to all the systems which took no account of such cars in fixing capacity, since in some of the regulations one or the other of the classes was taken into account in fixing the *pro rata* for distribution.

Previous to 1907 the Railroad Commission of the State of Ohio filed with the Interstate Commerce Commission two

complaints against the Hocking Valley and another railroad company. These complaints were based upon the ground that the failure of the railroads in times of car shortage to include in the *pro rata* of cars for distribution foreign railway fuel cars and private cars, and to charge the mines which had received such cars with the same as part of their distributive share, created an undue preference and worked unjust discrimination in violation of the act to regulate commerce. On July 11, 1907, the report and opinion of the commission was announced in the cases referred to. *R. R. Comm. of Ohio* v. *Hocking Val. Ry. Co.*, 12 I. C. C. Rep. 398. It was declared that the complaints were well founded, and the relief prayed was awarded. Nine days afterwards—presumptively in ignorance of the finding of the commission just referred to—the Illinois Central Railroad Company promulgated rules governing the distribution of cars to coal mines. Although by these rules foreign fuel cars, private cars and company fuel cars were not taken into account in ascertaining the capacity of a mine or mines, such cars were expressly directed not to be counted for the purpose of the daily distribution of cars among the respective mines. On August 15 following, however, presumably to cause the regulations to conform to the interpretation of the Interstate Commerce Act adopted by the commission in the Hocking Valley case, a circular was issued by the Illinois Central Railroad Company, to go into effect September 1, 1907, cancelling the circular of July 20, 1907, and directing that account should be taken in the distribution of cars to a particular mine or mines of both foreign railway fuel and private cars. Before the date fixed for the going into effect of this last-named circular the Majestic Coal and Coke Company, a West Virginia corporation, filed a suit against the Illinois Central Railroad Company in the United States Circuit Court for the Northern District of Illinois, complaining that to charge against its distributive share of coal cars, in the event of a car shortage, the fuel cars and private cars furnished it would violate its legal rights. After hearing, a temporary injunction, preventing the

going into effect of the regulations in the particulars mentioned, was issued. The distribution of coal cars thereafter continued to be made as provided in the prior circular.

With this prelude we come more immediately to the origin of the controversy before us.

On October 31, 1907, the Illinois Collieries Company filed with the Interstate Commerce Commission a complaint against the Illinois Central Railroad Company. The regulations of the railroad company as to the distribution of coal cars were assailed as unjustly discriminatory in violation of the act to regulate commerce, particularly as respected the practice of not taking into consideration foreign railway fuel cars and private cars in determining the distribution of coal cars among the various coal operators along the lines of the railroad on interstate shipments of coal. It appears that the complaint just referred to was heard before the commission, with two other complaints against other railroads involving the same general subject. In its report, which was filed in all three of the cases on April 13, 1908, *Traer* v. *Chicago & Alton R. R. Co.*, 13 I. C. C. Rep. 451, the commission held that not to count in times of car shortage when the daily distributions were made against the mine receiving the same company fuel cars, foreign railway fuel cars and private cars was a violation of the act to regulate commerce. In announcing this conclusion reference was made to the previous opinion of the commission in the Hocking Valley case, *supra*, and it was declared that the Illinois Central Railroad Company on the hearing before the commission had conceded the controlling effect of the previous ruling of the commission. Considering the temporary injunction issued by the Circuit Court of the United States for the Northern District of Illinois, the commission declared that in view of the decision of this court in the case of the *Texas & Pacific Ry. Company* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, it was the duty of the commission to order the carrier to desist from the unlawful discrimination.

Although the complaint in the case of the Illinois Central

Railroad Company differed from the complaints in the two other cases which were considered and passed upon by the commission at the same time, in that it did not assail the failure to take into account the company fuel cars in making distribution in times of car shortage, nevertheless the commission declared that the Illinois Central Railroad Company, both in its brief and argument, had conceded the importance of the subject to that company and had invoked the action of the commission thereon.

The order of the commission, as heretofore stated, therefore not only directed the desisting from the practice of failing to take into account the foreign railway fuel cars, private cars and the company fuel cars, but also required the carriers to establish regulations for a period of two years from July 1, 1908, providing for the counting of all such cars. The general scope of the order was, however, qualified by expressly authorizing a railroad company to deliver to a particular mine all the foreign railway fuel cars, the private cars and the company fuel cars consigned or assigned to said mine, even although the number thereof might exceed the *pro rata* share of the cars attributable to said mine when ascertained by taking into account all the cars which the order required to be considered. Where, however, the number of such cars was less than the *pro rata* share of the mine the order only permitted the carrier to add a sufficient number of system cars to make up the rightful *pro rata* number.

Being unwilling to comply with the order of the commission, the Illinois Central Railroad Company commenced the suit which is now before us to enjoin in all respects the enforcement of the order of the commission. It was averred that although the company was adequately equipped with coal cars and with sufficient motive power and operative forces, yet at times an inadequate supply of coal cars to meet the demand arose from the circumstances which we have previously stated. It was alleged that the regulations adopted by the company for ascertaining the capacity of the mines

and for the distribution of cars were in all respects just and reasonable, and it was charged that the order of the commission, directing the taking into account of private cars in the distribution of cars, was unjust, unreasonable, oppressive and unlawful, because it deprived the owners of such cars of the right to the use of their own property. It was further alleged that, as to the foreign railway fuel cars, the order was also unjust, unreasonable, oppressive and unlawful, because such cars constituted no part of the equipment of the road, and, failing to count them, could not constitute an unlawful discrimination or the giving of an unjust preference within the intendment of the act to regulate commerce. Besides charging that the order to count the company fuel cars was unjust, unreasonable, etc., it was averred that the attempt of the commission to deal with such cars was beyond its power, and was but an effort to deprive the company of its lawful right to freely contract for the purchase of the fuel necessary for the operation of its road. In addition, the proceedings in the suit brought by the Majestic Coal Company were set out, the granting of a temporary injunction therein as to counting foreign railway fuel cars and private cars was alleged, and it was charged that in any event, as to those two classes of cars, the order of the commission was not lawful, since it compelled the company to violate the injunction which was yet in force. The commission answered by asserting the validity in all respects of the order by it made, substantially upon the grounds which had been set out in its report and opinion announced when the order was made. All the averments in the complaint as to want of power were traversed and it was expressly charged that the subject of the distribution of coal cars as dealt with by the order was within the administrative power delegated to the commission by the terms of the act to regulate commerce. The nature and character of the preferences and discriminations which had led the commission to conclude that unlawful discrimination and unjust preference arose from the failure to count the classes of cars referred to

was alleged in subdivision XIV of the answer, a portion whereof is reproduced in the margin.[1] A certificate as to the public importance of the cause was filed by the Attorney General, in compliance with § 16 as amended by the act of June 29, 1906, 34 Stat. 584, c. 3591, and the cause was there-

[1] XIV. Defendant avers that the allotment by complainant of said foreign railway fuel cars, private cars, and complainant's fuel cars to the mines receiving them in addition to the full distributive shares of such mines in the general distribution of cars by complainant and the failure by complainant to count and charge said foreign railway fuel cars, private cars, and company cars against the mines receiving them, in said general distribution, results in undue and unreasonable preference or advantage to the mines and operators receiving such cars and subjects the owners and operators of mines which do not receive such cars to undue and unreasonable prejudice and disadvantage in the following respects, to wit:

(*a*) That the operator receiving the foreign railway fuel cars, private cars, or company fuel cars thereby receives a higher percentage of cars than mines of equal capacity which do not receive such cars.

(*b*) That the operator receiving the foreign railway fuel cars, private cars, or company fuel cars may operate his mine to a fuller capacity and thereby reduce the cost of coal per ton, resulting in an increased profit on his commercial coal.

(*c*) That the operator receiving foreign railway fuel cars, private cars, or company fuel cars is enabled to increase the number of working places in the mine, is enabled to develop his mine more rapidly, is enabled to increase his capacity rating, and in future reratings of such mine by complainant for the purposes of car distribution the mine would receive a higher rating and consequently a larger number of cars in complainants' general distribution of cars.

(*d*) That the operator receiving the foreign railway fuel cars, private cars, or company fuel cars is enabled thereby to secure and hold a larger, more efficient, and regular working force of miners and laborers.

(*e*) That the development of the mines which do not receive the foreign railway fuel cars, private cars, or company fuel cars is retarded in inverse ratio as the development of the mines receiving said cars is accelerated.

(*f*) That by the arbitrary allotment of the foreign railway fuel cars, private cars, or company fuel cars the complainant and the so-called foreign railways are enabled to secure low prices on railway fuel because the operator receiving such cars is enabled to produce his com-

after submitted at the same time with one brought by the Alton Railroad, involving a similar question, to a Circuit Court held by Judges Grosscup, Baker and Kohlsaat. A single opinion was announced in both cases. 000 Fed. Rep. 000. While deciding that the complainants were not entitled to relief in so far as the order of the commission concerned the counting of foreign railway fuel cars and private cars, it was yet held that the railway companies were entitled to an injunction restraining the enforcement of the orders of the commission in so far as they directed the taking into account of the cars employed by the company in hauling its own fuel. The conclusion on this latter subject was based upon the theory that, as the railroad companies took the coal which they bought for their own use from the tipple of a coal mine, and thereafter moved it for their own account and not for commercial purposes, the cars used for that purpose could not be treated as being engaged in commerce, as "commerce under these circumstances ends at the tipple." The court, however, observed:

"But this does not mean that these cars do not affect the problem of an equitable distribution of commercial equipment. The mine operators are objects of interest under the interstate commerce law, not as diggers of coal, but as shippers who tender a commercial product for transportation by interstate common carriers. The basis, therefore, on which the mines in a district should be rated is not their average output as a physical question, but the average output which they respectively tender for transportation in commerce."

And in accord with this reasoning it was in conclusion re-

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mercial coal at much lower prices than do the mines which do not receive such arbitrary cars.

(*g*) That the operator of the mine receiving the foreign railway fuel cars, private cars, or company fuel cars is thereby enabled to make contracts for the delivery of coal distributed over a long period, to an extent that the operator of the mines which do not receive such cars cannot do.

marked that the complainants as to the cars used for hauling their fuel were entitled to an injunction "against their being compelled to take fuel cars into consideration except as a means in determining the true capacities of the mines to tender coal to them for transportation in commerce."

From the final decree enjoining the commission from enforcing its order, in so far as it directed the taking into account the company fuel cars in the distribution of coal cars in times of car shortage and in so far as it directed the future taking such cars into account, the Interstate Commerce Commission appeals.

It is stated in the brief of counsel for the railroad company that, at the hearing below, despite the scope of the prayer of the bill, no question was raised by the railroad company as to the validity of the order of the commission to the extent that it controlled private cars and foreign railway fuel cars. Irrespective, however, of this admission, as the Interstate Commerce Commission alone has appealed, the correctness of the conclusions of the court below on these subjects is not open to inquiry. And this also renders it unnecessary to consider in any respect the effect of the injunction to which we have previously referred as issued in the suit filed on behalf of the Majestic Coal Company, since such injunction only related to foreign railway fuel cars and private cars. Besides, it is stated in the brief of counsel that before the decision of this case the preliminary injunction in favor of the Majestic Coal Company was dissolved and no appeal was taken therefrom.

In consequence of one of the comprehensive amendments to the act to regulate commerce, adopted in 1906, § 15, Act June 29, 1906, c. 3591, 34 Stat. 584, 589, it is now provided that "all orders of the commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be sus-

pended or set aside by a court of competent jurisdiction." The statute endowing the commission with large administrative functions, and generally giving effect to its orders concerning complaints before it without exacting that they be previously submitted to judicial authority for sanction, it becomes necessary to determine the extent of the powers which courts may exert on the subject.

Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, *c*, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Telegraph Cable Company* v. *Adams*, 155 U. S. 688, 698. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.

Power to make the order and not the mere expediency or wisdom of having made it, is the question. While, as we have seen, the court below reasoned that the transportation of coal bought from a mine by the railroad company for its own use, after delivery to it in its coal cars at the tipple, was

not commerce, because "commerce under these circumstances ends at the tipple," it yet reasoned that such coal was within the control of the interstate commerce law to the extent that a regulation compelling its consideration, for the purpose of rating the capacity of a mine as a basis for fixing its *pro rata* share of cars in times of shortage, would be valid. Because of this reasoning, it is insisted, it appears that the court below but substituted a regulation which it deemed wise for one which it considered the commission had inexpediently adopted, and this upon the assumption by the court that its authority was not limited to determining power. Without intimating an opinion as to the merits of the proposition, we put it aside as irrelevant, since we must decide whether the action of the court below was correct, irrespective of the reasoning by which such action was induced. We further also dismiss from view a contention, strenuously insisted upon in argument by the Government, to the effect that in determining the issue of power we must treat the railroad company as being at fault for the failure to daily deliver all the cars called for in times of car shortage. We put it aside because it is in direct conflict with facts expressly admitted or impliedly conceded in the answer of the Interstate Commerce Commission, and from which facts we must take it for granted that the equipment of coal cars of the railroad company was reasonably adequate to meet all normal conditions, although it became insufficient at times because of extraordinary circumstances, against which it was in reason impossible to provide.

We think the issues for decision will be best disposed of by at once considering the contentions advanced by the railroad company to establish that there was a want of power in the commission to make that portion of the order which the court below enjoined. The contentions on this subject are stated in argument in many different forms, and if not in some respects contradictory, are, at all events, confusing since, considered logically, we think they virtually intermingle power

and expediency as if they were one and the same thing. We shall not, therefore, in making an analysis of the contentions, follow their mere form of statement, but shall treat them all as reducible to two propositions, viz: First. That the act to regulate commerce has not delegated to the commission authority to consider, where a complaint is made on such subject, the question of the distribution of company fuel cars in times of car shortage as a means of prohibiting unjust preference or undue discrimination. Second. That even if such power has been delegated to the commission by the act to regulate commerce, the order whose continued enforcement was enjoined by the court below was beyond the authority conferred by the statute.

As the Interstate Commerce Commission alone has appealed, it is patent that those portions of the order of the commission which concern foreign railway fuel cars and private cars, and which the court below refused to enjoin, are not open to inquiry. The suggestion at once presents itself whether, if these subjects are not open, they do not necessarily carry with them the question of company fuel cars, on the ground that the three classes rest upon one and the same consideration, and that to divorce them would bring about conditions of preference and discrimination which the act to regulate commerce expressly prohibits. In view, however, of the great importance of the questions directly arising for decision, and the fact that the court below has treated the company fuel cars as distinct, we shall not be sedulous to pursue the suggestion, and come at once to the propositions of power previously stated.

First. *That the act to regulate commerce has not delegated to the commission authority to regulate the distribution of company fuel cars in times of car shortage as a means of prohibiting unjust preferences or undue discrimination.*

When coal is received from the tipple of a coal mine into coal cars by a railway company, and the coal is intended for its own use and is transported by it, it is said there is no con-

signor, no consignee and no freight to be paid, and therefore, although there may be transportation, there is no shipment, and hence no commerce. In changed form these propositions but embody the reasoning which led the court below to its conclusion that, under the circumstances, commerce ended at the tipple of the mine. The deduction from the proposition is, as the movement of coal under the conditions stated is not commerce, it is therefore not within the authority delegated to the commission by the act of Congress, as all such acts have relation to the regulation of commerce, and do not, therefore, embrace that which is not commerce. It is to be observed, in passing, that if the proposition be well founded, it not only challenges the authority of the commission, but extends much further, and in effect denies the power of Congress to confer authority upon the commission over the subject. In all its aspects the proposition calls in question the construction given to the law by the commission in every case where the subject has been before it, and also assails the correctness of numerous decisions in the lower Federal courts, to which we have previously referred, where the subject, in various forms, was considered. It goes further than this, since it, in effect, seeks to avoid the fair inferences arising from the regulations adopted by the railroad company. Those regulations, in providing for the obligation of the railroad company to supply cars, and recognizing the duty of equality of treatment, found it necessary, by express provision, to provide that private cars, foreign railway cars and company fuel cars should not be counted against the mine on the day when furnished, thus implying that, under the general rule of equality, if not restricted, it was considered the duty would exist to consider such cars. The contention, moreover, conflicts with the rule which, as we have seen, obtains in other and great systems of railroad, by which, for the purpose of avoiding inequality and preference, foreign railway fuel cars, private cars and company fuel cars are made one of the factors upon which a mine is rated in order

to fix the basis upon which its distributive share of cars is to be allotted in case of car shortage. And, from this, it must follow, if the proposition contended for be maintained, that it would not only relieve the railroad company, whose rights are here involved, from the obligation of taking into account its fuel cars in the making of the distribution, but from the duty even to consider them for the purpose of capacity rating. As a result, it would lead to the overthrow of the system of rating, prevailing on other railroads, by which, as we have said, such cars are taken into account, a consequence which is well illustrated by the case of *Logan Coal Co.* v. *Pennsylvania R. R. Co.*, 154 Fed. Rep. 497.

Under these conditions, it is clear that doubt, if it exist, must be resolved against the soundness of the contentions relied on. But that rule of construction need not be invoked, as we think, when the erroneous assumption upon which the proposition must rest is considered, its unsoundness is readily demonstrable. That assumption is this, that commerce in the constitutional sense only embraces shipment in a technical sense, and does not, therefore, extend to carriers engaged in interstate commerce, certainly in so far as so engaged, and the instrumentalities by which such commerce is carried on, a doctrine the unsoundness of which has been apparent ever since the decision in *Gibbons* v. *Ogden*, 9 Wheat. 1, and which has not since been open to question. It may not be doubted that the equipment of a railroad company engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equal distribution and the prevention of an unjust and discriminatory one.

The corporation as a carrier engaged in interstate commerce being then, as to its interstate commerce business, subject to the control exerted by the act to regulate commerce, and the instrumentalities employed for the purpose

of such commerce, being likewise so subject to control, we are brought to consider the remaining proposition, which is,

Second. *That even if power has been delegated to the commission by the act to regulate commerce, the order whose continued enforcement was enjoined by the court below was beyond the authority delegated by the statute.*

In view of the facts found by the commission as to preferences and discriminations resulting from the failure to count the company fuel cars in the daily distribution in times of car shortage, and in further view of the far-reaching preferences and discriminations alleged in the answer of the commission in this case, and which must be taken as true, as the cause was submitted on bill and answer, it is beyond controversy that the subject with which the order dealt was within the sweeping provisions of § 3 of the act to regulate commerce prohibiting preferences and discriminations. But it is contended that although this be the case, as the order of the commission not only forbade the preferences and discriminations complained of, but also commanded the establishment of a rule, excluding such discriminations for a future definite period of not exceeding two years, the order transcended the authority conferred upon the commission. This proceeds upon the assumption that § 15 of the act to regulate commerce, as enacted by the act of June 29, 1906, while conferring upon the commission the authority, upon complaint duly made, to declare a rate or practice affecting rates illegal, and to establish a new and reasonable rule or practice affecting such rates for a term not exceeding two years, has no relation to complaints concerning preferences or discriminations, unless such practices, when complained of, are of a character to affect rates, which it is insisted is not here the case. The pertinent part of the section in question (15) reads as follows, 34 Stat. 589:

"That the commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section 13 of this act, or upon

complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, for the transportation of persons or property as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed.

"All orders of the commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended or modified or set aside by the commission or be suspended or set aside by a court of competent jurisdiction."

The contention gives to the words found in the earlier part of the section, "any regulation or practice whatsoever of such carrier or carriers affecting such rates," a dominant and controlling power so as to cause them to limit every other provision in the section, however general in its language. We do not stop to critically examine the provision relied upon for the purpose of pointing out, as a matter of grammatical construction, the error of the contention, because we think, when the text of the section is taken into view and all its provisions

are given their natural significance, it obviously appears that the construction relied upon is without foundation, and that to sustain it would be to frustrate the very purpose which it is clear, when the entire provision is considered, it was designed to accomplish, and thus would be destructive of the plain intent of Congress in enacting the provision. The antecedent construction which the Interstate Commerce Act had necessitated, and the remedial character of the amendments adopted in 1906, all serve to establish the want of merit in the contention relied upon. In addition, to adopt it would require us to hold that Congress, in enlarging the power of the commission over rates, had so drafted the amendment as to cripple and paralyze its power in correcting abuses as to preferences and discriminations which, as this court has hitherto pointed out, it was the great and fundamental purpose of Congress to further.

Conceding, for the sake of the argument, the existence of the preferences and discriminations charged, it is insisted, when the findings made by the commission are taken into view and the pleadings as an entirety are considered, it results that the discriminations and preferences arose from the fact that the railroad company chose to purchase its coal for its fuel supply from a particular mine or mines, and that, as it had a right to do so, it is impossible, without destroying freedom of contract, to predicate illegal preferences or wrongful discriminations from the fact of purchase. But the proposition overlooks the fact that the regulation addresses itself, not to the right to purchase, but to the duty to make equal distribution of cars. The right to buy is one thing and the power to use the equipment of the road for the purpose of moving the articles purchased in such a way as to discriminate or give preference are wholly distinct and different things. The insistence that the necessary effect of an order, compelling the counting of company fuel cars in fixing, in case of shortage, the share of cars a mine from which coal has been purchased will be entitled to, will be to bring about

a discrimination against the mine from which the company buys its coal and a preference in favor of other mines, but inveighs against the expediency of the order. And this is true also of a statement in another form of the same proposition, that is, that if, when coal is bought from a mine by a railroad the road is compelled to count the cars in which the coal is moved in case of car shortage, a preference will result in favor of the mine selling coal and making delivery thereof at the tipple of the mine to a person who is able to consume it without the necessity of transporting it by rail. At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the commission the power which has been lodged in that body to consider complaints as to violations of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils. It follows from what we have said that the court below erred in enjoining the order of the commission, in so far as it related to company fuel cars, and its decree is therefore reversed, and the case remanded for further proceedings in conformity with this opinion.

MR. JUSTICE BREWER dissents.

INTERSTATE COMMERCE COMMISSION *v.* CHICAGO & ALTON RAILROAD COMPANY.

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

No. 232. Argued October 15, 1909.—Decided January 10, 1910.

Interstate Commerce Commission v. *Illinois Central Railroad Company*, *ante*, p. 452, followed as to power, under the act to regulate commerce, of the Commission to make reasonable arrangements for the distribution of coal cars to shippers, including cars for transportation of fuel purchased by the railroad company for its own use.

Where the case is submitted on bill and answer, a fact, alleged in the complaint and denied in the answer and for which proof is demanded, cannot be considered, especially where, as in this case, there is a contrary finding of a body such as the Interstate Commerce Commission.

THE facts are stated in the opinion.

Mr. Wade H. Ellis, Assistant to the Attorney General, and *Mr. Luther M. Walter*, Special Assistant to the Attorney General, with whom *Mr. L. A. Shaver* and *Mr. H. B. Arnold*, were on the brief, for appellant.

Mr. W. S. Kenyon and *Mr. Garrard B. Winston*, with whom *Mr. Robert Mather*, *Mr. F. S. Winston* and *Mr. J. M. Dickinson* were on the brief, for appellees.

By leave of the court, *Mr. Eldon J. Cassoday* and *Mr. Rush C. Butler* filed a brief for Receivers of the Illinois Collieries Company.

By leave of the court, *Mr. Francis I. Gowen* and *Messrs. Wayne MacVeagh*, *McKenney* and *Flannery* filed a brief on behalf of the Pennsylvania Railroad Company.

MR. JUSTICE WHITE delivered the opinion of the court.

This case is controlled by the opinion just announced in the case of *Interstate Commerce Commission* v. *Illinois Central Railroad Company, ante,* p. 452. The complaints made to the commission were alike in both cases, and they were heard before that body at the same time, and one report was made in both cases. The order, in both cases, was the same. Like bills for injunction were filed in the court below, and there also they were heard together and were disposed of in one opinion. There is only this difference between the two cases. In this the bill for injunction contained the following averment concerning a small number, out of the thousands of coal cars forming part of the equipment of the road:

"That your orator has purchased and now operates on its line 360 steel hopper-bottom coal cars; that said cars are of an extreme height, to wit, ten feet; that, by reason of such height, said cars can be unloaded only upon specially constructed trestles; that no consignees to whom coal is shipped from mines on your orator's line own or have the use of such trestles, and that such cars are not available for commercial shipment of coal. And your orator avers that it at all times restricts these cars to the service of hauling your orator's own fuel supply, and that by reason of such restriction and by reason of the fact that your orator alone has the means of unloading said hopper-bottom cars, said cars never constitute a part of your orator's equipment available for commercial shipments of coal."

The answer of the commission denied all knowledge of the truth of the averments thus made, and called for proof on the subject. No proof was made, and the cause was submitted to the court below on bill and answer. In view of this fact, and in consideration moreover of the weight which the law gives to the finding of the commission, as to the existence of unlawful preference and the operative effect of the order which the commission made, until set aside, we think the mere

averment of the facts referred to in no way causes this case to differ from the Illinois Central case. Of course, under these circumstances we intimate no opinion as to how far had the facts alleged as to the hopper cars been established, they would to the extent of such cars have taken this case out of the rule announced in the Illinois Central case. It follows that the judgment must be reversed and the case remanded for further proceedings in conformity to this opinion.

MR. JUSTICE BREWER dissents.

BALTIMORE & OHIO RAILROAD COMPANY *v.* UNITED STATES EX REL. PITCAIRN COAL COMPANY.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 289. Argued October 18, 19, 1909.—Decided January 10, 1910.

Regulations which are primarily within the competency of the Interstate Commerce Commission are not subject to judicial supervision or enforcement until that body has been properly afforded an opportunity to exert its administrative functions. *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, applied, and *Southern Railway Co.* v. *Tift*, 206 U. S. 428, distinguished.

The distribution to shippers of coal cars including those owned by the shippers and those used by the carrier for its own fuel is a matter involving preference and discrimination and within the competency of the Interstate Commerce Commission, and the courts cannot interfere with regulations in regard to such distribution until after action thereon by the commission.

Even if not assigned as error, this court will consider the jurisdictional question of whether there is power in the court, in view of the provisions of the act to regulate commerce, to grant the relief prayed for in regard to matters within the competency of the Interstate Commerce Commission.

Under the court review provisions of § 15 of the act to regulate commerce as amended in 1906, the courts are limited to the question of power of the commission to make the order and cannot consider the wisdom or expediency of the order itself. *Interstate Commerce Commission* v. *Illinois Central Railroad*, *ante*, p. 452.

Section 23 of the act to regulate commerce, although added thereto in 1889, will now be construed in the light of § 15, as amended in 1906; and the remedy of mandamus is limited to compelling the performance of duties which are either so plain as not to require a prerequisite exertion of power by the Interstate Commerce Commission, or which plainly arise from the obligatory force given by the statute to existing orders rendered by the commission within the lawful scope of its authority

Petition in mandamus by a shipper averring discrimination in distribution of coal cars by the Baltimore and Ohio Railroad dismissed because the matter had not been first submitted to the Interstate Commerce Commission.

165 Fed. Rep. 113, reversed.

THE facts are stated in the opinion.

Mr. Hugh L. Bond, with whom *Mr. W. Ainsworth Parker* was on the brief, for Baltimore and Ohio Railroad Company, plaintiff in error.

Mr. Edgar H. Gans, with whom *Mr. Charles H. Markell* was on the brief for Fairmont Coal Company *et al.*, plaintiffs in error.

Mr. William A. Glasgow, Jr., with whom *Mr. Frederick Dallam* was on the brief, for defendants in error.

MR. JUSTICE WHITE delivered the opinion of the court.

To decide the merits of this cause will require us to determine the legality of the regulations of the Baltimore and Ohio Railroad Company, by which that company distributed cars to coal mines along the line of its road in case of car shortage. As an incident to this general question we would further be required to consider the relations, irrespective of its mere attributes and duties as a common carrier, of the Baltimore and Ohio Railroad with various coal mines along the line of its road and the relation with or control over some, if not all, of these coal mines by other mines or mine operators, and in

addition to consider the relation of the Baltimore and Ohio Railroad with the Cumberland and Pennsylvania Railroad. This road taps the main track of the Baltimore and Ohio railroad at Cumberland, Maryland, proceeds thence to the state line between Maryland and Pennsylvania, where it strikes the Pennsylvania Railroad, and passing thence through a country rich in bituminous coal deposits, and containing coal mines, it reaches Piedmont, West Virginia, where its tracks again connect with those of the Baltimore and Ohio Railroad. As an additional incident we might also be required to consider the relation or control, direct or indirect, if any, which the Baltimore and Ohio Railroad exerted over some, if not all, of the coal mines along the line of the Cumberland and Pennsylvania road. Some, therefore, of the underlying questions involved in the cause, if we may consider them, are similar to the issues which were passed upon by us in the case of the *Interstate Commerce Commission* v. *Illinois Central Railroad*, which we have just decided, *ante*, p. 452. While referring to the general situation as depicted in that case, we think, in addition, a mere outline sketch of the conditions existing prior to the commencement of this suit, as regards the matters with which it is concerned, will serve to render clear the reasons which control us in deciding it,

The Baltimore and Ohio Railroad Company, a corporation existing under the laws of Maryland, owned and operated a railroad or railroads in the States of Maryland, West Virginia, Virginia, Pennsylvania, Ohio and other States, and, as a common carrier, was engaged in interstate commerce between such States. The main line of said road west of Cumberland, Maryland, passes through a bituminous coal field, which is worked by many coal operators, the product of whose mines depend for their movement to market in interstate commerce on the facilities for such movement which the Baltimore and Ohio affords. For the purpose of this case, the coal mines referred to may be treated as situated in what is described as the Monongah District of the Baltimore and Ohio Railroad.

Regulations of the Baltimore and Ohio Railroad, by which mines were rated in order to fix the basis for a *pro rata* distribution of coal cars in case of car shortage, had their peculiarities differing from other roads. They were based, first, upon the capacity of the mines; second, upon the previous shipments by the mines for a period of two years, the capacity counting as one and the previous shipments as two. The capacity was ascertained by considering the number of working places, etc., modified by taking into account the facilities for moving the coal out of the mine, such as tracks, tipple, etc. The previous shipments were taken from the records of the company during periods when there was no car shortage. Upon the basis of the capacity thus ascertained the regulations of the company for giving each mine owner in the case of shortage its percentage of cars, stated in the most summary way, were briefly these: In the first place, there was assigned, out of the general mass of cars before the distribution was made, such cars as it was deemed the Cumberland and Pennsylvania Railroad was entitled to. This was done by no fixed rule, but, in the discretion of the traffic manager, generally upon the basis of the percentage of shipments of coal hauled in the two previous years by that road. The estimated mass remaining after the deliveries to the Cumberland and Pennsylvania Railroad were subjected to certain arbitrary assignments, and the remainder, after such assignments had been taken out, were equally distributed among the mine operators, according to their capacity rating. The arbitrary deductions which were made, as we have just stated, were these:

1. Baltimore and Ohio Railroad cars placed at mines for Baltimore and Ohio fuel coal.

2. New mines are allotted an arbitrary number of cars daily or weekly for development. In cases where the inspection shows a marked increase in the capacity of certain mines, and it is not practicable to change the percentage of the whole district, proper arbitraries are applied pending a general revision.

3. Cars of foreign railroads assigned by them to their own fuel trade.

4. Cars of individual companies placed at mines owned by such companies and cars owned by individual consumers placed at mines for their coal.

There are also certain exceptions of a local character, as follows:

1. Curtis Bay premium. Whenever a shipper on the Baltimore and Ohio Railroad handles cars at Curtis Bay promptly in any one month, he is allowed in the succeeding month a premium of fifty per cent of the number of cars so handled, in addition to his regular percentage. This in lieu of an assignment of cars to the Curtis Bay trade.

2. At certain points, noted on the percentage sheets, an arbitrary number of cars is assigned to mines on fire.

3. At certain mines in the immediate vicinity of industries, empty cars intended for loading at such industries are first sent into the mines for loading coal for such industries.

4. When annual contracts are placed for foreign railroad fuel coal with mines on the Baltimore and Ohio, arrangements are made that if the foreign railroads' cars are furnished for this fuel coal, the Baltimore and Ohio will allow the mines shipping the coal a number of Baltimore and Ohio cars equal to the foreign cars furnished.

5. When mines are connected with foreign railroads as well as with the Baltimore and Ohio, their rating is reduced fifty per cent. A similar reduction is made in cases where mines are located near rivers and are equipped for loading boats.

Where mines needed box and stock cars for the shipment of coal, as to which class of cars shortage rarely arose, there was a special rule which we need not notice.

With the system just referred to in force on the nineteenth of January, 1907, the Pitcairn Coal Company, a West Virginia corporation, owning a coal mine on the line of the Baltimore and Ohio Railroad in West Virginia, filed its petition in mandamus in the United States Circuit Court for the District of

Maryland. The defendants were the Baltimore and Ohio Railroad Company, the Fairmont Coal Company, the Clarksburg Fuel Company, the Pittsburg and Fairmont Fuel Company and the Southern Coal and Transportation Company, these four coal companies operating coal mines located in West Virginia on the Monongah Division of the Baltimore and Ohio Railroad. Along with these there were also made defendants two other corporations, the Consolidation Coal Company, located on the Cumberland and Pennsylvania Railroad in Maryland, and the Somerset Coal Company, located on the Baltimore and Ohio Railroad in Pennsylvania. All of these coal companies were charged to be substantially one in interest and were generally described as the Fairmont Companies. In addition, thirty-one other coal companies, alleged to be independent companies, operating coal mines on the line of the Baltimore and Ohio Railroad, were also made defendants. Rearranging somewhat the order of the averments as contained in the bill, the prayer for relief was substantially based upon the following grounds: The Pitcairn Coal Company, it was averred, was entitled to an equal distribution of the coal cars of the Baltimore and Ohio Railroad in times of shortage, in order to move its output of coal in interstate commerce, that the railroad company had refused, after demand, to give it the share of cars to which it was entitled, and that its not doing so had been seriously prejudicial to the business of the company, had curtailed its production and interfered with the moving of the coal produced in interstate commerce, and that the conduct of the railroad in the premises had amounted to the giving of an undue preference to the Fairmont Coal Company and its affiliated companies, to the prejudice of the Pitcairn Company and all other independent companies. The method pursued by the Baltimore and Ohio Railroad for rating mines, by the consideration of both capacity and previous shipments, was alleged, and it was charged that, on the basis of capacity of the mine as rated by that system, the Pitcairn Company was entitled to seven-tenths per cent

of the cars for distribution in the Monongah Division. General averments were, however, made concerning the method of rating, which, in effect, charged that such method was discriminatory and preferential, and was put in force so as to operate in favor of the Fairmont Coal Company and the companies affiliated with it, to the prejudice of the Pitcairn Company and other independent coal operators, the Baltimore and Ohio Railroad being interested, it was charged, directly or indirectly, in the Fairmont and its affiliated companies. The method of deduction from the mass of cars for the benefit of the Cumberland and Pennsylvania Railroad was also charged to be discriminatory and preferential, and to have been devised for the purpose of favoring mines on the line of the Cumberland and Pennsylvania, which were affiliated with the Fairmont. The failure to charge against the mines which had received them, individual or private cars, foreign railroad cars and company fuel cars, as well as the other arbitrary allotments of cars provided for in the regulations to which we have referred, including the Curtis Bay regulation, were all assailed as preferential and discriminatory, it being alleged that in many instances the individual cars had been virtually paid for by the Baltimore and Ohio Railroad, and that the failure to charge them was in effect a mere means resorted to in order to give a preference contrary to the act to regulate commerce. The prayer was for an alternative writ of mandamus, commanding an equal distribution in accordance with the averments of the petition in effect for the undoing of the regulations referred to, and for the establishment of regulations conformable to the rights which the petition asserted. As the scope of the prayer is important in the view we take of the case, it is excerpted in the margin.[1]

[1] First. That in the event of scarcity of cars to be furnished by defendant, Baltimore and Ohio Railroad Company, to shippers of coal on the Monongah Division of said road, that defendant, the Baltimore and Ohio Railroad Company, be required to furnish to relator one and seven-tenths (1.7) per cent until such percentage shall properly

It suffices for the present purposes to say that the answer of the Baltimore and Ohio Railroad traversed every averment as to preference and discrimination, asserted the validity of the method of rating and the rules of distribution to which we have referred. In great detail the origin and history of the operation of private or individual cars was set out, various contracts on that subject were annexed to the bill, and a decree rendered by the Circuit Court of the United States for the Northern District of West Virginia in favor of the Fairmont Coal Company, perpetually enjoining the Baltimore and Ohio Railroad Company to deliver certain private cars to the Fair-

be increased, of the total number of cars in service, or supplied to all the shippers on the Monongah Division of said road, without deducting from said number of cars "Individual Cars," or any arbitrary allotment of cars to other shippers, and without deducting from the total number of cars on all the lines of the Baltimore and Ohio Railroad the "Individual Cars" claimed by the Somerset Coal Company, or the cars arbitrarily assigned to the Cumberland and Pennsylvania Railroad Company, or the Consolidation Coal Company, before making the percentage distribution to the Monongah Division.

Second. That writ of mandamus may be issued against the said Baltimore and Ohio Railroad Company, defendant, to command and require it to cease to make or give any undue or unreasonable preference or advantage to Fairmont Coal Company, Consolidation Coal Company, Cumberland and Pennsylvania Railroad Company, Somerset Coal Company, Southern Coal and Transportation Company, Clarksburg Fuel Company, or Pittsburg and Fairmont Fuel Company, or either of them, in the shipping and transportation of their coal, and to cease from subjecting the relator, Pitcairn Coal Company, or any other independent shipper of coal on the Monongah Division aforesaid, to any undue or unreasonable prejudice or disadvantage in the shipping and transportation of coal, or in any respect whatsoever and to move and transport the traffic of relator, Pitcairn Coal Company, and the other independent coal companies on the Monongah Division aforesaid, without discrimination or preference, and to furnish the said Pitcairn Coal Company, and the other independent shippers of coal on the Monongah Division, without preference or discrimination, and upon conditions as favorable to it or them as is given by the said railroad company to the said Fairmont Coal Company, Consolidation Coal Company, Somerset Coal Company, Clarksburg

mont Company, was referred to and made part of the bill. The Cumberland and Pennsylvania Railroad Company, the Fairmont Coal Company and the five coal companies alleged in the bill to be affiliated with the Fairmont Coal Company applied for leave to answer, on the ground that, although the alternative rule for mandamus had not been served upon them, and they had only been summoned to "do whatever they deemed proper to protect their interest in the premises," they desired to answer, because the questions involved "are extremely important and of unusual interest, not only to your petitioners and the railroad against whom the mandamus is

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Fuel Company, Southern Coal and Transportation Company, and Pittsburg and Fairmont Fuel Company, or for like traffic, under similar conditions, to any other shipper, its fair and reasonable percentage of all cars on the line of said railroad and to shippers of like traffic along its railroad line, based upon the system of distribution of cars in effect on said railroad as aforesaid, or upon any fair, reasonable and equitable basis, and to furnish to the said Pitcairn Coal Company, for the transportation of its coal, without discrimination, exception or limitation, and upon conditions as favorable as those given to other shippers, the percentage of the total car supply on said railroad at this time properly distributable by said railroad company to the said Monongah Division, and thereon distributed among the relator and the other shippers of coal thereon as aforesaid.

Third. That in ascertaining and fixing the number of cars to which relator, Pitcairn Coal Company, and the other coal companies on the Monongah Division aforesaid are entitled, the said Baltimore and Ohio Railroad Company shall take into consideration and include in the estimate or calculation of the number of cars, to be divided in the proportion to which the percentages of each mine entitles the owner thereof to cars, all cars, whether owned by individual operators, shippers, other railroad companies or by the Baltimore and Ohio Railroad Company, and which may be upon the road of said Baltimore and Ohio Railroad Company, and shall also take into consideration, and include in the estimate or calculation of the number of cars to be divided upon the percentages aforesaid, all cars, whether furnished or used by for fuel or supply coal for the Baltimore and Ohio Railroad Company, or for any other railroad company, and shall not deduct, before dividing the cars upon the percentages aforesaid, any cars for premiums at Curtis Bay, or other arbitrary allotments.

asked, but to the whole body of transportation companies engaged in interstate commerce, and that the importance of the questions involved is so great that your petitioners feel that they are making but a reasonable request when they ask for a reasonable time to thoroughly present the facts which the court ought to be in possession of for a full and complete determination of the question." The right to answer having been given, and delay for that purpose having been accorded, these companies answered. Without at all going into detail, we think it suffices to say that the answer traversed all the averments as to preference and discrimination alleged in the bill. It specially asserted the legality of the operation on the Baltimore and Ohio Railroad of private or individual cars; made copious reference to the acts or contracts from which the right to operate said cars had arisen; charged that to take said cars from the service of the persons who owned them would be confiscatory, and in substance asserted the validity of the system of rating and of distribution enforced by the regulations of the company which we have previously referred to. Fourteen out of the thirty-one corporations referred to in the petition as independent companies briefly answered, adopting the averments of the petition, and praying for the awarding of the relief therein asked. Sixteen did not answer, and one of said companies substantially joined in the defenses of the railroad company, except as to the individual cars, concerning which it averred that it was the duty of the railroad to purchase said cars from the persons owning them and to operate them as part of the railroad equipment. By stipulation the cause was heard by the court without a jury.

There was voluminous testimony and a protracted trial, each side requesting findings and instructions embodying their respective contentions and excepting in so far as they were overruled. The court considered all the contentions raised by the pleadings except several which were not pressed at bar. It held that in view of the relations which the Cumberland and Pennsylvania Railroad had to the Baltimore and Ohio and

the origin of those relations the method by which coal cars were turned over to the Cumberland road was not preferential or discriminatory. It decided that however amenable, abstractly considered, to criticism, if at all, might be the system of rating, and especially the inclusion therein of the amount of coal shipments, and the large influence attributed to that fact, yet, when the particular facts concerning the Monongah district and the relations of the Baltimore and Ohio to that district were given their proper weight, the system was a just one and ought not to be interfered with. The complaint as to the Curtis Bay premium was also decided to be without merit; and so also was the complaint as to consumer's cars, as to foreign railway fuel cars and company fuel cars. Considering the private cars belonging to mine operators, and, without at all going into the relation of the Baltimore and Ohio Railroad with the owners of such cars, it was decided that while there was a right on the part of the railroad to move the cars, and it would be confiscation to deprive the owners of the right to use them, yet the duty was on the railroad to take account of the cars in fixing the percentage in case of shortage. The court declined to consider the decree which had been rendered in favor of the Fairmont Company against the Baltimore and Ohio in the previous case, which was pleaded, as well as that in another cause which was relied upon in argument to the same effect as controlling. The mandamus prayed therefore was refused as to every item embraced in the petition but that particular item, and, as to it, the writ was awarded. *United States* v. *Balt. & Ohio R. R.*, 154 Fed. Rep. 108.

The Baltimore and Ohio Railroad Company, the Fairmont Companies and the Pitcairn Coal Company prosecuted error. The Circuit Court of Appeals held as follows: *a*, that the system of rating, so far as taking into view the shipments and percentages based thereon was considered, was discriminatory and preferential; *b*, that while the right to allot cars to the Cumberland and Pennsylvania Railroad under the facts found below was lawful, the methods by which the allotment

was made was also discriminatory and preferential; *c*, that the practice as to the Curtis Bay regulation was also amenable to the same criticism; *d*, that the duty existed to take into account the individual cars, the foreign railway fuel cars and the company fuel cars in making a *pro rata* division in case of car shortage, and that not to do so would give rise to undue preferences and unlawful discriminations forbidden by the act to regulate commerce. Concluding that the various subjects embraced in the complaint with which it thus dealt were all controlled by the act to regulate commerce, it was expressly decided that the right to rectify the wrongs by the issue of the writ of mandamus as prayed for was sanctioned by the twenty-third section of the act to regulate commerce, and the case was remanded to the court below, with directions to allow the writ of peremptory mandamus, in accordance with the opinion. *United States* v. *Balt. & Ohio R. Co.*, 165 Fed. Rep. 113. The case is here upon error prosecuted by the Baltimore and Ohio Railroad and the Fairmont Coal Companies.

One of the assignments of error assails the correctness of the conclusion of the court below to the effect that, compatibly with the act to regulate commerce, there was power under the circumstances disclosed by the record to consider the subject-matters which were complained of, and to award the relief concerning them which was prayed. Indeed, the nature of the controversy and the relief which it requires is such that, even without the assigned error, to which we have referred, the question at the very threshold necessarily arises and commands our attention as to whether there was power in the courts, under the circumstances disclosed by the record, to grant the relief prayed consistently with the provisions of the act to regulate commerce, and to that subject we therefore at once come.

To a consideration of this question it is essential to at once summarily and accurately fix the subject-matter of the alleged grievances and the precise character of the relief required in order to remedy the evils complained of upon the as-

sumption of their existence. As to the first, it is patent that the grievances involve acts of the Baltimore and Ohio Railroad, regulations adopted by that company and alleged dealings by the other corporations, all of which, it is asserted, concern interstate commerce, and all of which, it is alleged, are in direct violation of the duty imposed upon the railroad company by the provisions of the act to regulate commerce. As to the second, in view of the nature and character of the acts assailed, of the prayer for relief which we have previously excerpted and of the relief which the court below directed to be awarded, it is equally clear that a prohibition, by way of mandamus, against the act is sought and an order, by way of mandamus, was invoked, and was allowed which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of interstate commerce in the future. When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission and not subject to be judicially enforced, at least until that body, clothed by the statute with authority on the subject, had been afforded by a complaint made to it the opportunity to exert its administrative functions.

The controversy is controlled by the considerations which governed the ruling made in *Texas & Pacific Ry. Company* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. In that case suit was brought in a court of the State of Texas to recover, because of an exaction by a carrier, on an interstate shipment, of an alleged unreasonable rate, although the rate charged was that stated in the schedules duly filed and published in accordance with the act to regulate commerce. After great consideration, it was held that the relief prayed was inconsistent with the act to regulate commerce, since by that act the rates, as filed, were controlling until they had been declared to be unreasonable by the Interstate Commerce Commission on a complaint made to that body. It was pointed out that any other view would give

rise to inextricable confusion, would create unjust preferences and undue discriminations, would frustrate the purposes of the act, and, in effect, cause the act to destroy itself. The ruling there made dealt with the provisions of the act as they existed prior to the amendments adopted in 1906, and when those amendments are considered they render, if possible, more imperative the construction given to the act by that ruling, since, by § 15, as enacted by the amendment of June 29, 1906, the commission is empowered, indeed it is made its duty, in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to an unjust preference or undue discrimination, and to forbid the same, but, moreover, to direct the practice to be followed as to such subject for a future period, not exceeding two years, with power in the commission, if it finds reason to do so, to suspend, modify, or set aside the same, the order, however, to become operative without judicial action. In considering § 15 in the case of *Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, just decided, *ante*, p. 452, it was pointed out that the effect of the section was to cause it to come to pass that courts, in determining whether an order of the commission should be suspended or enjoined, were without power to invade the administrative functions vested in the commission, and therefore could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency. Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the *Abilene case*, that the primary interference of the courts with the administrative functions of the commission was wholly incompatible with the act to regulate commerce. This result is easily illustrated. A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found the complaint is declared to be well founded. The administrative powers of the commission are invoked concerning a regulation of like character upon a similar com-

plaint. The commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body. That these illustrations are not imaginary is established not only by this record but by the record in the case of the *The Interstate Commerce Commission* v. *Illinois Central Railroad Company*, *ante*, p. 452.

We say this record, because, as has been pointed out, one of the questions which we would be called upon to decide if the merits were open is whether the court below was right in holding that if anything but the physical capacity of a mine was taken into consideration by a railroad company in rating the mine for car distribution in time of car shortage, the act to regulate commerce would be violated, and therefore the system adopted by the Baltimore and Ohio Railroad Company was repugnant to the act, because it made not alone the physical capacity but past shipments factors to be considered. But the reports of the Interstate Commerce Commission show that on a complaint made to that body on the subject of the system of mine rating of the Baltimore and Ohio Railroad Company, the commission, before the decision of the Circuit Court of Appeals in this case was announced, had expressly refused to hold that the system was either preferential or prejudicial within the act to regulate commerce. In that report, speaking of the Baltimore and Ohio system of mine rating, it was said (*Rail & River Coal Co.* v. *B. & O. R. R. Co.*, 14 I. C. C. Rep. 94):

"This method of rating mines was adopted by the defendant in 1902, after a careful examination of the various systems in force on other lines. It was intended as a compromise between ratings based on physical capacity only and ratings based on commercial capacity only."

And after elaborately weighing the matter, it was said (p. 95): "In combining the two systems the defendant has adopted a middle ground, apparently upon the thought that neither the physical nor the commercial capacity is always a fair test. We are not prepared, on this record, to say that there is no force in that view, and that a system of mine rating based upon a combination of the physical and commercial capacities of the several mines does not more closely approximate the actual car requirements of the mines than a system based upon physical capacity only."

We say also the *Illinois Central case*, since it is shown in that case that when the railroad company changed its regulations, presumably to have them conform to the administrative ruling made by the commission in the *Hocking Valley case*, such change was prevented from going into effect by an injunction issued by the Circuit Court of the United States for the Northern District of Illinois in the *Majestic Coal Company case*. And when the commission came to discharge its duty upon the complaint made to it in the *Illinois Central case* it was put to the alternative of either abdicating its administrative duties or making an order in violation of the injunction.

And the destructive effect upon the system of regulation devised by the act to regulate commerce, which these illustrations show must be the result of construing that act as giving authority to the courts, without the preliminary action of the commission, to consider and pass upon the administrative questions which the statute has primarily confided to that body, may be greatly multiplied. This is shown by the opinion of the commission in the *Baltimore and Ohio case*, to which we have already referred, where the decisions of

other lower courts are referred to in conflict with the opinion of the court below in this case as to mine rating, and not in harmony with the views expressed by the commission in the *Baltimore and Ohio case*.

The court below deemed that it was its duty to award to the coal company the relief by mandamus which was prayed, upon the theory that § 23 of the act to regulate commerce rendered it imperative to do so, this conclusion being specially based upon the provision of that section authorizing the remedy of mandamus to compel carriers "to furnish cars or other facilities for transportation for the party applying for the writ."

The section in question is as follows (§ 10 of Act of March 2, 1889, c. 382, 25 Stat. 855, 862):

"SEC. 23. That the Circuit and District Courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act of which this is a supplement and all acts amendatory thereof as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ; *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held

to exclude or interfere with other remedies provided by this act or the act to which it is a supplement."

That it is not necessary to point out that there is ample scope for giving effect to and applying the remedy embraced in § 23, if that section be construed in harmony with the act of which it forms a part, and not as destructive of one of the main purposes of the act, is, we think, obvious. It is to be observed that the section, besides empowering the use of the writ of mandamus to compel the furnishing of cars and other facilities for transportation, also authorizes the use of that writ for the purpose of compelling the movement of traffic "at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper." As it was settled in the *Abilene case* that the right to question in the courts the rates established in accordance with the act to regulate commerce without previous resort, by complaint, to the commission, in order to determine their unreasonableness, would be destructive of the act, and therefore was not permissible, that ruling is equally applicable to the provision as to furnishing cars contained in § 23, which is here relied upon. But as we are required, for the determination of the case now before us, to consider the scope of the act to regulate commerce as now existing, as a result of the amendments of 1906, we shall not rest our conclusion alone upon the persuasive force of the reasoning which constrained to the conclusion announced in the *Abilene case*. Speaking generally, it is true to say that, prior to 1889, although the prohibitions of the act to regulate commerce as to preferences and discriminations were far reaching, the mechanism provided by the statute for the enforcement of orders of the commission on the subject, as well as those concerning a finding as to unreasonable rates, were deemed to be in many respects ineffective, or at least tardy in operation or unsatisfactory in prompt remedial results, and this because immediate effect was not given to the orders of the commission, but the aid

of judicial authority was required as a prerequisite for such result. Section 23, here relied upon, was not part of the original act, but, as we have said, was added thereto on March 2, 1889, for the obvious purpose of making the remedial processes of the act more speedy and efficacious. Now, it cannot in reason be questioned that among the purposes contemplated by the amendments adopted in 1906 was the curing of the presumed remedial inefficiency of the act by supplying efficient means for giving effect to the orders of the commission, made in the exertion of the authority conferred upon that body. To that end one of the amendments, § 15, gives operative effect to the orders of the commission without the sanction of previous judicial authority, and endows that body with the power, not only as to unreasonable rates, but as to practices found upon complaint to be unduly prejudicial and unjustly discriminatory, to correct the same by its order, which order should have effect within the period fixed in the statute, and, to enforce these provisions, penalties and forfeitures are provided. Sec. 16. It being demonstrable, as we have seen, that to give to § 23 the broad meaning which the court below affixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted, since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889. This conclusion being in reason impossible, it must follow that, construing the provisions of § 23 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obliga-

tory force which the statute attaches to orders of the commission, rendered within the lawful scope of its authority, until such orders are set aside by the commission or enjoined by the courts.

Nor is there anything in the contention that the decision in *Southern Ry. Co.* v. *Tift*, 206 U. S. 428, qualifies the ruling in the *Abilene case*, and is an authority supporting the right to resort to the courts in advance of action by the commission for relief against unreasonable rates or unjust discriminatory practices, which, from their nature, primarily require action by the commission. While it is true that the original bill in the *Tift case* sought relief from alleged unreasonable rates before action by the commission, yet, as said by this court (p. 437):

"The Circuit Court granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon sufficient pleadings, identical with those before the court, and upon testimony adduced upon the issues made, the decision was adverse to the appellants. This action of the commission, with its findings and conclusions, was presented to the Circuit Court, and it was upon these, in effect, the decree of the court was rendered. There was no demurrer to that petition, and the testimony taken before the commission was stipulated into the case, and the opinion of the court recites that, 'with equal meritorious purpose, counsel for respective parties agreed that this would stand for and be the hearing for final decree in equity.' "

The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the Circuit Court with directions to set aside its judgment, and enter judgment dismissing the petition.

Reversed.

MR. JUSTICE HARLAN and MR. JUSTICE BREWER dissent.

MACON GROCERY COMPANY *v.* ATLANTIC COAST LINE RAILROAD COMPANY.

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

No. 351. Argued October 20, 21, 1909.—Decided January 17, 1910.

A suit brought by shippers to enjoin a railroad company from putting a tariff schedule into effect on the ground that it violates rights secured by the act to regulate commerce is a case arising under the Constitution and laws of the United States, and the jurisdiction of the Circuit Court over the person of the defendant must be determined accordingly.

Under the jurisdictional act of March 3, 1875, c. 137, 18 Stat. 470, as amended by the act of March 3, 1887, c. 373, 24 Stat. 552, corrected by the act of August 13, 1888, c. 866, 25 Stat. 433, the Circuit Court in the district of which the defendant is not an inhabitant has not jurisdiction of a case arising under the Constitution and laws of the United States, even though diverse citizenship exist, the plaintiff resides in the district, and the cause be one alone cognizable in a Federal court.

Where pleas to the jurisdiction which should have been sustained on one ground were overruled but subsequently the Circuit Court of Appeals reversed and remanded with instructions to dismiss without prejudice for want of jurisdiction on a different ground, this court may reach the result which should have been originally arrived at by affirming the decree of the Circuit Court of Appeals without expressing any opinion as to the merits of the reasoning on which it was based.

166 Fed. Rep. 206, affirmed.

THE facts, which involve the jurisdiction of the Circuit Court, are stated in the opinion.

Mr. William A. Wimbish for appellants.

Mr. Henry L. Stone and *Mr. Claudian B. Northrop* for appellees.

MR. JUSTICE WHITE delivered the opinion of the court.

This litigation was commenced on the equity side of the Circuit Court of the United States for the Southern District of Georgia, by the filing on July 25, 1908, of a bill on behalf of the present appellants, all citizens of the State of Georgia, who are wholesale dealers in groceries and food products and like commodities. The defendants named in the bill are the appellees in this court, railroad corporations of States other than Georgia, viz., the Atlantic Coast Line Railroad Company, the Louisville and Nashville Railroad Company, the Nashville, Chattanooga and St. Louis Railway Company, the Southern Railway Company, and the Cincinnati, New Orleans and Texas Pacific Railway Company.

Briefly stated, the object of the bill was to restrain the putting into effect, by the interstate carriers just named, of proposed advances in rates on fresh meats, grain products, hay and packing-house products within the territory of what is known as the Southeastern Freight Association. That territory, roughly described, embraces the States of South Carolina, Florida, Georgia, points in Tennessee, and that portion of Alabama east of a line drawn from Chattanooga through Birmingham, Selma and Montgomery to Pensacola. It was averred that freight tariffs, embodying the proposed advances in rates, had been filed with the Interstate Commerce Commission, that notice had been given that such tariffs would become effective on August 1, 1908, and that practically every interested line of railroad within the territory in question had joined in such tariffs as participating carriers. The advance in rates was averred to be an "arbitrary and unlawful exaction," and to be the direct outcome of understandings and agreements in suppression of competition and in unlawful combination in restraint of interstate trade, arrived at and made effective through the agency of the Southeastern Freight Association and other affiliated associations, and that the acts of such combinations in mak-

ing the advance of rates complained of was the result of a conspiracy, unlawful as well at common law as under the statutes of the United States. Averring that to permit the going into effect of the proposed unjust and unreasonable rates would entail irreparable loss and injury to complainants and others similarly situated, would operate to the prejudice of the public interest, and would bring about a multiplicity of suits for reparation, the bill prayed the allowance of an injunction *pendente lite*, restraining the putting into effect of the proposed advances, and that upon a final hearing a decree might be awarded perpetually enjoining such advances.

Specially appearing for the purpose, the various defendants respectively filed a plea to the jurisdiction, each defendant asserting in substance an exemption from being sued in a district of which it was not an inhabitant. Demurrers to the pleas to the jurisdiction were sustained. Thereupon, without waiving the benefit of the pleas, defendants jointly demurred to the bill upon numerous grounds. Without specifically passing on the demurrer, the court heard the application for an injunction, upon affidavits and documents submitted on behalf of the complainants, and on August 1, 1908, announced its opinion "sustaining the contention of the complainants and directing the injunction prayed to issue upon the condition that complainants should within ten days present their complaint to the Interstate Commerce Commission for investigation and determination of the reasonableness of the rates involved." *Macon Grocery Co.* v. *Atlantic C. L. R. Co.*, 163 Fed. Rep. 738. Two days afterwards an order was entered, in which, among other statements, it was recited—"that the complainants, together with other persons in the cities of Atlanta, Columbus, Rome and Athens, Georgia, have this day filed with the Interstate Commerce Commission their complaint, praying the commission to investigate and determine the reasonableness of the rates involved, also to declare what are just and reasonable maximum rates."

The order decreed that the defendants to the action and each of them—"be and they are hereby jointly and severally enjoined from enforcing collection of the advance in rates made effective August 1st, 1908, from Ohio and Mississippi River crossings, Nashville, Tennessee, and points with relation thereto, to all points within the State of Georgia, on Classes B, C, D and F, fresh meats, C, L, grain products, hay and packing-house products; this injunction to continue and remain in force pending an investigation and determination of the reasonableness of the rates involved, by the Interstate Commerce Commission, or until further order of the court."

Thereupon an appeal was taken to the Circuit Court of Appeals for the Fifth Circuit. It was there held that the case presented "for necessary consideration the proper construction of the act to regulate commerce," and that the jurisdiction of the court did not rest solely upon diversity of citizenship of the parties. The court, being of opinion "that the sound construction of the different provisions of the act to regulate commerce as amended and now in force, necessarily forbid the exercise of the jurisdiction attempted to be invoked by the bill," reversed the decree of the Circuit Court and remanded the case to that court with instructions to dismiss the bill without prejudice.

Assignments of error, eighteen in number, have been filed, wherein, in various forms of statements, appellants assail the action of the Circuit Court of Appeals in adjudging that the Circuit Court was without jurisdiction over the subject-matter of the bill. The appellees also, in the argument at bar, press upon our notice, as they did below, the claims made in the special pleas to the jurisdiction filed in the Circuit Court. It is of course the duty of this court to see to it that the jurisdiction of the Circuit Court was not exceeded, (*Louisville & Nashville R. R. Co.* v. *Mottley*, 211 U. S. 149, 152, and cases cited), and we shall dispose of the case before us by considering and deciding the last-mentioned contention. The basis of the claim that the Circuit Court had not

acquired jurisdiction over the person of the defendants was that none of the defendants was an inhabitant of the district in which the suit was brought, and that the suit being one "wherein the jurisdiction is not founded only on the fact that the action is between citizens of different States, but is based also upon acts of Congress of the United States relating to interstate commerce and alleged causes of action arising thereunder," the defendant could not be sued outside of the district of which it was an inhabitant. As cause of demurrer to the pleas the complainants stated "that the controversy presented by the bill is wholly between citizens of different States, and is solely founded upon diversity of citizenship." While sustaining the demurrer the Circuit Court yet declared:

"It is true that in this case the illegality of the alleged increase in rates must necessarily, in large measure, be determined by the Federal law. The legality or illegality of the alleged combination in restraint of trade must be determined by the same law, and it seems to be conceded that, generally speaking, this court would not have jurisdiction of these questions finally except under conditions which do not exist here. That is to say, the court can only, for final determination, entertain the Federal question in the district of which the defendants are inhabitants."

Despite these views, however, as the court considered, if the averments of the bill were taken as true, there was "a threatened and immediate violation of the Federal law of the gravest character to a large number of people," irreparable injury would be occasioned if the increase in rates was allowed to go into effect, and as there was not time for those affected to have protection or seek recourse elsewhere, jurisdiction was entertained for the purpose of giving temporary relief.

The pertinent section of the statute regulating the original jurisdiction of Circuit Courts of the United States is the first section of the act of March 3, 1875, 18 Stat. 470, ch. 137, as

amended by the act of March 3, 1887, 24 Stat. 552, ch. 373, as corrected by the act of August 13, 1888, ch. 866, 25 Stat. 433, reading as follows:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, . . . or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid. . . . But . . . no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

In *Patton* v. *Brady*, 184 U. S. 608, 611, discussing the question as to when a case may be said to arise under the Constitution of the United States, the court observed:

"It was said by Chief Justice Marshall that 'a case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either,' *Cohens* v. *Virginia*, 6 Wheat. 264, 379; and again, when 'the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction.' *Osborne* v. *Bank of United States*, 9 Wheat. 738, 822. See also *Gold-Washing & Water Co.* v. *Keyes*, 96 U. S. 199, 201; *Tennessee* v. *Davis*, 100 U. S. 257; *White* v. *Greenhow*, 114 U. S. 307; *Railroad Company* v. *Mississippi*, 102 U. S. 135, 139."

In *Tennessee* v. *Davis*, 100 U. S. 257, the court said:

"What constitutes a case thus arising was early defined in the case cited from 6 Wheaton (*Cohens* v. *Virginia*). It is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted. Story, Const., sec. 1647. It was said in *Osborne* v. *Bank* (9 Wheat. 738), 'When a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.' And a case arises under the laws of the United States, when it arises out of the implication of the law."

In cases of the character of the one at bar the rulings of the lower Federal courts have uniformly been to the effect that they arose under the Constitution and laws of the United States. *Tift* v. *Southern Railway Co.*, 123 Fed. Rep. 789, 793; *Northern Pacific Ry. Co.* v. *Pacific, &c. Ass'n*, 165 Fed. Rep. 1, 9; *Memphis Cotton Oil Co.* v. *Illinois Central R. R. Co.*, 164 Fed. Rep. 290, 292; *Imperial Colliery Co.* v. *Chesapeake & O. Ry. Co.*, 171 Fed. Rep. 589. And see *Sunderland Bros.* v. *Chicago, R. I. & P. Ry. Co.*, 158 Fed. Rep. 877; *Jewett Bros.* v. *C., M. & St. P. Ry. Co.*, 156 Fed. Rep. 160. We are of opinion that the case before us may properly be said to be one arising under a law or laws of the United States. As said by Taft, Circuit Judge, in *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co. et al.*, 54 Fed. Rep. 730:

"It is immaterial what rights the complainant would have

had before the passage of the interstate commerce law. It is sufficient that congress, in the constitutional exercise of power, has given the positive sanction of federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States."

The object of the bill was to enjoin alleged unreasonable rates, threatened to be exacted by carriers subject to the act to regulate commerce. The right to be exempt from such unlawful exactions is one protected by the act in question, and the purpose to avail of the benefit of that act, as well as of the anti-trust act, is plainly indicated by the averments of the bill. Of necessity, in determining the right to the relief prayed for, a construction of the act to regulate commerce was essentially involved.

The jurisdiction of the Circuit Court not being invoked solely upon the ground of diversity of citizenship, it inevitably follows that, as there was no waiver of the exemption from being sued in the court below, that court was without jurisdiction of the persons of the defendants. *In re Keasbey & Mattison Co.*, 160 U. S. 221; *In re Moore*, 209 U. S. 490; *Western Loan Co.* v. *Butte & Boston Min. Co.*, 210 U. S. 368. In the first case, the question involved was as to the jurisdiction of the United States Circuit Court for the Southern District of New York over an action brought in that court by a corporation of Pennsylvania against a corporation of Massachusetts, having its principal place of business in New York City, for infringement of a trade-mark. In the course of the opinion it was said (pp. 228, 229, 230):

"But when this suit was brought, the first section of the Judiciary Act of 1875 had been amended by the act of March 3, 1887, c. 373, as corrected by the act of August 13, 1888, c. 866, in the parts above quoted, by substituting for the jurisdictional amount of $500, exclusive of costs, the amount of $2,000, exclusive of interest and costs; and by striking out, after the clause 'and no civil suit shall be brought before

either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant,' the alternative, 'or in which he shall be found at the time of serving such process or commencing such proceeding,' and by adding 'but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' 24 Stat. 552; 25 Stat. 433.

"The last clause is added by way of proviso to the next preceding clause, which, in its present form, forbids any suit to be brought in any other district than that of which the defendant is an inhabitant; and the effect is that, in every suit between citizens of the United States, when the jurisdiction is founded upon any of the grounds mentioned in this section, other than the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but when the jurisdiction is founded only on the fact that the parties are citizens of different States, the suit shall be brought in the district of which either party is an inhabitant. And it is established by the decisions of this court that, within the meaning of this act, a corporation cannot be considered a citizen, an inhabitant or a resident of a State in which it has not been incorporated; and, consequently, that a corporation incorporated in a State of the Union cannot be compelled to answer to a civil suit, at law or in equity, in a Circuit Court of the United States held in another State, even if the corporation has a usual place of business in that State. *McCormick Co.* v. *Walthers,* 134 U. S. 41, 43; *Shaw* v. *Quincy Mining Co.,* 145 U. S. 444; *Southern Pacific Co.* v. *Denton,* 146 U. S. 202. Those cases, it is true, were of the class in which the jurisdiction is founded only upon the fact that the parties are citizens or corporations of different States. But the reasoning on which they proceeded is equally applicable to the other class, mentioned in the same section, of suits arising under the Constitution, laws, or treaties of the United

States; and the only difference is that, by the very terms of the statute, a suit of this class is to be brought in the district of which the defendant is an inhabitant, and cannot, without the consent of the defendant, be brought in any other district, even in one of which the plaintiff is an inhabitant.

* * * * * * * *

"This suit, then, assuming it to be maintainable under the act of 1881, is one of which the courts of the United States have jurisdiction concurrently with the courts of the several States. The only existing act of Congress, which enables it to be brought in the Circuit Court of the United States, is the act of 1888. The suit comes within the terms of that act, both as arising under a law of the United States, and as being between citizens of different States. In either aspect, by the provisions of the same act, the defendant cannot be compelled to answer in a district of which neither the defendant nor the plaintiff is an inhabitant. The objection, having been seasonably taken by the defendant corporation, appearing specially for the purpose, was rightly sustained by the Circuit Court."

We are of opinion that the jurisdictional statute of 1888 is applicable, even upon the assumption that the cause of action was alone cognizable in a court of the United States, as the particular venue of the action was not provided for elsewhere than in that statute.

The pleas to the jurisdiction of the Circuit Court having been seasonably made, should have been sustained and the bill dismissed, without prejudice, for want of jurisdiction over the persons of the defendants. As, however, practically the same result will be reached by the decree entered in the Circuit Court of Appeals, which ordered the reversal of the decree of the Circuit Court and remanded the cause, with instructions to dismiss the bill without prejudice, we affirm that decree without expressing an opinion as to the merits of the reasoning upon which it was based.

Affirmed.

MR. JUSTICE HARLAN, dissenting

I cannot agree to the opinion in this case, and will briefly state the reasons for my dissenting.

The plaintiffs in error, citizens of Georgia, brought this suit in equity in the Circuit Court of the United States for the Southern District of Georgia against the defendants in error, corporations of several different States, other than Georgia. The relief sought was a decree enjoining those corporations from putting in force and maintaining in Georgia certain rates established by agreement among themselves. It seems to me that this case could have been disposed of upon the authority of *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Company*, recently decided, *ante*, p. 481, in which the court held, in substance, that shippers, who complain of rates adopted by interstate carriers, cannot obtain relief by an original suit brought in any court, Federal or state, but must make application, at the outset, to the Interstate Commerce Commission. This, I think, is all that need have been said; for, whatever interpretation was given to the Judiciary Act of 1888, (25 Stat. 433,) the Circuit Court would have been required, under the case just cited, to decline jurisdiction. But the court, in its wisdom, does not refer to this view of the case and deems it necessary to determine whether the plaintiffs, citizens of Georgia, may, under the Judiciary Act of 1888, considered alone, invoke the jurisdiction of the Circuit Court, held in that State, against the defendant corporations of other States.

If I correctly interpret the opinion of the court, it proceeds on the theory that if the action had been founded alone on diversity of citizenship the suit—although the defendants were corporations of other States—could have been maintained in the United States Circuit Court sitting in Georgia, that being the State of the residence of the plaintiffs. But as the plaintiffs were so unfortunate as to possess and, in their pleadings, to assert, in addition to diversity of citizenship, a Federal right and to seek to have that right protected by the

Federal court against the illegal acts of the defendant corporations, they must now either go into a state court of Georgia, in order to obtain the desired relief, or go to the respective States, however distant, which incorporated the defendants and sue there. Certain cases are referred to as requiring this construction of the act of 1888—*McCormick Harvesting Machine Co.* v. *Walthers*, 134 U. S. 41; *Shaw* v. *Quincy Mining Company*, 145 U. S. 444, and *In re Keasbey and Mattison Co.*, 160 U. S. 221. But I cannot perceive that there was in either of those cases such a question as the one just stated. Neither of them actually involved or decided any such question. The *McCormick case* was a suit in the Circuit Court of Nebraska, by a citizen of that State, against an Illinois corporation, having an agent in Nebraska. The defendant pleaded that, as it was not an inhabitant of Nebraska, it could not, under the act of 1888, be sued in that State. But this plea was overruled by the court below and this court held that the McCormick Company, although not an inhabitant of Nebraska, was liable to be sued in the Federal court held in the State of the plaintiff's residence. Nothing more was involved or decided in that case. The *Shaw case* was a civil suit brought in the Federal court, sitting in New York, by a citizen of Massachusetts against a citizen of Michigan. But although the parties were citizens of different States, neither the plaintiff nor the defendant resided in or was a citizen of the State in which the suit was brought. What was really involved in that case and what was decided appears from the last paragraph of the opinion of this court, as follows (p. 453): "All that is now decided is that, under the existing act of Congress a corporation, incorporated in one State only, cannot be compelled to answer, in a Circuit Court of the United States held in another State in which it has a usual place of business, to a civil suit, at law or in equity, *brought by a citizen of a different State.*" In the *Keasbey-Mattison case* it appears that the suit was brought, in the Federal court of New York, by a Pennsylvania corporation against a Massachusetts corporation. What

the court said leaves no doubt as to what was intended to be decided. It said: "This suit, then, assuming it to be maintainable under the act of 1881, is one of which the courts of the United States have jurisdiction concurrently with the courts of the several States. The only existing act of Congress, which enables it to be brought in the Circuit Court of the United States, is the act of 1888. This suit comes within the terms of that act, both as arising under a law of the United States, and as being between citizens of different States. In either aspect, by the provisions of the same act, the defendant cannot be compelled to answer in a district of which *neither the defendant nor the plaintiff is an inhabitant.*" Whatever general expressions are to be found in the opinions in the cases cited neither of those cases is an authority for the broad, unqualified statement that the United States Circuit Court, held in a State of which the plaintiff is a citizen, may not take cognizance of a suit brought by him in a Federal court against a corporation of another State, where such suit presents a controversy between citizens of different States and, *in addition*, discloses the fact that the plaintiff claims a Federal right which needs to be protected against the wrongful or illegal acts of the defendant corporation. This proposition is, of course, subject to the condition that the foreign corporation, by having an agency in Georgia or otherwise, can be reached by some process and brought into the Federal court sitting in Georgia. It is inconceivable, I think, that Congress intended to deprive the Federal court, sitting in the State of the plaintiff's residence of jurisdiction to protect his Federal right, simply because it appears from the record that the defendant and the alleged wrongdoer are citizens of different States. It necessarily follows from the opinion of the court in this case that where a citizen of another State is sued in a state court, and the suit involves a Federal right claimed by the plaintiff, the defendant cannot remove the case to the Federal court, but *must* remain in the state court of original jurisdiction, and there defend his asserted Federal right. The state court might well say, under

the opinion just delivered, that although the controversy between the parties involves Federal rights, and presents a controversy between citizens of different States, as well as one arising under the Constitution and laws of the United States, it is a suit of which the Federal court could not take cognizance by removal. We so say because such a case could not, under the court's present view of the act of 1888, have been originally brought in that court, and because, according to the settled doctrines of this court, no case can be removed from a state court to a Federal court which could not have been originally brought in the latter court. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Arkansas* v. *Coal Co.*, 183 U. S. 185; *Joy* v. *St. Louis*, 201 U. S. 332, 340–1.

I recognize the fact that the act of 1888 was not drawn with precision. But I am of opinion that as the act gives the Circuit Court original jurisdiction, concurrent with the courts of the several States, "of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, . . . in which there shall be a controversy between citizens of different States," the intention of Congress would be best effectuated by holding that the jurisdiction of the Circuit Court is not excluded, in a controversy between citizens of different States, simply because the plaintiff, who sued in the Federal court held in the State of his residence, asserts a Federal right and seeks to have it protected against the illegal acts of the defendant, a citizen of another State; provided, always, that the defendant, if a corporation of another State, may, through agents conducting its business in the State where the suit is brought, be reached by the process of the court and subjected to its authority. The presence in the case of a Federal right asserted by the plaintiff ought not prejudice him and does not, I think, alter the fact that the controversy is one of which a Circuit Court may take cognizance, because it is a controversy between citizens of different States.

THE STATE OF NORTH DAKOTA EX REL. FLAHERTY *v.* HANSON, SHERIFF OF GRAND FORKS COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

No. 47. Submitted November 29, 1909.—Decided January 17, 1910.

A State cannot place a burden on a lawful taxing power of the United States; nor can it place a burden upon the person paying a tax to the United States solely because of such payment and without reference to the doing by such person of any act within the State and subject to its regulating authority.

A State cannot so exert its police power as to directly hamper or destroy a lawful authority of the United States.

A state statute requiring the holder of a Federal liquor license to perform duties in conflict with the requirement of the Federal statute is an exercise of power repugnant to the Constitution and cannot be enforced; and so held as to chap. 189, General Laws of North Dakota, 1907, requiring the holder of such a license to file and publish a copy thereof.

Quære, whether the payment to the United States of the special liquor tax and taking a receipt therefor creates a *prima facie* presumption that the person holding the receipt is engaged in the liquor business.

16 N. Dak. 347, reversed.

THE facts, which involve the constitutionality of a statute of North Dakota, are stated in the opinion.

Mr. Edward Engerud, Mr. Daniel B. Holt, Mr. John S. Frame and *Mr. George A. Bangs* for plaintiff in error:

The act complained of, chap. 189, Gen'l Laws, 1907, of North Dakota is not a regulation for sale of liquor and is not a proper exercise of the police power of the State. It relates only to the holders of Federal licenses.

Even if such was the intent of the legislature, effect cannot be so given to it unless the language is plain and unambiguous. Courts cannot imagine an intent and twist the language so as to substitute what the court thinks the law should have been

instead of what it is. *Ruggles* v. *Illinois*, 108 U. S. 526; *United States* v. *Fisher*, 2 Cranch, 358; *United States* v. *Wiltberger*, 5 Wheat. 95; *United States* v. *Hartwell*, 6 Wall. 395.

The act does not regulate the liquor business in the State because it does not apply to all persons in the State.

The act deprives the state court of the power to decide who are liquor dealers within the meaning of the state law. It affects only those dealers who obey the Federal law and post their receipts.

The incriminating facts under the statute are the possession of a Federal tax receipt and failure to register and publish it.

The statute is an attempt to exercise police power inherent in the State, but it cannot be enforced without resort to the Federal statutes. This situation is foreign to our form of government. *Butchers' Union* v. *Crescent City*, 111 U. S. 746; *Ableman* v. *Booth*, 21 How. 506; *United States* v. *Tarble*, 13 Wall. 397; Cooley, Const. Law, 399; *Thorpe* v. *Railroad Co.*, 27 Vermont, 140.

The act is an unlawful interference with Federal regulations.

The fact that the state legislature intended by the law in question to make the enforcement of the prohibition laws of the State more easy and certain cannot save it if in truth it interferes in any manner with a subject over which the Federal Government has control. *Bowman* v. *Chicago, &c.*, 125 U. S. 475; *Rhodes* v. *Iowa*, 170 U. S. 412.

There can be no question made of the right of Congress to raise revenue for the maintenance of the Federal Government by taxing those who engage in the sale of liquors, and it is equally within the power of Congress to prescribe the conditions under which that tax shall be paid, and the notice which the person paying it shall give to the public of the fact of such payment.

While the State is not prohibited from also taxing the persons who engage in that business because of the fact that Congress has seen fit to tax them it cannot lay upon those persons

duties and obligations different from those imposed by Congress.

The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission, but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Prigg* v. *Pennsylvania,* 16 Pet. 539; *Houston* v. *Moore,* 5 Wheat. 1

To the same effect also see *Farmers' &c. Bank* v. *Dearing,* 91 U. S. 29; *Easton* v. *Iowa,* 188 U. S. 220; *Ohio* v. *Thomas,* 173 U. S. 276; *Sturgis* v. *Crowninshield,* 4 Wheat. 122; *Patterson* v. *Kentucky,* 97 U. S. 501; *Webber* v. *Virginia,* 103 U. S. 344; *Commonwealth* v. *Petty,* 29 S. W. Rep. 291; *Cranson* v. *Smith,* 37 Michigan, 309; *Hollida* v. *Hunt,* 70 Illinois, 109; *Commonwealth* v. *Felton,* 101 Massachusetts, 204; *Crittenden* v. *White,* 23 Minnesota, 24; *People* v. *Kennedy,* 38 California, 147; *State* v. *Pike,* 15 N. H. 83.

Besides being an unwarranted usurpation of authority over transactions and relations between the Federal Government and its citizens, the act interferes with and impedes the operations of the Federal laws relating to internal revenue.

There was no appearance or brief for defendant in error.

Mr. Justice White delivered the opinion of the court.

By § 18 of the act of February 8, 1875, ch. 36, 18 Stat. 307, as amended by § 4 of the act of March 1, 1879, ch. 125, 20 Stat. 327, 333, a special tax of twenty-five dollars is imposed on retail dealers in liquors, as therein defined, and a tax of twenty dollars on a retail dealer in malt liquors. By Rev. Stat., §§ 3232 and 3233 a person is forbidden to engage in or carry on any trade or business made subject to a special tax until the tax has been paid, and it is made the duty of one engaging in a trade or business on which a special tax is imposed by law

to register with the collector of the district "his name or style, place of residence, trade or business, and the place where such trade or business is to be carried on." In addition, Rev. Stat., § 3239, as amended by the act of February 27, 1877, ch. 69, 19 Stat. 240, requires every person engaging in any business, made liable to a special tax, except tobacco peddlers, to place and keep conspicuously in his establishment or place of business all stamps denoting the payment of said special tax, and penalties are affixed for non-compliance. So also any one carrying on a business made liable to a special tax without payment of the tax is subject to fine and imprisonment under § 16 of the act of 1875.

By other sections of the Revised Statutes it is provided as follows:

"SEC. 3240. Each collector of internal revenue shall, under regulations of the Commissioner of Internal Revenue, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid.

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"SEC. 3243. The payment of any tax imposed by the internal-revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes."

The State of North Dakota on March 13, 1907 (Laws No. Dak., 1907, p. 307), enacted a law requiring the registration and publication of any receipt, stamp or license, showing the payment of the special tax levied under the laws of the United

States upon the business of selling distilled, malted and fermented liquor. Briefly, the law provides as follows: A notice of the particulars contained in the receipt or license and other details respecting the place where the tax receipt or license is posted, etc., is required to be made for three weeks in official newspapers, and the fees for publication are declared to be the same "as allowed by law for the publication of other legal notices." The holder of the receipt or license is also required to place and keep posted, at all times, with the government tax receipts or license, an affidavit of the fact of publication and the obtaining of such license, etc., together with a copy of the notices or advertisements. A duly authenticated copy of the tax receipt or license is required to be filed with a named official, to whom a ten-dollar filing fee is to be paid, and such official is required to publish, in certain official newspapers, the first week in each month, a list of all such tax receipts or licenses filed during the previous month, such notice to be published one week in each newspaper.

Upon complaint made before a committing magistrate, for the county of Grand Forks, State of North Dakota, R. E. Flaherty, by the name of R. C. Flarty, was held to answer upon a charge of neglecting to register and publish a government receipt for the payment of an internal revenue tax on the business of a retail dealer in malt liquors. Having been committed to the custody of the sheriff, Flaherty unsuccessfully made application for a writ of *habeas corpus* to a judge of a state District Court. Afterwards a similar application was made to the Supreme Court of the State and the writ was granted by that court, but, upon hearing, the writ was quashed. *State ex rel. Flaherty* v. *Hanson*, 16 No. Dak. 347. This writ of error was thereupon prosecuted.

The detention complained of was asserted to be illegal upon the ground that the law upon which the prosecution was based was repugnant to the state and Federal Constitutions. We, of course, have to deal solely with the claim of alleged repugnancy to the Constitution of the United States.

The law of North Dakota, which we have already summarized, is in the margin.[1]

The state court was of opinion that the law made the person

[1] An act providing for the publication and registration of special tax receipts or licenses from the Government of the United States to sell distilled, malt and fermented liquors, issued to persons in North Dakota, the payment and collection of registration fees and publication fees, regulating the posting and exhibiting of such tax receipts or licenses, prescribing the duties of officials and owners and lessors of property in relation thereto, prescribing penalties for failure to perform the duties prescribed and other regulations pertaining to the sale of intoxicating liquors.

Be it enacted by the Legislative Assembly of the State of North Dakota:

§ 1. Liquor license. Tax receipt must be registered.—Every receipt, stamp or license showing payment of the special tax levied under the laws of the United States upon the business of selling distilled, malt or fermented liquor, issued to or held by any person, firm or corporation in this state shall be registered and published as in this act required.

§ 2. Notice to be published. Contains what.—Immediately upon posting or displaying the special tax receipt or license mentioned in said section one of this act as required under government regulations, it shall be the duty of the person in whose name such tax receipt or license is issued, to cause to be published for three successive weeks in the official newspaper of the county and for the same period in the official newspaper of the city, if within an incorporated city, a notice which shall contain the following information: Name of person to whom the government tax receipt or license is issued; date of special tax receipt or license; description of property where said tax receipt or license is posted, and, if within an incorporated city, the number of the lot and block and street number and setting forth specifically the room, building or place where said tax receipt or license is posted; the name of the owner and the name of the lessor of the property in which said tax receipt or license is posted. Upon discontinuance of business or removal of the special tax receipt or license mentioned in section one of this act to another building or place, a similar notice containing the information prescribed in this section, shall be published in the same manner as prescribed herein, and setting forth further the fact of removal, giving date and description of place to which such removal is made as fully as in the original notice.

who had paid the special United States tax and taken a receipt therefor subject to the burdens which the law imposed, wholly without reference to whether such person so paying the tax

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§ 3. Copy of receipt filed with auditor.—It shall be the further duty of any person to whom a tax receipt or license from the government of the United States is issued, as mentioned in section one of this act, to file a duly authenticated copy of the same before or immediately upon posting, if in an incorporated city with the city auditor, otherwise with the county auditor of the county and pay a fee for the filing thereof of ten dollars, which fee shall be turned into the general fund of the city or county as the case may be.

§ 4. Auditor publishes list of licenses.—The city auditor, if in an incorporated city, or county auditor, if not within an incorporated city, shall be required to publish in the official newspaper of the city and each of the official newspapers of the county the first week in each month a list of all such tax receipts or licenses filed during the previous month, such notice to be published one week in each newspaper.

§ 5. Fees for publication. Copy posted.—The fee for publication of notices required under this act shall be the same as allowed by law for publication of other legal notices and the publisher may require the fee for such publication to be paid in advance. Upon the expiration of the publication required by this act the publisher or manager of the newspaper in which said notice is published shall make an affidavit of publication with a copy of the advertisement attached thereto, together with the copy of notice or advertisement referred to herein shall be posted and remain posted at all times with the tax receipt or license referred to in section one of this act.

§ 6. Owner of premises must publish, when. Penalty for failure.—In case the person to whom the tax receipt or license referred to in section one of this act shall be issued, shall fail to cause to be published the notice required by this act, it shall be the duty of the owner or lessor of the premises whereon or wherein the tax receipt or license from the government of the United States referred to in section one of this act shall be posted, to cause such advertisement to be published as in this act required and if such owner or lessor shall knowingly fail to do so he shall be guilty of a misdemeanor.

§ 7. Duty of officers.—It shall be the duty of every sheriff, deputy sheriff, constable, mayor, marshal, police judge and police officer of any city or town having knowledge of any violation of the provisions of this act to notify the state's attorney of the fact of such violation and to furnish him the names of any witnesses within his knowledge

and taking the receipt had posted the same, as required by the laws of the United States, or done any act within the State. The court said (p. 353):

"The argument of petitioner's counsel to the effect that the act applies only to those persons who have complied with the federal statute with reference to posting the receipts for the payment of such tax is, we think, unsound. While section 2 of the act, when given a literal construction, and without considering the other portions of the act, would appear to sustain petitioner's contention, in this respect, we think it apparent that when the whole act is construed together the legislative intent that the same shall apply to all who have *paid* the federal tax is apparent and such intent must be given effect."

Considering the contention that the sole purpose was to burden the person who made a payment of a tax to the United

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by whom such violation can be proven. If any such officer shall fail to comply with the provisions of this section he shall be guilty of a misdemeanor and upon conviction, in addition to the punishment therefor prescribed by law, shall forfeit his office. For failure or neglect of official duty in the enforcement of this act any of the city or county officers herein referred to may be removed by civil action.

§ 8. Duty of county auditor.—It shall be the duty of the county auditor of each county to apply to the internal revenue department of the government of the United States the first week in each month for a list of all special tax receipts or licenses mentioned in section one of this act issued to persons within his county, naming the persons, date and places, and the same shall be immediately published one week in each of the official newspapers of the county and city. The cost of procuring such information, upon filing of a duly verified voucher, shall be paid by the county as other county expenses are paid.

§ 9. Penalty.—Failure on the part of any person to comply with the provisions of this act shall constitute a misdemeanor.

§ 10. Emergency.—Whereas, it is desirable that the publicity required by this act shall begin as soon as possible, an emergency exists and this act shall be in force from and after its passage and approval.

Approved March 13, 1907. (Laws of Nor. Dak., 1907, p. 307.)

States, and thus in effect hinder the making of such payments, the court said (p. 350):

"Such is not the scope nor intent of the act, as we construe it; but, on the contrary, the obvious purpose sought to be accomplished by its enactment was to furnish knowledge to the public and all concerned of the fact that the persons who have paid such tax to the government are or may become engaged in the business of selling intoxicating liquors contrary to the laws of this state. Its purpose, in other words, was solely to furnish knowledge to aid in the enforcement of our statute against the unlawful traffic in intoxicating liquors.

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"The legislature, in enacting this law, merely did what it had the unquestioned right to do under the police power of the state. Such power is very broad and it is limited only by the constitution and laws of the United States and the constitution of this state. That the legislature has the right, within the police power of the state, to provide that the possession of an internal revenue tax receipt for the payment of the government tax upon the occupation of retail dealer in fermented and distilled liquors shall constitute *prima facie* evidence that the possessor is violating, or has violated the prohibition law of the state, is too well settled to admit of serious doubt. 23 Cyc. 255, and cases cited. Yet such a law is no less free from the objection urged by petitioner's counsel than is the act in question. If such a law is constitutional, then why cannot the legislature also enact a law making it a public offense for any citizen of the state to procure such a receipt and neglect or refuse to furnish a public record thereof, and to give the most complete publicity to the fact of its issuance? Such a law would certainly have a tendency to aid in the better enforcement of the law against such illegal traffic, and we are aware of no provision, either in the federal Constitution or statutes or in the constitution of the state, which directly or impliedly prohibits such legislation."

As thus interpreted, the law was held not to be repugnant to

the Constitution of the United States, and to be but a lawful exercise of the police power of the State to regulate the traffic in liquor within the State.

The errors assigned insist that the statute, as thus construed, is repugnant to the Constitution of the United States: First, because, under the guise of the exertion of the police power of the State, the law really imposes a burden directly upon the exertion by the Government of the United States of its lawful power of taxation, and because, even if this be not the case, the conditions and requirements of the statute are so in conflict with the act of Congress concerning the payment of the tax and the issuance of the receipt as to amount to a direct burden upon the constitutional power of Congress to tax.

The propositions, which are in substance one and the same, we think are well founded. Under the construction placed upon the statute by the court below we see no escape from the conclusion that it immediately and directly places a burden upon the lawful taxing power of the United States, or, what is equivalent thereto, places the burden upon the person who pays the United States tax, solely because of the payment of such tax and wholly without reference to the doing by the person of any act within the State which is subject to the regulating authority of the State. That the attempted exertion of such a power is repugnant to the Constitution of the United States is so elementary as to require nothing but statement. We place in the margin,[1] however, a few of the numerous cases in which the principle has been announced or recognized.

[1] *M'Culloch* v. *Maryland*, 4 Wheat. 316, 405, 406, 436; *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Osborne* v. *Bank of United States*, 9 Wheat. 738; *Brown* v. *Maryland*, 12 Wheat. 419, 448, 449; *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245, 251; *The License Cases*, 5 How. 504, 573, 574, 579; *Sinnott* v. *Davenport*, 22 How. 227; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 584; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283; *Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 625, 626; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 667; *Knowlton* v. *Moore*, 178 U. S. 41, 59; *Plummer* v. *Coler*, 178 U. S. 115, 117; *Reid* v. *Colorado*, 187 U. S. 137, 151.

But if the mere form in which the burdens imposed by the statute be disregarded and their essence be considered, nevertheless we are of the opinion that the statute must be held to be repugnant to the Constitution of the United States. This follows, because it is clear that in principle a State may not so exert its police power as to directly hamper or destroy a lawful authority of the Government of the United States. Here, again, the doctrine is elementary, and finds clear and consistent expression in the cases previously cited. Its potentiality, however, as applied to the case in hand, is so pointedly illustrated by the case of *United States* v. *Snyder*, 149 U. S. 210, that we briefly refer to that decision. In that case a Circuit Court of the United States had refused to enforce, in favor of the United States, a lien upon real estate for taxes under the internal revenue laws, on the ground that the lien, or assessment for the tax, had not been recorded in the mortgage records for the parish of Orleans, where the real estate in question was situated, as required by the laws of Louisiana, and that the proceeding to enforce the lien had not been brought within the period fixed by the state law. The Circuit Court, therefore, in effect, had held that it was in the power of the State to burden, control or regulate the right of the United States to assess and collect taxes under its constitutional power of taxation. In deciding that this view was unsound it was said (p. 214):

"The power of taxation has always been regarded as a necessary and indispensable incident of sovereignty. A government that cannot by self-administered methods, collect from its subjects the means necessary to support and maintain itself in the execution of its functions is a government merely in name. If the United States, proceeding in one of their own courts, in the collection of a tax admitted to be legitimate, can be thwarted by the plea of a state statute prescribing that such a tax must be assessed and recorded under state regulation, and limiting the time within which such tax shall be a lien, it would follow that the potential existence of the gov-

ernment of the United States is at the mercy of state legislation.

"Moreover, it scarcely seems necessary to look beyond the Constitution itself for a decisive reply to the question we are now considering. The 8th section of the 1st article declares that 'the Congress shall have power to lay and collect taxes, duties, imposts and excises, . . . but all duties, imposts and excises shall be uniform throughout the United States.' The power to impose and collect the public burthens is here given in terms as absolute as the language affords. The provision exacting uniformity throughout the United States itself imports a system of assessment and collection under the exclusive control of the general government. And both the grant of the power and its limitation are wholly inconsistent with the proposition that the States can by legislation interfere with the assessment of Federal taxes, or set up a limitation of time within which they must be collected."

Undoubtedly, as suggested by the court below, there are decisions of state courts holding that in a proceeding to enforce a penalty or to punish for a violation of a state law as to the sale of liquor the payment of the special United States tax and taking of a receipt therefor by the defendant may be offered in evidence, and creates a *prima facie* presumption that the person paying the tax and holding the receipt was engaged in the business of selling liquor. Without in anywise intimating an opinion as to the soundness of the decisions thus referred to, and assuming only for the purpose of the argument their correctness, we yet fail to see how in any respect they can be considered persuasive as to the compatibility of the statute here under consideration with the Constitution of the United States.

Nor is there merit in the contention that the cases of *Allen* v. *Riley*, 203 U. S. 347; *Woods* v. *Carl*, 203 U. S. 358, and *Ozan Lumber Company* v. *Union County Bank*, 207 U. S. 251, tend to support the proposition that the statute in question was a valid exercise of the police power of the State and not a

direct burden upon the taxing power of the Government of the United States. In the cases relied upon it was but held that certain state statutes regulating the sale within a State of patent rights or patented articles were valid because but a reasonable exertion of the police powers of the State over acts done in the State, and were hence not inconsistent with the legislation of Congress over the subject. But that, as we have stated, is not the character of the legislation here involved. Indeed, testing the provision of the law under consideration by the criterion of reasonableness which was applied in the cases relied upon, it becomes manifest that the act here in question is directly antagonistic to the legislation of Congress concerning the subject with which the state statute deals, since that statute adds onerous burdens and conditions in addition to those for which the act of Congress provides, and which burdens are, therefore, inconsistent with the paramount right of Congress to exert, within the limits of the Constitution, an untrammelled power of taxation.

Reversed and remanded.

THE CHIEF JUSTICE, MR. JUSTICE MCKENNA and MR. JUSTICE HOLMES dissent.

BRILL *v.* WASHINGTON RAILWAY AND ELECTRIC COMPANY.

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

No. 66. Argued December 10, 13, 1909.—Decided January 17, 1910.

Where a decree to which he is privy has established the right of a manufacturer to sell an article, there is force in the argument that such right should be recognized in another suit against his customer and defended by him. *Kessler* v. *Eldred*, 206 U. S. 285.

Devices used in connection with steam railway cars are not patentable

as new inventions when applied to street railway cars, even though a long time may have elapsed between their first use and their application to street cars.

Where the claim is very narrow, as in this case, there is little room for the doctrine of equivalents.

30 App. D. C. 255, affirmed.

THE facts are stated in the opinion.

Mr. Francis Rawle and *Mr. Frederick P. Fish*, with whom *Mr. Melville Church* was on the brief, for appellant.

Mr. H. S. Duell, with whom *Mr. Charles H. Duell* and *Mr. F. P. Warfield* were on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity to restrain the infringement of a patent. The suit is brought against a party that is alleged to have used the patented device, but it is defended by the Peckham Manufacturing Company, the vendor, which is a successor by purchase to the Peckham Motor Truck and Wheel Company. The principal claim now relied upon was declared void in *North Jersey St. Ry. Co.* v. *Brill*, 134 Fed. Rep. 580; *S. C.*, 67 C. C. A. 380, reversing the decision of the Circuit Court, 124 Fed. Rep. 778, 125 Fed. Rep. 526, a suit brought by the same plaintiff and said to have been defended by the Peckham Motor and Truck Company. (On the authority of that case a preliminary injunction against the present defendant was refused in *Brill* v. *Peckham Mfg. Co.*, 135 Fed. Rep. 784; *S. C.*, 68 C. C. A. 486.) If the first Peckham Company was privy to the decree declaring the patent void there would be great force in the argument that that decree established, as against the plaintiff, the right of the Peckham Manufacturing Company to make and sell the patented article, and that the right ought to be recognized in a suit against its customer defended by it. *Kessler* v. *Eldred*, 206 U. S. 285, 288,

289. It is unnecessary to decide that question, because the formal proofs are wanting, but on the obvious facts we should be unwilling to come to a different conclusion from that reached in the earlier litigation and again in the present suit unless it was impossible to avoid the result. With these preliminaries we proceed to the merits of the case.

The present form of car used on the electric street railways is a long car resting by pivots upon two four-wheeled trucks. The plaintiff makes a truck of this sort and has a parent and a divisional patent for "Improvements in Car Trucks for Motor Propulsion and the Like," dated June 27, 1899, and numbered respectively 627,898 and 627,900. The arrangement in actual use may be described as follows, nearly in the plaintiff's words: The side frames are connected near the middle by two parallel metal cross-pieces or transoms, having space enough between them to allow another parallel piece, called the bolster, to move vertically, occupying the space between with but slight play. The car body rests on a pivot in the middle of the bolster. The ends of the bolster rest on the top of semi-elliptic springs parallel to and below the sides of the truck. The ends of the springs in their turn rest on two spring links hanging from the sides of the truck near the axles. More specifically they are supported on the bottom of metal bands or stirrups which surround and hang by their tops on spiral springs each of which is attached underneath to a metal bolt running up through its middle and connected at the top with the frame of the truck by a ball and socket-joint. That is to say the pin passes up through the frame, in which is a conoidal aperture to give it play in all directions, and the head of the pin is hemispherical seated in a like recess in the frame.

The claims relied upon are the following: In number 627,898 the parent patent,

"13. The combination in a car-truck, of the side frames, the semi-elliptic springs movably and resiliently suspended from the side frames, and a bolster secured to said springs, substantially as described."

"81. The combination in a car-truck, of the side frames, the semi-elliptic springs, a cross-bolster resting on the semi-elliptic springs, links, and springs combined with said links, said links deriving their support from the side frames and connecting the ends of the semi-elliptic springs with the side frames, substantially as described."

In 627,900, the divisional patent,

"13. In a car-truck, the combination with the side frames, of the links comprising bolts pivoted between their ends, said links being pivotally suspended from the side frames, longitudinally-disposed semi-elliptic springs secured to the lower end of said bolts, a cross-bolster resting on said springs, and further springs included in the link suspension of said semi-elliptic springs, substantially as described.

"14. In a car-truck, the combination with the side frames, of the cross-bolster suspended below the side frames by semi-elliptic springs and pivotal links, said links comprising a plurality of sections pivotally secured together, and further springs combined with said links to elastically suspend said semi-elliptic springs from the side frames, substantially as described.

"15. In a car-truck, the combination with the side frames, of the cross-bolster suspended below the side frames by semi-elliptic springs and articulated and pivotal links, said links comprising a plurality of sections pivotally secured together, and spiral springs about and combined with said links to elastically suspend said semi-elliptic springs from the side frames, substantially as described."

"17. The combination in a car-truck having an upper chord, of the longitudinally-disposed semi-elliptic springs, a transverse bolster supported upon said springs, links depending from and flexibly supported on said upper chord and passing through enlarged apertures therein, said links being articulated between their ends, the ends of the semi-elliptic springs being supported upon the lower articulation of said links, substantially as described."

The parent patent contains the following disclaimer:

"The location of the semi-elliptic springs outside of the wheel-gage on each side of the truck, together with the location of the links for supporting the semi-elliptics closely adjacent to the axle-boxes, and the swinging of said springs from the truck-frame from such points gives a better support for the car-body than does the usual link-hung bolster supported from the truck-transoms within the wheel-gage. These general features of construction, however, are embraced in an application filed by Samuel M. Curwen and myself on the 3d day of November, 1896, Serial No. 610,902, and therefore I do not claim the same herein."

The answer denies the validity of the patents, setting up a large number of earlier ones, and also denies infringement. There was a trial in the Supreme Court of the District, upon which a decree was rendered dismissing the bill. The decree was affirmed by the Court of Appeals, 30 App. D. C. 255, and an appeal was taken to this court.

It is difficult to put one's finger with certainty upon what the plaintiff claims. It certainly is not the total combination of a successful truck. Mr. Brill, the inventor and the plaintiff's assignor, is pictured as playing a large part in the development of street railway trucks, but whether that be true or not, his share in the invention of the truck that we have described, so far as the present patent at least is concerned, must be at best but very small. It is insisted, to be sure, that the case is not affected by inventions for use with steam railroad cars because of the different requirements upon street roads. Cars for the latter use must be low hung to make getting in and out easy, must accommodate the motors hung upon the axles, must be adapted to short curves and so forth. But these differences are not of universal effect; indeed this patent is not confined to street cars. The suspension of the car body upon a semi-elliptic spring hung from the side frame of the truck by a jointed hanger, with most of the characteristics of the present patent, as disclosed in a patent to Thyng in 1845, was obvi-

ously as available for street as for steam railways, and the use of these features by Brill was not a patentable invention. The use, on the modern long car, of two four-wheeled pivotal trucks with a short wheel base and wheels of equal diameter, which support the car body by a pivot on a bolster between the axles, resting on semi-elliptic springs, was not peculiar to Brill. It was described in a patent to Taylor, October 31, 1895, No. 507,855. Brill's specification disclaims at the outset the general features of the truck it describes. Indeed it hardly is denied that every element in the combination was well known in the construction of railway cars.

We are not dealing with a new type of trucks, but with certain features only. At the argument it was admitted that the plaintiff's case must stand or fall on claim 13 of No. 627,898. In that claim the only possible element of novelty is the mode in which the semi-elliptic springs are suspended from the side frames. In practice the links are elastic and the pins on which the whole combination hangs have a universal ball and socket movement, although the claim only says 'movably and resiliently suspended . . . substantially as described.' Neither 'movably' nor 'resiliently' indicates the ball and socket arrangement, but it is described in the specification and we give the plaintiff the benefit of the doubt. We agree, however, with the Circuit Court of Appeals that the substitution of a ball and socket movement for the movement in one direction of the Thyng link, coupled as it was with a slight longitudinal play, required a minimum of invention. A link having universal movement was patented by Beach in 1876. The plaintiff's witness, Akarman, says that there always has been provision made for lateral and longitudinal motion in every well-constructed truck. Spring links to support semi-elliptic springs were old; it is unnecessary to recite the patents in which they appear. The mention of 'the usual link hung bolster' in the disclaimer indicates the indisputable fact. We also agree with the other court that the disclaimer in favor of Brill and Curwen is a solemn admission of the priority of the

devices claimed by them. It certainly covers the collocation of the spring links and semi-elliptic springs. One of the claims of Brill and Curwen is, "12. The combination in a car truck of the side frames, the equalizing-bars movably and resiliently suspended from the side frames, and a bolster supported on said equalizing-bars, substantially as described." It is said that the Brill patent did not follow the Thyng invention for more than fifty years. The answer is that for most of that time it was not wanted. Very soon after the change in street railway travel required it it came.

If the plaintiff's claim could be sustained, which we cannot admit, it would be confined to the specific form of link described. There would be little room for the doctrine of equivalents. The defendant's device does not use a ball and socket but uses a rigid link supported by a relatively unyielding spiral spring in the frame of the truck, and does not infringe the very narrow claim which is the most that in any view could be allowed.

Decree affirmed.

MR. JUSTICE MCKENNA dissents.

MANKIN *v.* UNITED STATES FOR THE USE OF LUDOWICI-CELADON COMPANY.

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

No. 167. Submitted January 7, 1910.—Decided January 17, 1910.

Under the labor and material law of February 24, 1905, c. 778, 33 Stat. 811, amending the act of August 13, 1894, c. 280, 28 Stat. 278, indemnity is provided for persons furnishing labor and materials to a subcontractor as well as to the contractor in chief for the construction of a public building.

The indemnity extends to the full amount furnished notwithstanding the contractor may have already paid the subcontractor in full or

in part. Provisions in state statutes, limiting recovery against contractor to amount remaining unpaid to subcontractor, do not affect suits under the Federal statute which contains no such provisions.

The decision in *Hill* v. *American Surety Co.*, 200 U. S. 197, in regard to claims against subcontractors under the act of 1894, followed as to such claims under the statute as amended in 1905.

158 Fed. Rep. 1021, affirmed.

THE facts, which involve the construction of the Federal labor and material act of February 24, 1905, c. 778, 33 Stat. 811, are stated in the opinion.

Mr. C. V. Meredith, Mr. J. Jordan Leake, Mr. T. C. Catchings and *Mr. O. W. Catchings* for plaintiff in error:

The statute must be strictly construed as a mechanic's lien statute and as such does not, as amended in 1905, inure to the benefit of subcontractors. The act as amended differs in this respect from the statute as construed in *Hill* v. *Am. Surety Co.*, 200 U. S. 197. No matter how meritorious his service the statute does not protect one who is not clearly within it. Phillips on Mech. Liens, 2d ed., §§ 36, 47 *et seq.; Wood* v. *Donaldson*, 17 Wend. 550; *Donaldson* v. *Wood*, 22 Wend. 395; Boisot, Mech. Liens, §§ 246 *et seq.; McGuire* v. *Ohio R. R. Co.*, 33 W. Va. 63.

Under the statute as amended the contractor and surety company are not and should not be required to pay twice, and the material men are only entitled to recover the amount remaining unpaid to the subcontractor which in this case is for less than the amounts claimed by the material men and awarded by the court below.

Where the owner is compelled to pay twice the statute is highly penal and must be construed strictly against one seeking that result. *West Lumber Co.* v. *Knapp*, 122 California, 81; *Hampton* v. *Christenson*, 84 Pac. Rep. 200; *Alderman* v. *Hartford Co.*, 66 Connecticut, 47; *Nixon* v. *Cydon Lodge*, 56 Kansas, 298; *Dunn* v. *Rankin*, 27 Ohio, 132; *Morrison* v. *Whaley*, 16 R. I. 715.

The New Jersey statute has been construed as not requiring payment beyond the amount due the subcontractor. *Garrison* v. *Borio*, 47 Atl. Rep. 1060; and see also as to New York rule, *Brainard* v. *Kings County*, 84 Hun, 290, aff'd 155 N. Y. 538; Phillips, Mech. Liens, 2d ed., § 61, citing *Renton* v. *Conley*, 49 California, 188, and *McKnight* v. *Washington*, 8 W. Va. 666; *Stout* v. *Golden*, 9 W. Va. 231; *McIntire* v. *Barnes*, 4 Colorado, 288; Boisot, Mech. Liens, § 255; *Wadsworth* v. *Hodge*, 88 Alabama, 500.

If the rule were otherwise a contractor might have to pay those supplying materials to the subcontractor more than he agreed to pay the subcontractor himself. *McMurray* v. *Brown*, 91 U. S. 256, 266; *Hunler* v. *Truckee Lodge*, 14 Nebraska, 24, 41; *Fullerton Lumber Co.* v. *Osborn*, 72 Iowa, 472; *Wolf* v. *Penna. R. R. Co.*, 29 Pa. Sup. Ct. 439; *Knelly* v. *Howarth*, 208 Pa. St. 487; *Mullikeir* v. *Harrison*, 44 S. E. Rep. 426; *Gridley* v. *Sumner*, 43 Connecticut, 14; *Lumber Co.* v. *Smith*, 35 So. Rep. 693; *Merriott* v. *Crane Co.*, 126 Ill. App. 337, 343; *Am. Surety Co.* v. *United States*, 127 Alabama, 349; *General Supply Co.* v. *Hunn*, 126 Georgia, 615; *Vandenberg* v. *Walton*, 92 Pac. Rep. 149; see Digest of laws of various States in Alexander's Lien Laws; Southeastern States, Alabama, p. 35; Florida, p. 114; Mississippi, p. 435; North Carolina, p. 474; South Carolina, p. 525; Virginia, p. 694.

Mr. C. H. Alexander, *Mr. W. C. Bowman*, *Mr. Richard F. Reed* and *Mr. Gerard Brandon* for defendants in error.

Mr. Justice Day delivered the opinion of the court.

This is a writ of error to the Circuit Court of Appeals for the Fifth Circuit, wherein a judgment of the Circuit Court of the United States for the Southern District of Mississippi in favor of the defendants in error was affirmed. The facts are: The Mankin Construction Company on February 27, 1905, entered into a contract with the Secretary of the Treasury for the con-

struction of a certain post-office building in the city of Natchez, Mississippi, and gave bond under the act of February 24, 1905, (33 Stat. 811, c. 778), amending the act of August 13, 1894, (28 Stat. 278, c. 280). This bond was conditioned that the Mankin Construction Company should "promptly make payment to all persons supplying them labor or materials in the prosecution of the work contemplated by said contract." Upon this bond the Title, Guaranty & Trust Company of Scranton, Pa., was surety.

The Mankin Construction Company on April 29, 1905, entered into a written contract with one W. E. Smythe as subcontractor, by the terms of which Smythe agreed to furnish certain plumbing, gasfitting, sheet-metal, tile roofing, etc., to be used in the construction and erection of the post-office building. The building was completed about July 12, 1906, was accepted by the Government, and payment therefor was made to the Mankin Construction Company in accordance with the terms of the contract.

The defendants in error, the Ludowici-Celadon Company, the Nelson Manufacturing Company, and the J. L. Mott Iron Works, respectively, sold and delivered to Smythe, the subcontractor, certain materials which he used in the construction of the post-office building, as required by the original contract. Smythe failed to make full payment on account of such purchases, and no suit having been brought by the United States under the act of Congress (33 Stat. 811), within six months, affidavit was made by the Ludowici-Celadon Company that it had supplied labor and material for the prosecution of the work of constructing the post-office building; and it was furnished with a copy of the contract and bond, as required by the act, and thereupon instituted suit in the name of the United States in the United States Circuit Court for the Southern District of Mississippi against the Mankin Construction Company and its surety.

The Nelson Manufacturing Company and the J. L. Mott Iron Works intervened in the action, and claimed the right

also to recover on account of the materials furnished by them respectively. There was a judgment upon the bond in favor of the claimants. It also appears that the Mankin Construction Company had paid Smythe, the subcontractor, the amount due him under the contract, less $644.57, before receiving any notice from either of the claimants of their respective claims against Smythe. The judgment upon the bond was in favor of the United States for the use of the Ludowici-Celadon Company in the sum of $1,217.78, for the use of the Mott Iron Works in the sum of $709.97, for the use of the Nelson Manufacturing Company in the sum of $2,129.47. The amount due upon the accounts not being disputed, the court instructed the jury to find for the claimants.

Upon writ of error to the Circuit Court of Appeals for the Fifth Circuit that court affirmed the judgment of the Circuit Court upon the authority of *Hill* v. *The American Surety Co.*, 200 U. S. 197. In the *Hill case* this court held that one who furnished labor or materials in the carrying out of a contract for public works, although such materials were furnished to a subcontractor, to whom a part of the work had been let, could recover upon a bond given under the act of August 13, 1894 (28 Stat. 278, c. 280). In the *Hill case* it was held that, construing the bond in the light of the statute, and the purpose of Congress to provide security for payment for labor and material going into the construction of a public building, it was intended thereby to provide indemnity for a person or persons who furnished labor or materials to the subcontractor, thereby enabling the contractor to meet his engagement to supply the material and labor necessary to the construction of a public building.

The present action accrued after the passage of the statute of February 24, 1905, amending the act of August 13, 1894, in which original act a right of action was given in the name of the United States for the use and benefit of the persons supplying the labor or materials in the prosecution of the work provided for in the contract, and requiring a bond for the benefit

of such persons. In that act there was no limitation upon the number of actions which might be brought, nor was there any preference given to the United States in a recovery upon the bond. In the amended act a single action was provided for, and priority was given to the claim and judgment of the United States. In such suit any person or company who had furnished labor or material used in the construction or repair of any public building was allowed to intervene in the suit by the United States on the bond, and to have their rights and claims adjudicated; and it was further provided that if no suit should be brought by the United States within six months of the completion and final settlement of the contract then the person or persons supplying the labor or materials should, upon filing an affidavit in the Department under the direction of which the work had been done, or the materials furnished, be furnished with a certified copy of the contract and bond, and might thereupon bring an action in the name of the United States in the Circuit Court of the United States in the district where the contract was performed and executed. There are other provisions looking to the distribution of the recovery upon the bond, and providing for bringing all creditors into the single suit which is authorized to be instituted.

In respect to the condition of the bond required to be given, the language of the amended act is precisely the same as that contained in the act of August 13, 1894, and the condition is that "such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract."

It is the contention of the plaintiff in error that the act of February 24, 1905, differs from the act of August 13, 1894, in that a copy of the contract and bond is to be furnished for the purpose of suit to the "person or persons supplying the contractor with labor and materials," and upon furnishing an affidavit to the Department under whose direction the work has been prosecuted, that the labor and materials for the

prosecution of said work has been supplied, but payment for which has not been made, whereas, in the act of August 13, 1894, it is provided that any person or persons making an application therefor, and furnishing an affidavit to the Department that the labor and materials for the prosecution of such work had been supplied by him or them, payment for which had not been made, shall have a certified copy of the contract and bond for the purpose of bringing suit thereon.

In both statutes a copy of the contract and bond is to be furnished upon an affidavit that labor and materials for the prosecution of the work has been supplied by the persons applying for such copy. In the amended statute it is provided that if the action is not instituted by the United States within six months, then the person or persons supplying the contractor with labor and materials, and furnishing the affidavit that the same were supplied for the prosecution of such work, shall have a certified copy of the contract and bond for the purposes of the suit. The additional phrase used in this connection, "the person or persons supplying the contractor with labor and materials," it is contended, shows that only those who furnish labor and materials directly to the contractor come within the benefit of the act. We cannot agree with this contention. The phrase, "person or persons supplying the contractor with labor and materials," are the words embodied in both statutes alike in the requirement of a bond for their benefit. In the *Hill case* it was distinctly held that "persons supplying the contractor with labor and materials" included not only the subcontractor, but any one who furnished labor and materials to the subcontractor for carrying out the work contracted for. There is nothing in the provision as to who shall have a copy of the bond for the purpose of suit which changes or limits the obligation of the bond under identical requirements in both statutes, alike embracing, as construed in the *Hill case*, persons furnishing labor and materials to a subcontractor.

As to the other point, that the Mankin Construction Com-

pany had paid to Smythe, the subcontractor, the amount due him, except the sum of $644.57, before receiving notice of the claims of the outstanding debts recovered in this case, there is no provision in the statute that notice shall be given to the contractor of claims against the subcontractor and limiting the recovery to the amount unpaid at the time of such notice. Such provision is found in some of the state statutes, and is made a condition of recovery in some of the mechanics' lien acts; but this case is controlled by the Federal act under consideration and the obligation of the bond, which requires payment to all persons supplying labor and material in the prosecution of the work contemplated by the contract.

As was said in the *Hill case*, the contractor can protect himself by requiring a bond securing him against liability on account of engagements of the subcontractor with persons who furnish labor and material upon his order. Indeed, the present contract contained, as the record shows, a provision that the general contractor reserved the right to require a full release from all claims for which he had become liable for materials furnished to, or work done for, the subcontractor, on account of materials and work required by the contract, with the right to withhold any amount due to the subcontractor until such release should be furnished.

We agree with the Circuit Court of Appeals that this case is ruled by the decision made in *Hill* v. *American Surety Company, supra*. The judgment of the Circuit Court of Appeals, affirming the judgment of the Circuit Court, is, therefore,

Affirmed.

OLD NICK WILLIAMS COMPANY *v.* UNITED STATES.

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

No. 26. Argued November 9, 10, 1909.—Decided January 24, 1910.

A writ of error is not actually brought until filed in the court which rendered the judgment, and the same rule is applicable to appeals. *Credit Company* v. *Arkansas Central Railway*, 128 U. S. 261.

The statutory time for taking appeals from one Federal court to another is prescribed by act of Congress and must be calculated accordingly; it cannot be extended by order of the court.

Assignment of errors does not require the previous settlement of the bill of exceptions, and failure to file the writ within the statutory time is not excused because there was delay on the part of the trial judge in settling the bill.

Assignment of errors is not a jurisdictional requirement; and, although by the rule errors not assigned are disregarded, the court at its option may notice a plain error not assigned or specified.

152 Fed. Rep. 925, affirmed.

THIS was an indictment in the District Court of the United States for the Western District of North Carolina against the Old Nick Williams Company, a corporation which was authorized to carry on the business of a rectifier, and which was convicted of violating the second paragraph of § 3317 of the Revised Statutes by the verdict of a jury finding it guilty of carrying on the business of a rectifier with intent to defraud the United States of the tax on the spirits rectified by it. The verdict was rendered November 28, 1905, and motions to set aside the verdict and for new trial and in arrest of judgment were severally made and overruled, and thereupon judgment was entered on that day sentencing defendant to pay a fine of $5,000 and be taxed with the costs. On the same day it was ordered that the defendant have ninety days to prepare its bill of exceptions, and that the attorney for the United States have

thirty days, after being served with the defendant's bill of exceptions, to make objections thereto, and that the court would settle the bill of exceptions upon ten days' notice to the attorneys of the parties, and that when filed the bill of exceptions should be deemed as made in ample time.

January 17, 1906, by consent of the parties, the court by its order further extended the time for preparing and filing defendant's bill of exceptions to March 15, 1906, and afterwards extended the time to April 1. On July 27, 1906, the court, over the objection of the attorney for the United States, made an order which recited that defendant had filed with the clerk its bill of exceptions, to which the United States attorney had filed certain objections and proposed amendments, so that the bill of exceptions had not been settled and signed by the court within six months from the date of the entry of the judgment, and the court, being of opinion that defendant was entitled, under the circumstances, to have the bill of exceptions settled and a writ of error and citation issued and served *nunc pro tunc* as within the time required by law, directed that the attorneys should appear before him August 7, 1906, and have the bill of exceptions settled and signed by the court, and further ordered that when the bill of exceptions was settled and signed and after a petition for a writ of error and assignments of error had been filed by defendant, the writ of error and citation in due form should be issued and served, all to bear date as of the fifteenth of April, 1906, that being the date on which the defendant filed its proposed bill of exceptions with the clerk, and which was within six months from the entry of the judgment. Thereafter, on September 12, 1906, defendant, having presented its petition for the allowance of a writ of error and its assignment of errors, the court signed an order allowing the writ of error and directing that the writ of error and citation when issued bear date April 15, 1906. Thereupon the writ of error was issued on September 12, 1906, as of April 15. The attorney for the United States moved to dismiss the writ of error because not sued out within six months after the entry of

the judgment. The statute restricting the time for writs of error in such cases is § 11 of the act of Congress of March 3, 1891 (26 Stat. 826, 829 c. 517), and reads:

"SEC. 11. That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed."

The writ was dismissed for the reasons given in the opinion by Morris, J., reported in 152 Fed. Rep. 925.

Mr. Charles A. Moore, with whom *Mr. William P. Bynum* was on the brief, for petitioner.

Mr. Assistant Attorney General Fowler for the United States.

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

The rule has long been settled that "a writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly." Taney, C. J., in *Brooks* v. *Norris*, 11 How. 204; *Polleys* v. *Black River Company*, 113 U. S. 81; *Credit Company* v. *Arkansas Central Railway*, 128 U. S. 258; *Farrar* v. *Churchill*, 135 U. S. 609; *Conboy* v. *Bank*, 203 U. S. 141.

The same rule is applicable to appeals as to writs of error. Section 1012, Revised Statutes. As Mr. Justice Bradley said in *Credit Company* v. *Arkansas Central Railway*, 128 U. S. 261:

"An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought' until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court."

There the appeal was allowed by Mr. Justice Miller on the last day on which an appeal could be taken (Revised Statutes, § 1008), but was not presented to the court below nor filed with the clerk until five days after the prescribed time had expired. It was held that the appeal must be dismissed, and Mr. Justice Bradley added:

"The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."

In *Farrar* v. *Churchill*, 135 U. S. 609, it was held that a cross appeal in equity, like other appeals, must be entered within the time limited, calculating from the date of the decree, and because in that case petition, order and bond were not filed in the Circuit Court until after the lapse of two years from the entry of the decree the cross appeal was dismissed. It was ruled also that the failure to file an assignment of errors, although required by the act of Congress, and the rule of court, was not jurisdictional and could be waived. Revised Statutes, § 997; Rule 11; *School District* v. *Hall*, 106 U. S. 428.

In *Conboy* v. *Bank*, 203 U. S. 141, it was held that the time within which an appeal may be taken under § 25*b* of the bankruptcy act and general order in bankruptcy XXXVI runs from the entry of the original judgment or decree, and when it has expired is not revived by a petition for a rehearing, and that where the right of appeal has been lost, appellant cannot reinvest himself with that right by filing such petition, and *Credit Company* v. *Arkansas Central Railway*, 128 U. S. 258, 261, was cited with approval.

Plaintiff in error contends that the delay in settling the bill of exceptions was not its fault, but was attributable to the judicial engagements of the trial judge, and that until the bill of exceptions was settled its counsel could not intelligently

prepare the assignment of errors which should accompany the petition for the writ of error. But the assignment of errors does not require the previous settlement of the bill of exceptions, and can be formulated before that takes place. In *Waldron* v. *Waldron*, 156 U. S. 361, cited in the opinion of the Court of Appeals, the judgment was entered July 10, 1890, and the writ of error was dated July 15, 1890, but the bill of exceptions was not settled during the term, and, because of subsequent delays, not until February, 1891, yet this court held it to be in time in the circumstances. But the writ of error had already issued and been deposited with the clerk of the trial court, and after that the time for complying with it might by proper authority be enlarged. *Mussina* v. *Cavazos*, 6 Wall. 355.

As we have stated, the assignment of errors is not a jurisdictional requirement, and although by the rule errors not assigned would be disregarded, the court might at its option notice a plain error not assigned or specified.

The delay in the present case in taking out the writ of error was not the act of the court, but of plaintiff in error. At all events, plaintiff in error might have brought its writ of error within the time prescribed by statute, and the court had no power to allow it after the time limited had expired.

Judgment affirmed.

WAGG *v.* HERBERT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 29. Argued November 11, 1909.—Decided January 24, 1910.

In a suit in equity to have a deed declared a mortgage and in which fraud, oppression and undue influence are charged, the court is not concluded by what appears on the face of the papers but may inquire into the real facts of the transactions. *Russell* v. *Southard*, 12 How. 139.

A court of equity may decree that a deed given in settlement of a mortgage debt, no new consideration moving, was, by reason of fraud, oppression and undue influence, merely a new mortgage, and by such decree no new contract is created by the court, and the relation of mortgagor and mortgagee originally existing is not disturbed.

Though laches may be the equitable equivalent of the legal statute of limitations, there is no fixed time that makes it a bar, and in this case a delay of a little over two years in bringing an action to have a deed declared to be an equitable mortgage did not amount to laches.

19 Oklahoma, 525, affirmed.

THIS was a suit commenced on June 13, 1903, in the District Court of Pawnee County, Oklahoma, by William H. Herbert and Mary B. Herbert, his wife, against a number of defendants, the principal one being Solomon R. Wagg, the appellant. The suit was one to have a certain conveyance, in form conveying the legal title to a tract of land from Mrs. Herbert to Wagg, adjudged void, as having been fraudulently obtained, and to redeem the property from a prior mortgage lien. An outline of the transaction between the Herberts and Wagg is as follows: On October 26, 1898, they borrowed from him one thousand dollars and gave their promissory note payable in one year, with interest after maturity at ten per cent per annum, and as security therefor a mortgage on eighty acres belonging to her, and adjoining the town of Cleveland, in the county of Pawnee.

Wagg retained one hundred dollars as interest for the first year, and sent the mortgagors nine hundred dollars. At the same time, as required by him, the plaintiffs executed to him a warranty deed for the same real estate, which was left in the bank of Cleveland in escrow as security for the note and mortgage. In closing this transaction he wrote to one of the plaintiffs a letter, in which he said: "This pays first year's interest, second year's interest is not due until the end of the second year and six months' grace on end of this makes a full two and a half years before you allow, or I can ask for the deed in case of default of contract."

On December 26, 1899, he withdrew the deed in escrow from the bank and caused it to be filed and recorded in the office of the register of deeds of Pawnee County. His excuse for this was that not merely was one hundred dollars due as interest, but also that there was a default in the payment of taxes for the year 1898, and that to protect the property he had been obliged to pay them, amounting to $24.94, with accrued penalty and costs. Notwithstanding he had taken and recorded this deed, which apparently transferred to him the legal title, he advised Mrs. Herbert that she might still redeem the land according to the terms of the original loan. In May, 1901, the parties, who had been talking of a settlement for some time, executed two deeds, one from Mrs. Herbert, her husband having left for parts unknown, to the defendant of the entire eighty acres, and one from him to her of twenty-five acres. Thereafter this defendant platted the fifty-five acres as an addition to the town of Cleveland and sold and conveyed lots to the other parties named as defendants.

In the second amended petition, the one upon which the case was tried, plaintiffs alleged that the defendant Wagg was guilty of fraud and oppression, and taking advantage of his position and the relationship of the parties, obtained for a grossly inadequate consideration the title to the fifty-five acres; that after platting he conveyed some lots "to innocent purchasers, the exact lots and amounts received for which are

not known to the plaintiff, but which amount to a large sum of money;" that he had not accounted for the moneys so wrongfully received, and that an accounting was necessary.

The case was tried by the judge without a jury. Several hundred pages of testimony were taken, and on May 19, 1905, a decree was entered finding generally the issues in favor of the plaintiff, Mrs. Herbert, the death of whose husband had been suggested pending the suit, adjudging that the deed of May, 1901, from her to the defendant was a mortgage, that an accounting be had and that she be allowed to redeem. The case was reserved for further consideration and determination of the claims of and an accounting with the other defendants. This decree was, on October 12, 1907, affirmed by the Supreme Court of the Territory, *Wagg* v. *Herbert*, 19 Oklahoma, 525, all the defendants joining in the appeal to that court. Thereafter the case was brought here on appeal by the defendant Wagg, the other defendants not joining in the appeal, but named as parties appellees.

Mr. Arthur J. Biddison for appellant:

A general averment of fraud in a bill in equity is limited by the facts set forth to show the fraud. *United States* v. *Des Moines &c. Ry.*, 142 U. S. 544; *Wiseman* v. *Eastman*, 21 Washington, 163. A general averment without stating specific facts presents no issue and no proof is admissible. *Kingman Ry. Co.* v. *Quinn*, 45 Kansas, 477; *Woods* v. *Carpenter*, 101 U. S. 135; *Southall* v. *Farish*, 1 L. R. A. 641; *Bardwick* v. *Dillon*, 7 Oklahoma, 535; *Lee* v. *Mehew*, 8 Oklahoma, 136; *Jackson* v. *Rowell*, 4 L. R. A. 637.

The legal title passed under the conveyances and there was no fraud. *Bradbury* v. *Davenport*, 52 Pac. Rep. 301; *Vance* v. *Anderson*, 45 Pac. Rep. 816; *Seawell* v. *Hendricks*, 46 Pac. Rep. 557; *McDonald* v. *Huff*, 19 Pac. Rep. 499; *Russell* v. *Southard*, 12 How, 139, distinguished.

It is neither fraud, oppression nor undue influence for a creditor to make claims in excess of his legal rights. *Nell* v.

Carson, 2 S. W. Rep. 107; *Schramm* v. *Haupt*, 37 N. W. Rep. 798; *Perkins* v. *Frinka*, 15 N. W. Rep. 115; *Thompson* v. *Phœnix Ins. Co.*, 46 Am. Rep. 357; *Insurance Co.* v. *Warten*, 59 Am. St. Rep. 129; *Fish* v. *Clelland*, 33 Illinois, 238; *Severance* v. *Ash*, 17 Atl. Rep. 69; 14 Am. & Eng. Ency. of Law, 2d ed., 54; *Morton* v. *Morris*, 72 Fed. Rep. 392; *Stewart* v. *Miller*, 7 S. W. Rep. 603; *Walker's Adm.* v. *Farmers' Bank*, 14 Atl. Rep. 823.

Nor is it fraud or oppression to threaten a civil suit. *Dispeau* v. *Bank*, 53 Atl. Rep. 868; *Hilburn* v. *Buckman*, 7 Atl. Rep. 272; 10 Am. & Eng. Ency. L., 2d ed., 344.

In order to constitute undue influence the grantor must be deprived of free agency. *Conley* v. *Nailor*, 118 U. S. 127. Misrepresentations of law only will not vitiate a contract, even if the other party is ignorant of his rights. *Allen* v. *Galloway*, 30 Fed. Rep. 467; *Abbot* v. *Treat*, 3 Atl. Rep. 47; *Kingsberry* v. *Sargent*, 22 Atl. Rep. 126; *Jones* v. *Foster*, 51 N. E. Rep. 862; *Foster* v. *Railway Co.*, 146 U. S. 88; *Insurance Co.* v. *Warten*, 59 Am. St. Rep. 129; *Wetzel* v. *Transfer Co.*, 65 Fed. Rep. 23; *S. C.*, 167 U. S. 237. The transaction was a purchase of part of the property and not an acquisition of the equity of redemption.

The plaintiff was guilty of laches, barred by the two-year statute of limitations, and changed conditions make the avoidance inequitable. *Moore* v. *Moore*, 56 California, 89; *McMillan* v. *Cheeney*, 30 Minnesota, 519. Knowledge of facts and not of law is all that is necessary to set statute in motion. *Commissioners* v. *Renshaw*, 99 Pac. Rep. 638; *Black* v. *Black*, 68 Pac. Rep. 662; *Piekenbrock* v. *Knower*, 114 N. W. Rep. 200; *Donaldson* v. *Jacobitz*, 72 Pac. Rep. 846; *Redd* v. *Brun*, 157 Fed. Rep. 190. For cases similar to this in which laches was held a bar see *Alsop* v. *Riker*, 155 U. S. 448; *Leavenworth* v. *Douglass*, 53 Pac. Rep. 123; *Thornton* v. *Natchez*, 129 Fed. Rep. 84; *Johnson* v. *Atlantic Co.*, 156 U. S. 648; *Life Ins. Co.* v. *Austin*, 166 U. S. 699; *State* v. *LaCrosse*, 77 N. W. Rep. 167; *Grass* v. *Portland Co.*, 54 Pac. Rep. 845; *Robers* v. *Van Ant-*

wick, 58 N. W. Rep. 757; *Schlawig* v. *Purslow*, 8 C. C. A. 315; *Wheeler* v. *McNeil*, 101 Fed. Rep. 685.

Silence, delay, acquiescence or use or retention of fruits of contract amounts to ratification. *Scheftel* v. *Hays*, 58 Fed. Rep. 457; *Kinne* v. *Webb*, 54 Fed. Rep. 54; *Parson* v. *McKinley*, 57 N. W. Rep. 1134; *Paine* v. *Harrison*, 37 N. W. Rep. 588; *Grymes* v. *Sanders*, 93 U. S. 55; *Shelby* v. *Creighton*, 91 N. W. Rep. 369; *Hoyt* v. *Latham*, 143 U. S. 553; *Oil Co.* v. *Marbury*, 91 U. S. 537; *Litchfield* v. *Brown*, 17 C. C. A. 28. A delay of three years or less was held fatal in *Blackman* v. *Wright*, 65 N. W. Rep. 843; *Straight* v. *Junk*, 59 Fed. Rep. 321; *Sagadohoc Land Co.* v. *Ewing*, 65 Fed. Rep. 702; *Curtis* v. *Lakin*, 94 Fed. Rep. 251; *Day* v. *Ft. Scott Co.*, 38 N. E. Rep. 567; *Perry* v. *Pierson*, 25 N. E. Rep. 636; *Land Co.* v. *Neill*, 6 So. Rep. 1; *Hatch* v. *Ferguson*, 57 Fed. Rep. 959; aff'd 14 C. C. A. 41; *Curley* v. *Rue*, 35 N. E. Rep. 824; *Arnold* v. *Hagerman*, 17 Atl. Rep. 93; *Fraker* v. *Hauck*, 36 Fed. Rep. 403; *Goodell* v. *Deivey*, 100 Illinois, 308; *Bedford* v. *Moore*, 54 Missouri, 448; *Learned* v. *Foster*, 117 Massachusetts, 365; *Schadski* v. *Abright*, 5 S. W. Rep. 807; *Kline* v. *Vogel*, 1 S. W. Rep. 733; *Schlaing* v. *Flechenstein*, 45 N. W. Rep. 770; *Hamilton* v. *Lubukee*, 99 Am. Dec. 562; *Parkhurst* v. *Van Courtland*, 7 Am. Dec. 427; *Ward* v. *Sherman*, 192 U. S. 168; § 761, Wilson's Ann. Stat. 1903.

Mr. E. M. Clark and *Mr. Watson E. Coleman* for appellee submitted.

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

The petition charged that the defendant Wagg was guilty of fraudulent, wrongful, oppressive and unjust conduct, and that through such conduct he obtained the deed of May 28, 1901. The trial court, as stated, found generally in plaintiff's favor. The Supreme Court, in an elaborate opinion, in which it

narrated fully the details of the transactions between these parties and the testimony given on the hearing, closed its recital in these words:

"It must therefore follow, as an irresistible conclusion, that the allegations in the petition, of fraud, oppression, undue influence, and inadequate consideration were fully sustained by the evidence, and we are unable to perceive how the trial court could have reached any other fair, just, and rational conclusion upon the entire evidence as disclosed by this record."

The testimony as to the value of the property at the time of the settlement in May, 1901, was conflicting, some placing it at $100 per acre. In reference to this conflict the court said:

"It is a settled rule of this court, and one which we have reiterated and reiterated time and again, that where the evidence reasonably sustains the finding and judgment of the court, or where the evidence is conflicting, it will not be disturbed by this court."

Evidently the Supreme Court believed that the defendant had acquired in settlement of a debt a tract of land of far greater value than the amount of the debt, and that this was accomplished by fraud, oppression and undue influence. Upon these facts a decree setting aside the conveyance was undoubtedly right.

Counsel for defendant, on his appeal to this court, has filed a brief of over 150 pages, in which he narrates the facts as they appear to him, and cites many authorities as to the circumstances which will uphold a conveyance upon such or similar facts. Of course, upon the face of the papers the deeds of May, 1901, vested in the defendant the title to the fifty-five acres, but it is well established that in a suit in equity between parties, in which fraud, oppression and undue influence are charged, the court is not concluded by that which appears on the face of the papers, but may institute an inquiry into the real facts of the transactions. So thoroughly is this doctrine established that any discussion of the cases in this and other courts affirming it would be useless. They rest upon elementary

principles of equity. It is sufficient to refer to *Russell* v. *Southard*, 12 How. 139, and the many authorities cited in the opinion.

Counsel further contends that the decree is erroneous, in that it adjudges that the deed of May, 1901, to defendant was a mortgage, and as such only a lien upon the property; that there is no evidence that this deed was not intended as a conveyance or that it was intended as a mortgage, and that courts do not make contracts for parties. But this contention presents a mere technical matter. The petition alleges, in addition to the averment that the deed was obtained wrongfully and fraudulently, "that the only consideration received by said plaintiff for the said purported deed, marked 'Exhibit E' (the deed to defendant of May, 1901, of the entire tract) was a relinquishment of the said mortgage herein referred to as 'Exhibit B' (the original mortgage given by Mr. and Mrs. Herbert to defendant)." In other words, whatever technical criticism may be made upon the form of the decree, it was in substance a finding and decree that the deed of May, 1901, was void, as having been obtained by the fraudulent conduct of the defendant, and that being set aside, left the property subject to the lien of the original mortgage given October 24, 1898. Of course, the act of Wagg in taking from the bank the deed placed in escrow and having it recorded may, in view of his assurances to Mrs. Herbert, be regarded as immaterial. Equitably, the relation of mortgagor and mortgagee was not disturbed. The court did not make a new contract for the parties, but, leaving the mortgage valid and binding, decreed the invalidity of a subsequent conveyance, and also ordered an accounting by the defendant as a mortgagee in possession.

There is in this case no lapse of time, no matter of estoppel, which, so far as the defendant Wagg is concerned, forbids a court of equity from investigating and determining the real facts. Mrs. Herbert's deed to defendant was executed May 28, 1901, and this suit was commenced June 13, 1903, less than two years and a month from the date of the wrong complained

of. While laches is often spoken of as the equitable equivalent of the legal statute of limitations, yet there is no fixed time which makes it an absolute bar. In *Russell* v. *Southard, supra,* there was between the fraudulent transaction and the commencement of the suit a lapse of nineteen years and eight months, and it was held that that was not sufficient, the court saying (p. 155):

"The absence of all valuable consideration for the surrender of the equity, and the circumstances of distress under which it was made, and which, so far as appears, continued to exist down to the filing of the bill, coupled with the conviction, which we think Russell mistakenly entertained, that his rights were probably destroyed, must prevent us from allowing the lapse of time to be a positive bar."

The rights of purchasers from Wagg subsequent to May 28, 1901, are protected by the accounting ordered, and as they did not appeal from the decree it must be assumed that they were satisfied with it.

The decree of the Supreme Court of the Territory of Oklahoma is

Affirmed.

LOWREY *v.* TERRITORY OF HAWAII.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 469. Argued December 6, 1909.—Decided January 24, 1910.

The decision and opinion of this court in *Lowrey* v. *Hawaii*, 206 U. S. 206, construed and followed as to construction of contract involved and liability thereunder of the Hawaiian government.

A condition to teach a definite Christian doctrine is not satisfied by teaching merely a form of general evangelical Christianity.

Where the breach of a covenant of use entails either forfeiture or payment of a specified sum, the grantee has the right of election until disavowal on his part and denial of the alternative obligation, and until then, notwithstanding a continuous breach, the statute of limitations does not run against the grantor.

A deed of trust conveying all lands of grantor or in which it has any interest held in this case to include its right to a liquidated sum in lieu of right of reëntry for a breach of covenant of use of lands theretofore conveyed by it.

19 Hawaii, 123, reversed.

THE facts are stated in the opinion.

Mr. David L. Withington for appellant:

It is law of this case that the terms of the agreement require the inculcation of general learning and knowledge accompanied with religious instruction in accordance with the confession of faith submitted to the Hawaiian government, *Lowrey* v. *Hawaii*, 206 U. S. 206, and it is as much a breach to fail to teach doctrine as to teach religion.

The condition for religious teaching is unchanging, definite and absolute to-day. No waiver or statute of limitation bars the action.

A trust of this kind for religion is valid, and, so long as there is anyone in interest demanding its fulfillment, must be

carried out. *Watson* v. *Jones*, 13 Wall. 679. The general doctrines of Christianity are a part of the common law of the country and we are a Christian people. *Holy Trinity Church* v. *United States*, 143 U. S. 457. And see *Vidal* v. *Girard's Executors*, 2 How. 127; *Free Church* v. *Overtown*, L. R. 1904, A. C. 515.

While an independent church may by majority vote change its views as held in *Wiswell* v. *Congregational Church*, 14 Ohio St. 31; *Keyser* v. *Stansifer*, 6 Ohio, 363; *Trinitarian Cong. Soc.* v. *Union Cong. Soc.*, 61 N. H. 384; *Fadners* v. *Braunborg*, 73 Wisconsin, 257; *Landis' Appeal*, 102 Pa. St. 467, that is not the case where the church has been founded for a particular form of worship and doctrine; in such case even all the members cannot alter the doctrine. *Schnorr's Appeal*, 67 Pa. St. 138; *St. Mary's Church Case*, 7 Serg. & R. 517; *Den* v. *Bolton*, 12 N. J. L. 206; *Craigdallie* v. *Aikman*, 1 Dow, 1; *Foley* v. *Wonnter*, 2 Jac. & W. 245; *Leslie* v. *Birnie*, 2 Russ. 114; *Davis* v. *Jenkins*, 3 Ves. & B. 156; *Milligan* v. *Mitchell*, 3 Myl. & C. 72; *S. C.*, 1 Myl. & K. 446.

For cases in which courts have interfered to prevent funds given to support either Unitarianism or Trinitarianism from being used to support the other, see *Roshi's Appeal*, 69 Pa. St. 462; *Rottman* v. *Bartling*, 22 Nebraska, 375; *Attorney General* v. *Hulton*, 7 Ir. Eq. 612; *Miller* v. *Gable*, 2 Denio, 492, 548; 2 Story, Eq., § 1191*a*; *Attorney General* v. *Pearson*, 3 Meur. 353; *S. C.*, 7 Sim. 290; *Shore* v. *Attorney General*, 9 Clark & F. 355; *Attorney General* v. *Shore*, 11 Sim. 592; *Attorney General* v. *Wilson*, 16 Sim. 210; *Attorney General* v. *Drummond*, 1 Dru. & W. 353; *Christian Church* v. *Carpenter*, 108 Iowa, 650; *Cape* v. *Plymouth Church*, 117 Wisconsin, 155; *Rodgers* v. *Burnett*, 108 Tennessee, 173.

It is the duty of courts to see that dedicated property is not diverted from the trust to which it has been dedicated. *Lamb* v. *Cain*, 129 Indiana, 486; *Smith* v. *Pedigo*, 145 Indiana, 385 and 406; *Princeton* v. *Adams*, 10 Cush. 129. The guaranty of religious freedom does not affect this rule. *Bear* v. *Heasley*, 98 Michigan, 279. The right to the property depends

not on numbers but on those who adhere to the doctrine specified in the dedication. *Baker* v. *Ducker*, 79 California, 365; *Peace* v. *Christian Church*, 20 Tex. Civ. App. 85; *Greek Church* v. *Orthodox Church*, 195 Pa. St. 425; *Dochkus* v. *Lithuanian Society*, 206 Pa. St. 25; *Roshi's Appeal*, 69 Pa. St. 462; *Clark* v. *Brown*, 108 S. W. Rep. 421; *Mack* v. *Kime*, 129 Georgia, 1; *Marien* v. *Evangelical Congregation*, 132 Wisconsin, 650. This property whether in the hands of the mission, government, or trustees was impressed with a trust for a religious use, and failure to enforce a trust is not barred by mere lapse of time. *Oliver* v. *Piatt*, 3 How. 333, 411; *New York Indians* v. *United States*, 170 U. S. 1.

Mere silence or delay will not defeat the action where the obligation is continuous. *Tynan* v. *Warren*, 53 N. J. Eq. 313; *Union College* v. *New York*, 173 N. Y. 38; *Ryder* v. *Loomis*, 161 Massachusetts, 161; *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Massachusetts, 290; *Royal* v. *Aultman Co.*, 116 Indiana, 424; Angell on Limitation, 5th ed., § 72; *Ganley* v. *Bank*, 98 N. Y. 487.

Past breaches can be waived by considering the condition still in effect with knowledge of the breaches. *Hubbard* v. *Hubbard*, 97 Massachusetts, 188; *Payson* v. *Burnham*, 141 Massachusetts, 547; *Linzee* v. *Mixer*, 101 Massachusetts, 512; *Bacon* v. *Sandberg*, 179 Massachusetts, 396. Neglect and remissness may not constitute a breach. There must be an intent not to carry out the contract. *Osgood* v. *Abbott*, 58 Maine, 73; *Mills* v. *Seminary*, 58 Wisconsin, 135; *Coleman* v. *Whitney*, 62 Vermont, 123. Mere silence and delay do not create estoppel against forfeiture. *Gray* v. *Blanchard*, 8 Pick. 284; *Maginnis* v. *Ice Co.*, 112 Wisconsin, 385. Parol assent without change of situation does not destroy express condition. *Jackson* v. *Crysler*, 1 Johns. Cas. 125; *Plumb* v. *Tubbs*, 41 N. Y. 442; *Congregationist Society* v. *Osborn*, 94 Pac. Rep. 881; *Howe* v. *Lowell*, 171 Massachusetts, 575. Patient endurance of repeated breaches does not bar right to rescind when the conduct becomes unendurable. *Gall* v.

Gall, 126 Wisconsin, 390; and on this point see also *Bleecker* v. *Smith*, 13 Wend. 530; *Doe* v. *Woodbridge*, 9 B. & C. 376; *Dakin* v. *Williams*, 17 Wend. 447; *Doe* v. *Jones*, 5 Exch. 498; *Farwell* v. *Easton*, 63 Missouri, 446; *Alexander* v. *Hodges*, 41 Michigan, 691; *Adams* v. *Copper Co.*, 7 Fed. Rep. 634. A demand or equivalent act is necessary to set statute in motion. *Preston* v. *Bosworth*, 153 Indiana, 458; *Water Power Co.*, v. *Belin*, 69 Minnesota, 253; *Lewis* v. *Lewis*, 74 Connecticut, 630; *Hadley* v. *Manufacturing Co.*, 4 Gray, 140; *Crane* v. *Hyde Park*, 135 Massachusetts, 147; *Merrifield* v. *Cobleigh*, 4 Cushing, 178; *Ward's Appeal*, 35 Connecticut, 161; *Yeary* v. *Cummins*, 28 Texas, 91; *Link* v. *Jarvis*, 33 Pac. Rep. 201; *Eames* v. *Savage*, 14 Massachusetts, 425; *United States* v. *Louisiana*, 123 U. S. 32; *Bonnivell* v. *Madison*, 107 Iowa, 85; *French* v. *Merrill*, 132 Massachusetts, 525; *Cromwell* v. *Norton*, 193 Massachusetts, 293; *Stretch* v. *Schenck*, 23 Indiana, 77; *Parks* v. *Satterthwaite*, 123 Indiana, 411; *Horner* v. *Clark*, 27 Ind. App. 6.

For cases in which the statute did not run from the breach but the demand, see *Lydig* v. *Braman*, 177 Massachusetts, 212; *Babcock* v. *Wyman*, 19 How. 289; *Stringer* v. *Stringer Co.*, 93 Georgia, 320; *Parker* v. *Gaines*, 11 S. W. Rep. 693; *Goodwin* v. *Ray*, 108 Tennessee, 614; *Bolles* v. *Stearns*, 11 Cush. 320; *Owen* v. *Higgins*, 113 Iowa, 735. Nor after condition broken until forfeiture asserted. *St. Louis R. R.* v. *McGee*, 115 U. S. 469; *Bybee* v. *Ore. & Cal. R. R.*, 139 U. S. 663; *Topham* v. *Braddick*, 1 Taunt. 572; *Wright* v. *Hamilton*, 2 Bailey's Law, 51; *Collard's Admr.* v. *Tuttle*, 4 Vermont, 491.

Where an agreement is in the alternative a money demand does not arise until a refusal to convey. The choice is primarily in the promisor. *Mayer* v. *Dwinell*, 29 Vermont, 298; *Foster* v. *Goldschmidt*, 21 Fed. Rep. 70; *Dessert* v. *Scott*, 58 Wisconsin, 390; *Smith* v. *Sanborn*, 11 Johns. 59.

The day before payment the obligor, the day of payment the obligee, can elect. *McNitt* v. *Clarke*, 7 Johns. 465; *Patchen* v. *Swift*, 21 Vermont, 292; *Ross* v. *Sutton*, 1 Bailey's Law, 129. See also *Barker* v. *Jones*, 8 N. H. 413; *White* v.

Toncray, 5 Gratt. 179. On refusal the election passes to the obligee. *Ramsey* v. *Waltham*, 1 Missouri, 395; *Phillips* v. *Cornelius*, 28 So. Rep. 871; *McMillan* v. *Philadelphia Co.*, 159 Pa. St. 142; *Center* v. *Center*, 38 N. H. 318; *Litchfield* v. *Irvin*, 51 N. H. 51; *Hartmann* v. *United States*, 35 C. Cl. 106.

The effect of the statute of limitations was fully disposed of on the last appeal. 206 U. S. 206.

Plaintiffs are entitled to maintain this action. *McCandless* v. *Castle*, 19 Hawaii, 518; *Oahu R. & L. Co.* v. *Armstrong*, 19 Hawaii, 258. The court below could not authorize a new defense. *Murphy* v. *Utter*, 186 U. S. 95.

Mr. C. R. Hemenway, Attorney General of Hawaii, for appellee:

There was no breach of the condition, but substantial compliance has been continuous as to giving religious instruction.

If, however, there has been any breach it occurred as early as 1877 and any action thereon is barred by the statute of limitations. Section 2004, Rev. Laws, Hawaii; *Hartmann* v. *United States*, 35 C. Cl. 106; *Butler* v. *United States*, 23 C. Cl. 335; *Carlisle* v. *United States*, 29 C. Cl. 414; *Aachen & Munich Fire Ins. Co.* v. *Martin*, 156 Fed. Rep. 654; *Brown* v. *Houdlette*, 10 Maine, 399; *Davis* v. *Brown*, 98 Kentucky, 475; *Wilcox* v. *Plummer's Exrs.*, 4 Pet. 172; *Finn* v. *United States*, 123 U. S. 227; *United States* v. *Connor*, 138 U. S. 61; *United States* v. *Greathouse*, 166 U. S. 602; *United States* v. *Wardwell*, 172 U. S. 48; *Kendall* v. *United States*, 107 U. S. 123; *De Arnaud* v. *United States*, 151 U. S. 483.

These cases also show that the statute runs from the time the claim becomes perfect and complete. On this point see also *Riddle* v. *Beattie*, 77 Iowa, 168; *Kane* v. *Bloodgood*, 7 Johns. Ch. 90.

Whenever there is an adequate remedy at law the statute will be held to apply, even though relief may be sought in equity, and the statute will run from the time the first cause

of action accrues. *Jewell* v. *Jewell*, 139 Michigan, 578; *Hayward* v. *Gunn*, 82 Illinois, 385; *Agens* v. *Agens*, 50 N. J. Eq. 566; *Roberts* v. *Ely*, 113 N. Y. 128; *Egerton* v. *Logan*, 81 N. C. 172; *Townsend* v. *Eichelberger*, 51 Ohio St. 213; *Hostetter* v. *Hollinger*, 117 Pa. St. 606; *Wallace* v. *Lincoln Bank*, 89 Tennessee, 630; *Merton* v. *O'Brien*, 117 Wisconsin, 437; *Cone* v. *Dunham*, 59 Connecticut, 145; *Farnam* v. *Brooks*, 9 Pick. (Mass.), 212, 242; *Merrill* v. *Monticello*, 66 Fed. Rep. 165; *S. C.*, 72 Fed. Rep. 462.

The findings of fact from which the conclusion that there was no breach reached by the Supreme Court of Hawaii necessarily are binding and conclusive upon this court. *Halsell* v. *Renfrow*, 202 U. S. 287; *San Pedro Co.* v. *United States*, 146 U. S. 120; *Zeckendorf* v. *Johnson*, 123 U. S. 617; *Eilers* v. *Boatman*, 111 U. S. 356; *Sturr* v. *Peck*, 133 U. S. 541; *Sims* v. *Sims*, 175 U. S. 162; *Holloway* v. *Dunham*, 170 U. S. 615; *Idaho Co.* v. *Bradbury*, 132 U. S. 509; *Grayson* v. *Lynch*, 163 U. S. 468.

Plaintiffs are not entitled to maintain this or any cause of action for a breach of this agreement. The agreement under which they hold only refers to real property and not to a claim of this nature.

Even if this might have been raised by demurrer, it is not waived, as no officer could waive a defense for the Territory. *Peacock* v. *Republic of Hawaii*, 11 Hawaii, 404; *Kendall* v. *United States*, 107 U. S. 123; *Carlisle* v. *United States*, 29 C. Cl. 414; *Finn* v. *United States*, 123 U. S. 227; *Christie Street Com. Co.* v. *United States*, 129 Fed. Rep. 506; *De Arnaud* v. *United States*, 151 U. S. 483; *United States* v. *Utz*, 80 Fed. Rep. 851.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is the second appeal in this case. The first appeal was from a judgment in favor of the Territory, entered upon demurrer to the complaint, which judgment was reversed. *Lowrey* v. *Hawaii*, 206 U. S. 206.

The action is for the sum of $15,000, which the Hawaiian government reserved the right to pay, instead of deeding back certain lands conveyed to it by the American Board of Commissioners of Foreign Missions in 1849. The facts as alleged in the complaint are set out with considerable fullness in the report of the case on the first appeal and need not be repeated. Upon the return of the case to the Supreme Court of the Territory an answer was filed, denying "all and singular the matters, allegations and things set forth," and giving notice that the Territory would "rely in making its defense *inter alia* on the statute of frauds." Subsequently the plaintiffs made a motion upon the record and "upon the judgment in the Supreme Court of the United States" for judgment. The Territory made a motion to amend its answer to set up the statute of limitations. The plaintiffs' motion was denied, that of the Territory was granted, to which rulings plaintiffs excepted. Testimony was taken, which was directed principally to the question of the breach of the condition upon which the conveyance to the government was made. The court, in its opinion, says that, in addition to the "large amount of documentary and other evidence," it has "also referred to proceedings of a public nature, of which it could ordinarily take judicial notice, and to documents from the public archives, when specially referred to in the exhibits on file." Concluding from this and the other evidence that the plaintiffs were not entitled to recover, it rendered judgment for the Territory. 19 Hawaii, 123.

The decision on the first appeal is an important factor in the determination of this, for upon that, as a guide, the Supreme Court of the Territory accepted evidence and determined the meaning of the agreement by which the lands were conveyed.

The American Board of Foreign Missions for many years prior to 1850 conducted a Protestant mission in the Hawaiian Islands, and, as an essential part of its work, carried on many schools. Its most notable work was centered in a school, established in 1831 at Lahainaluna, on the island of Maui, where

it possessed a large tract of land. The purpose for which the conveyance of this school to the Hawaiian government was made and the course of instruction in it, before and after the conveyance as explaining that purpose, make the controversy in this case. It is contended by appellants that the course of instruction in the institution comprised not only the usual topics belonging to secular learning, but included also direct religious teaching and training in the doctrine represented by the mission, that is, the doctrines of the Congregational and Presbyterian churches of the United States, and was expressed in a "Confession of Faith," which was attached to the agreement that transferred the property to the Hawaiian government. "The central purpose of the agreement was," counsel for appellant contended on the other appeal, "to 'continue' an established institution, the keystone of a system with defined and well-known aims, the chief being the promotion of religion by instruction in definite religious truth." The opposing contention was that the doctrine to be taught was not specialized, that there were no restrictions upon the course of instruction, except that it should not be, using the words of the agreement, "contrary to those theretofore inculcated by the mission;" and, insisting that those words constituted the complete measure of the obligation of the government, resisted the attempt of the appellants to go outside of them to ascertain the purpose of the parties. These contentions were considered and the grounds of them accurately distinguished. The contention of the appellants was accepted. It is not necessary to repeat our reasoning at length. Our conclusion was that the Hawaiian government engaged to teach not only secular science, but the definite religious doctrine expressed in the confession of faith, attached to the agreement. The latter, we said, was "not in a formally executed paper," but was found in a correspondence. "And taking the whole of it," it was said, "there is a very little aid from extrinsic evidence needed to demonstrate its meaning and purpose." And after considering some parts of the correspondence, we con-

cluded as follows (p. 221): "The correspondence concerned the transfer of a school established in 1835, the design of which was to perpetuate the Christian religion, and with an object described to be 'still more definite and of equal or greater importance,' that is, 'to educate young men to be Christian ministers.' A religious instruction was prescribed. All this the government was informed of when the proposition was made to transfer the school to its 'fostering care and patronage.' And the government accepted the grant, accepted as it was tendered, and necessarily for the purpose it was tendered."

The right to resort to extrinsic evidence, against the contention of the Territory, was decided, but the amount of aid that the correspondence needed or received from such evidence we explicitly pointed out. We said that the "justness" of the conclusion expressed in the paragraph quoted above was, without extrinsic evidence, "almost indisputable," and that it became "indisputable if extrinsic evidence be considered." In other words, it was decided that the probative force of the correspondence was sufficient without other evidence to establish the agreement in accordance with the contention of appellants. The Supreme Court of the Territory underestimated this ruling and entered into an extensive inquiry of circumstances from which it decided the agreement to be what this court had decided it not to be.

It may be that we could rest the case on the prior decision without considering the new evidence which was received, or, rather, the new facts which are expressed in the findings of the Supreme Court. But as that learned court based its decision upon them and the Territory earnestly urges them as taking this appeal out of the ruling on the former appeal, we have given consideration to them. We cannot, however, without extending this opinion to a great length, quote them in full, and will, therefore, only state their character and what they establish or tend to establish.

The findings set forth the circumstances which preceded

the transfer to the government, as exhibited in the observations of Commodore Wilkes in 1841, and the report of the principal of the school in 1848. Commodore Wilkes observed a defective and inefficient administration of the affairs of the school and its funds, which might have been "avoided" by a full examination of the subject by "practical men," and a decadence in consequence from its "meridian." The principal's report personified the school and made it conscious of the loss of admiration, but he said "she stands at her post, and is contented to do good in a more humble way than when the friends and lovers of her youth stood by and praised her." He said that during 1849 "studies at the institution were practically broken up by reason of various sicknesses which attacked the principal's family, and that, in consequence, "school operations were suspended in February, and no new class entered pending the action of the general meeting of the mission," and he "thought it best" to await that meeting, for, as he said, "the late unparalleled diminution of the population may also have some effect in modifying the views of the mission in regard to this school and render it expedient in their minds to alter its operations or the number of its scholars." If a new class was to be called, he said, he had "a few considerations, 'to present,' to the brethren to guide them in their selections." And again: "Many thousands of dollars have been wasted or unprofitably laid out upon young men sent there of only middling ability and low morals. It has been with regret that the teachers have had to select, with a few good ones, many young men of doubtful talents and worth to make up a class when they felt there were enough in the nation that would do honor to their training at the seminary."

"Besides these conditions," the findings of the court recite, "and the emigration to the gold fields of California, the general meeting had to face an embarrassed condition of the funds of the home board and the consequent curtailment of the allowance to the mission. (From report of committee,

April 25, 1849.) It was under these circumstances that the offer of transfer to the Hawaiian government was made."

It may be well to comment on the facts as we go along, and we may say we see nothing in these declarations and reports that militates with the views of the agreement expressed in our former opinion. We see no intention in them or reason for abandoning the purpose for which the school was founded. Indeed, intention and reason for its better fulfillment by a transfer to the government. The school would receive more constant support under the government. The young men of "doubtful ability and low morals" might not seek its instruction, could be more easily rejected if they did so, and those "in the nation that would do honor to their training at the seminary" might be attracted by the sanction which would be given to their ability and morals. That this was the hope which induced the transfer is almost expressed in the correspondence which forms the agreement.

This was in effect declared in the opinion on the first appeal and the quotation from that becomes apposite. Stating a part of the correspondence which contained the offer to the government, we said (206 U. S. p. 220):

"The Mission reminds the Minister of Public Instruction that the seminary was established in 1831, 'to promote the diffusion of enlightened literature and Christianity throughout the islands,' and that it had been unceasingly watched over, cherished and cared for by the Mission, and that $77,000 had been expended for its benefit. It was stated that in consequence of debts incurred 'in the prosecution of its labors of benevolence and mercy' the American Board of Commissioners of Foreign Missions was compelled to diminish its grants to each of the missions under its care, including the Hawaiian mission, and that the latter for that reason would be 'unable to carry forward its operations with the vigor to be desired in all of its departments of labor.' In view of these facts, it was stated and believed that under the circumstances the transfer of the institution 'to the fostering care and patronage of the

government' would 'promote the highest interest of the Hawaiian people.' An offer was then made to transfer the seminary with the conditions which we have referred to. A confession of faith was enclosed. The government modified the proposal by reserving the right to pay $15,000, as an alternative to the reversion of the property to the Mission if the government should not fulfill the conditions of the grant. The modification was accepted, and in a subsequent communication a new confession of faith was substituted to that originally proposed."

And from this, it followed, we further said, as we have seen, that the school was established "'to perpetuate the Christian religion,' " and had purpose, still more definite and of equal or greater importance, that is, " 'to educate young men to be Christian ministers.' " And of this, "the government was informed of when the proposition was made to transfer the school to its 'fostering care and patronage.' "

There are, however, other findings of fact. It is found that there was substituted for the first confession of faith, which was printed, a second confession of faith, which was written. In a letter which accompanied the latter it stated that the first was "not so distinctive as to prevent a barrier to the introduction there (in the school) of other and deleterious doctrines not specified in the said confession." It is said by the Supreme Court of the Territory that it was "worthy of note" that it did not appear that the "Prudential Committee" had been advised of the substitution. We think this unimportant. Even if it did not, therefore, become a part of the agreement, it certainly expressed the purpose of the agreement. It was, however, considered by the parties as a part of the agreement.

The curriculum of the school from 1835 to 1863 is inserted in the findings, by which studies were arranged for a course of four years. This appears:

"The laws of the high school were read, amended and the different articles adopted as follows:

"'Whereas in the good providences of God, the experiment

of the high school established by the mission in 1831 having proved successful, and having accomplished all that could reasonably have been expected, and the necessity of such an institution still continuing, the directors now lay before the mission a more definite and enlarged plan of operations, such as they suppose from actual experiment to be practicable, and of the highest interests to the moral, social, literary and spiritual condition of this people.' "

The design of the high school is set forth in six chapters, which express provisions for teaching general literature and the sciences, and the following, being paragraphs one and four and paragraph five of chapter one.

"To aid the Mission in accomplishing the great work for which they were sent hither; that is, to introduce and perpetuate the religion of our Lord and Saviour Jesus Christ, with all its accompanying blessings, civil, literary and religious."

"4. Another object still more definite and of equal or greater importance, is, to educate young men of piety and promising talents, with a view to their becoming assistant teachers of religion, or fellow laborers with us in disseminating the gospel of Jesus Christ to their dying fellowmen.

"5. He shall also watch over the moral and spiritual interests of the scholars; he shall cause a portion of their weekly studies to be directed to the great truths of the Bible, that while they increase in science and literature they may have the means of that knowledge which makes wise unto salvation."

It is found, however, that "so far as the proposed curriculum contemplated the preparation of graduates of the school for immediate service in the ministry, it was never carried out, though frequently referred to by contemporaneous writers as the eventual design of the school."

It is further found that the main object of the school from 1835 to 1839 was the education of Hawaiian teachers for the common schools. The curriculums of other years are given, and it is found that, "after the transfer to the government the

institution continued to be primarily for the education of teachers (Report Minister Public Instruction, 1850, p. 26; Report President Board of Education, 1872, p. 4), from the middle classes of the Hawaiian people (Report President Board of Education, 1886, p. 3). Education for the ministry is not referred to in any official report as one of the purposes of the school, but the most that could be said is the statement by Rufus Anderson, secretary of the A. B. C. F. M.: " A year spent in theological study with a missionary is thought sufficient to prepare a pious graduate of Lahainaluna for the pastoral office." Anderson, The Hawaiian Islands, p. 189.

And there are findings as to the events of 1863, 1864 and 1865, the principal of which was the opinion of the Attorney General, and a dispute between the mission and the Board of Education as to the right of appointment of teachers.

The opinion of the Attorney General recognized that the school was received by the government and was held by it, under conditions which, if not performed, would require the government to reconvey the property or pay the mission fifteen thousand dollars.

The dispute over the appointment of teachers arose in April, 1865. In a letter to the President of the Board of Education the mission asserted the right to appoint, and suggested the names of certain persons. The Board of Education replied, asking for the grounds "on which any such claim to interfere in the internal management of said school appear to you to be founded." The mission replied, asserting the right of appointment as a means of accomplishing the purpose of the transfer. It was said that nothing was "more evident than that the mission intended carefully to guard against the introduction into the institution of any doctrine, practice or influence antagonistic to its own faith and practice and form of Christian worship." And they asserted, further, that "nothing could be clearer than that the missionaries contemplated still to have this a co-operating institution to aid them, as it had already done in times past, in the diffusion of

solid science and Christianity *as they understood it*, as benevolent Congregationalists and Presbyterians of the United States, who had contributed to build and sustain the institution understood and practiced it." And it was said that "an object so dear to them would not have been given up without the intention of so guarding in the future as to have it continue to aid instead of defeat the purpose for which it was founded." In further emphasis of this intention the writer of the letter said that he knew "that the intention was to secure the continued co-operation of the seminary in the work which the American Board was prosecuting" there "through its mission." The Board of Education admitted that the institution was to be continued so as to "aid instead of defeating the purpose for which it was founded," and said, "Nothing had been done to justify the intimation that the board" had "any desire to defeat such purpose or introduce any doctrine, practice or influence antagonistic to the faith, practice and forms of worship of the founders." The board dissented from the view expressed by the mission, that the appointment of any man not acceptable to it to the post of teacher was a "violation of the whole spirit of the agreement," and said that a full compliance of the agreement consisted "in appointing persons teaching in the doctrine and after the manner of the Congregational and Presbyterian churches of the United States." The board concluded by saying that they were aware that if they did not see fit to carry on the institution according to the terms of the contract, they had to reconvey it or to pay the sum of $15,000, and that if the views expressed were not satisfactory, the board would think favorably of a proposition to reconvey it at once.

It will be seen, therefore, that from the agreement, as gathered from the correspondence and from the extrinsic evidence which we have detailed, there can be no doubt that the school was transferred by the mission and accepted by the government upon the condition that definite Christian doctrines should be taught, namely, doctrines which constituted

the belief of the Congregational and Presbyterian churches of the United States and not merely some form of general, evangelical Christianity.

Religious instruction, "represented by the second or substituted confession of faith," according to finding 23, was continued from 1875 to 1877.

In December, 1876, upon the recommendation of Dr. Bishop, a change was made from the Hawaiian to English as a medium of instruction, comment upon which will be presently made. We omit, as not important, the curriculum as to secular studies after 1877. The findings as to religious instruction must, however, be given in full:

"There is no evidence that the substituted confession of faith was in use at Lahainaluna as a creed, doctrine or standard of religious instruction at any period. There is no evidence of any formal creed as a standard to which the pupils were required or instructed to adhere.

"(29) From 1877 until the present date the course of religious instruction has been substantially the same. This includes morning prayer, including occasional discussions of passages of the scripture, compulsory attendance at Sunday-school with preparation of the international Sunday-school lessons furnished by the Hawaiian board itself, and compulsory attendance at Christian Endeavor exercises Sunday evenings, at which the pupils discuss biblical subjects based on the Christian Endeavor topic as given in the Christian Endeavor World. Nothing in this religious teaching is contrary to any religious tenet or doctrine expressed in the substituted confession of faith. Mr. Macdonald, who has been principal since 1903, testifies that no creed had been taught during that time at the school, but that he had tried to make upright, truthful Christian men, and held Christ up as the best example to follow; that he had taught nothing about the Pope, or the doctrine of the trinity, or the doctrine of Adam's fall, or that the descendants of Adam were without holiness and alienated from God until their hearts were renewed with divine grace; that on

Sunday there was a Sunday-school and occasionally, in the morning, a preaching service, in the evening a Christian Endeavor meeting; that the first year he was in Lahainaluna the boys were allowed to go to Lahaina to their own churches, but since then, with the exception of the day scholars numbering ten or twelve, they were required to stay on the ground on Sunday and attend Sunday-school and the evening exercises; that the chapel exercises on week day mornings lasted about ten minutes and consisted of a hymn, a portion of the scripture and a repeating of the Lord's Prayer in unison, and occasionally incidental remarks by the principal regarding the passage of the scripture; that there was no direct Christian instruction given in the class room exercises during the week days other than moral instruction, as teaching the boys to do their work honestly; that the Sunday morning exercises consisted of a regular system of Bible instruction following the international Sunday-school lesson series purchased from the Hawaiian Board; that the Sunday-school lessons were assigned in advance; that in the Christian Endeavor meetings the Christian Endeavor topic in a modified form as given in the Christian Endeavor World was usually taken, and prayers sometimes offered by the boys and the teachers.

"(30) There is no evidence of any protest with regard to Lahainaluna or the course of study there from the American Board or from the Hawaiian Evangelical Association as bodies, but first objection is from the plaintiffs who are trustees of certain property rights under deed from the American Board."

It is further found that "technical and agricultural training have been prominent features of the school for over half of a century, and the emphasis laid on agricultural work in the past few years does not amount to a change in kind, but one in degree. There has been no change in the official designation of the school."

In 1903 there was a movement to obtain the Federal aid available for agricultural colleges, in connection with which the Deputy Attorney General gave an opinion as to the

character of the school, the conditions upon which the government of Hawaii had received it and the effect of the provisions of the Organic Act of the Territory, that "no public money be appropriated . . . for the support or benefit of any sectarian, denominational or private school." The opinion is quoted at length in the findings, but we are only concerned with parts of it. It recognizes that the school was received upon the condition of cultivating sound literature and solid science. This, it was said, was affirmative and could not be escaped. The provision for religious instruction, he declared, was negative, and was satisfied by no religious teaching whatever. His conclusion was, and we quote his words, "So long as the government maintains this school it shall not teach any doctrine contrary to the confession of faith, but it is not compelled to teach any religious doctrine whatever, and therefore, in my opinion cannot be held to be a sectarian institution." And further, "that the school is not a sectarian institution under the prohibition stated in section 55 of the Organic Act."

As we have said, the Supreme Court of the Territory gave especial prominence to the ruling on extrinsic evidence, and made it contradictory to the agreement as expressed in the correspondence. This result was worked out, as it seems to us, by giving too much effect to the curriculum of the school after 1877. That, indeed, might be considered as tending to show that the agreement had been abandoned or its conditions waived, but not that it did not exist. To this proposition of abandonment or waiver we then will address ourselves, and as relevant to it the views of the Supreme Court of the Territory may be given. They are exhibited in the following paragraphs (pp. 146, 147):

"Under the decision of the United States Supreme Court we are to construe the condition of transfer in the light of the circumstances which preceded it and the immediate and long continued practice under it. Confining ourselves for the present to the condition respecting religious instruction reading,

'It shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission which we represent, a summary of which will be found in the confession of faith herewith enclosed,' the following possible constructions of the language may be considered:

"(1) That the condition is purely negative in character and does not require the teaching of any religious doctrine. This construction is precluded by the decision of the United States Supreme Court.

"(2) That the contents of the confession of faith should be taught as a formal doctrine or creed. There is no evidence that the parties ever acted upon this interpretation. No evidence has been presented that the substituted confession of faith was in use at Lahainaluna as a creed, doctrine or standard of religious instruction at any period. Dr. Bishop, who was in the school from 1865 until 1877, testified that he had never seen it. (Transcript, p. 13.) In fact, there is no evidence of any formal creed as a standard to which the pupils were required or instructed to adhere.

"(3) That religion should be taught and that as taught it should not be contrary to the doctrines mentioned. Thus construed it is obvious that it allows considerable latitude in the amount of religious instruction. If it means that theology shall form part of the curriculum of the school the condition was broken as early as 1877 and any action thereon is long since barred by the statute of limitations applicable to claims against the government. R. L. Sec. 2004; *Hartman* v. *United States*, 35 C. Cl. 106. If, however, the acts and statements of the parties in 1865 are to be relied upon as contemporaneous construction the same must be true of the acts of the parties in 1877 and from thence to the present day. The fact that the change from Hawaiian to English as a medium of instruction necessarily involved the discontinuance of abstract studies of a theological nature is obvious. The fact that this change was made upon the recommendation of Dr. Bishop and with the full acquiescence of all concerned

from 1877 until 1903 is surely as potent as the actions of the parties during the preceding years. To the present day there has been no protest from the American Board or from the Hawaiian Evangelical Association as bodies, but the first objection is from the plaintiffs who are trustees of certain property rights under deed from the American Board, the terms of which will be more fully considered later.

"Unless the condition prescribes the amount and extent of religious instruction it has not been broken. From 1877 until the present date the course of religious instruction has been substantially the same."

The first proposition, the court said, was precluded by our first decision; of the other two, the court felt free to exercise its judgment. In this it committed error. We have shown how antagonistic the contention of the parties were, and we tried to be clear in our decision of them. We did more than decide that the condition as to religion was not negative. We gave it more force than simple inhibition of teaching something which was not inconsistent with the religion of the mission. We gave it the force of a requirement to teach that religion, and more, to educate young men to teach it. The Supreme Court, however, says that there is no evidence that the parties ever acted upon the interpretation "that the contents of the confession of faith should be taught as a formal doctrine or creed." Exactly what is meant by the words "formal doctrine or creed" is not clear, but if they mean the religion of the mission, the conclusion was not open to the court to draw nor do the findings sustain it. Dr. Bishop testified, it is true, that he had never seen the confession of faith until it was shown in the present case, but he also testified that "the system of doctrine which was taught was substantially the old orthodox, Congregational or Presbyterian doctrine." As to the confession of faith, he said, "that it very well represented the form of doctrine taught at Lahainaluna." Nor do we draw the same conclusion from the change from Hawaiian to English as a medium of instruction that the Su-

preme Court drew. Dr. Bishop did recommend the change, and he expressed a fear that the consequences might be an omission of studies of an abstract nature, in which he included "evidences of Christianity;" but he suggested such instruction could be committed to the "exceptionably" able Hawaiian teacher whom he mentioned. But there is nothing in that to show that a definite form of religion could not be taught. There might be difficulty in it, of course, but that such a difficulty could not be overcome would take all purpose or justification from missionary societies. Besides, because the school met difficulties, and might have to yield temporarily to them for varying periods of time, cannot be considered as conclusive of the intention of the parties to abandon the purpose expressed in the agreement or to waive its obligations. And this is an answer to the other contentions of the Territory. That the mission would encounter difficulties in its way was no doubt guessed when the school was founded. It was demonstrated by trial. For the better execution of the purpose of its foundation, the mission transferred it to the government. The government, too, met difficulties. Its duty was to strive against them, overcome them if possible, not to make them a reason to violate its contract. But it is said by the Supreme Court that if the condition be "that theology shall form part of the curriculum of the school, the condition was broken as early as 1877, and any action thereon is long since barred by the statute of limitations applicable to claims against the government." This might be if the obligation of the government had been to pay money simply. Its obligation was not that, as we have seen, but to perform a trust expressly assumed by it. In other words, it was the grantee of an estate upon condition, having the right, however, to elect to pay $15,000 as an alternative of the performance of the condition. We find no evidence of such election in what occurred in 1877, nor indeed long subsequently to that date. The circumstances must be kept in mind and the relation of the parties. The government had received a gift of valuable property, the

product of voluntary contributions. It was given and received for a special purpose, the purpose for which the contributions were made. The government accepted it and pledged its faith for the execution of the purpose, a faith, we may assume, which was as much relied on as the sanctions which accompanied it. It is not possible to believe that the government had so little sense of its obligations that if it had intended to depart from its agreement it would not have offered to reconvey the property or tender the execution of the alternative which it had reserved; and we certainly cannot hold that a mere change in the course of studies, which might have temporary excuse, instantly acted to make the grantors of the property a claimant for money against whom the statute of limitations would immediately begin to run. The government's right should not be overlooked in this connection. The following is the condition expressed in the proposal made to the government: "That in case of the nonfulfillment or violation of the conditions upon which this transfer is made by the said government, the whole property hereby transferred, hereinbefore specified, together with any additions or improvements which may have been made upon the premises, and all the rights and privileges hereby conveyed or transferred to the Hawaiian government, by the said island mission, shall revert to the said mission, to have and to hold the same for and in behalf of the American Board of Commissioners of Foreign Missions." The acceptance of the government was as follows: "That in case of nonfulfillment on the part of the government of the conditions specified it shall be optional with this government to allow the institution, with all additions and improvements which may have been made upon the premises, and all rights and privileges connected therewith, to revert to the said mission or pay the sum of $15,000." The onus, therefore, was upon the government to act, not upon the mission. To avert the reversion of the property to the mission a way was provided, but it did not enter into the head of anybody that by a fail-

ure to adopt it instantly upon a change of studies the property passed back to the grantor. But such was the inevitable result if there was a breach of the conditions in 1877, and such was the result if there was a breach later than 1877. It might be contended that such result would not ensue without some action upon the part of the mission. But it was certainly optional with the mission to treat the breach, if there was a breach, as a forfeiture. It is said in *Hubbard* v. *Hubbard*, 97 Massachusetts, 188, that it is optional with the grantor of an estate upon condition, in case the breach of the condition occurs, whether he will avail himself of the same as a forfeiture of the estate. To do so, it is further said, requires action on his part, and, if he is not in possession, usually requires entry for breach of condition. Until such entry the grantee holds his estate liable only to be defeated, but it is not actually determined by the forfeiture.

It is said in *Carbon Block Coal Co.* v. *Murphy et al.*, 101 Indiana, 115, 117, 118: "'A condition may be waived by the one who has a right to enforce it, . . . But a mere silent acquiescence in, or parol assent to, an act which has constituted a breach of an expressed condition in a deed, would not amount to a waiver of a right of forfeiture for such breach.' *Lindsey* v. *Lindsey*, 45 Indiana, 552, p. 567; 2 Washb. Real Prop. 16. A mere indulgence is never construed into a waiver of a breach of condition. *Gray* v. *Blanchard*, 8 Pick. 284; *Jackson* v. *Crysler*, 1 Johns. Cases, 125."

In *Trustees of Union College* v. *City of New York*, 173 N. Y. 38, a deed conveying land to Long Island City for the purpose of building a city hall contained the provision that if the land should cease to be used for such or other similar buildings the land should revert to the grantor as if the conveyance had not been made, was held to be a condition subsequent and required the grantee to comply therewith within a reasonable time. It was further held that ten years was a reasonable time for compliance with the covenant, and that the fact that the grantor did not assert a right to reënter for fifteen

years after the breach did not operate as an estoppel or preclude him from insisting upon a forfeiture and claiming possession. It was also held that a grantor was not compelled to demand performance before bringing action of ejectment. The court said (p. 42):

"The condition was the use and the continuing use of the land for the purpose of the grant. The long-continued silence of the plaintiff could not operate as an estoppel upon, or preclude, it from insisting upon a forfeiture, and from claiming possession of the premises. The effect of an express condition in a deed cannot be destroyed by silent acquiescence. (*Jackson* v. *Crysler*, 1 Johns. Cases, 125.) The title to the property was vested in the grantee and the plaintiff was entitled to assume that its grantee would comply with the condition of the grant. If it elected to await compliance as long as it did, that fact cannot be construed against its right to reclaim possession."

In *Althea Coleman* v. *Ralph Whitney et al.*, 62 Vermont, 123, a mortgage deed was executed by a husband, the condition of which was a promise to support the wife of the grantor during her life. The condition was performed for a time and then violated. The wife brought suit to obtain a maintenance from the mortgaged premises. It was held that she was entitled to such relief, notwithstanding there had been successive conveyances of the property, and the successive owners had occupied the premises under their deeds, and had, in no way recognized her rights; and it was held further, that the obligation to support the wife was a continuing one, and that "the lapse of fifteen years without receiving support, simply because she did not ask it, would be no bar."

It was said in *Oliver et al.* v. *Piatt*, 3 How. 333, 411, that the mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trusts*.

In *Tynan* v. *Warren*, 53 N. J. Eq. 313, 321, Vice Chancellor Green, speaking for the court, said: "I do not understand that mere delay in bringing a suit will deprive a party of his remedy, unless such neglect has so prejudiced the other party by loss of testimony or means of proof, or changed relations that it would be unjust to now permit him to exercise his right." It is certain that none of those conditions appear in the present case. A mere change of the curriculum was not of itself an unequivocal disavowal of the trust, or an assertion of adverse right or interest in the government, and we find nothing in the record tantamount to such disavowal and assertion until the Governor of the Territory and the Superintendent of Public Instruction refused the demand of the plaintiffs' attorney to either pay the $15,000 or reconvey the property. The grounds of their refusal we are not informed of, but it was a disavowal of the trust and a denial of the alternative obligation to pay the money. The right of election in the Territory then passed to the plaintiffs, appellants here, and the bringing of the action was a sufficient exercise of it.

It is finally contended that the appellant cannot maintain this action. The Supreme Court of the Territory sustained this contention, saying, however, that it based its "decision upon the consideration of the substantial rights involved." The right of the plaintiffs is derived from a deed executed July 25, 1903, by the American Board of Commissioners for Foreign Missions to the plaintiffs as "trustees." It recites that the grantor is desirous of contributing to the support and maintenance of the Board of Hawaiian Evangelical Association, an eleemosynary corporation organized and established "in the great work of propagating Protestant Christianity, and for that purpose the land and property particularly described and referred to was conveyed in trust in order to assist said intended beneficiary to effectually carry out its corporate powers and purposes in said Hawaiian Islands." The instrument revokes and annuls all powers of attorney and grants of authority theretofore given to any person or persons whomso-

ever, and gives, grants, bargains and sells, conveys and confirms, unto F. J. Lowrey, Henry Waterhous and William O. Smith certain lands described in the schedule annexed to the instrument, together with "all other lands in the possession of or belonging to the said grantor or to which said grantor has right, title, interest, claim or demand whatsoever, at law or in equity, and whether held by it in fee simple, as lessee thereof, beneficiary therein, or otherwise, as fully and to all intent and purpose as though a particular description thereof was herein incorporated and included in said schedule . . ." to have and to hold the same "in trust, nevertheless for the following uses and purposes, that is to say: First. To hold, manage and control the same, and receive and take the rents, issues, profits, income and proceeds of sales and authorized mortgages thereof, and hold such increment and realizations under the same trusts as the above granted trust property, using and applying the same, however, in the manner hereinafter provided. . . Sixth. And, generally to do and perform every act and thing and exercise every power and authority whatsoever, not herein specifically denied or withheld from or herein directed to be otherwise done or exercised by said trustees, as fully and to every intent and purpose as though the said trustees were the absolute owners in fee in their own personal right of the property hereby conveyed. Seventh. Any and all moneys arising from or out of the property of the trust estate, whether by way of rents or other issues and income or from sales or mortgages thereof, shall be received and held by said trustees;" and, after the payment of taxes and other expenses, "and until otherwise directed," by the grantor, shall be delivered "to said beneficiary, from time to time, any balance or portion of the moneys, then remaining in their hands over and above what may, in their judgment, be required for the current expenses connected with the said trust, any unapplied balance to be placed on general deposit, or the said trustees may invest the same upon security as they may approve."

And the grantor reserved "the full right and authority, at any time or times, to direct any change or alteration in the disposition of the income and proceeds of the trust estate," or to remove any trustee or fill any vacancy however occurring.

It will be observed, therefore, that the instrument was designed to convey every interest in property that the grantor had. Considering its language and careful provisions, its purposes and the control reserved to the grantor of the trust and the disposition of funds, it would be a narrow construction of it to hold that the interest of the grantor in the Lahainaluna school did not pass by it, whether such interest was a right to receive a conveyance of the school or of the $15,000 which was to be in lieu of such conveyance. In other words, to completely enforce the rights and interests of the mission in the school and devote it or the proceeds from it to the purposes of the trusts which were created.

The judgment is reversed and the cause is remanded with directions to enter judgment for appellants as prayed for.

MR. JUSTICE BREWER took no part in the decision.

UNITED STATES *v.* SHIPP.

INFORMATION IN CONTEMPT.

No. 4. Original [No. 5, original, of October Term, 1908]. Opinion delivered June 1, 1909.—Sentence pronounced November 15, 1909.[1]

ON June 1, 1909, after the opinion and judgment of the court (214 U. S. 403) were delivered, *The Solicitor General* moved in open court for sentence, and thereupon the defendants Shipp, Gibson, Williams, Nolan, Padgett and Mayes, moved for leave to present petition for rehearing and the court ordered that they be allowed thirty days to present a

[1] For a full report of the proceedings in this case see 214 U. S. 386.

motion for leave to file a petition for rehearing and that they be remanded to custody to be released on their respective recognizances in $1,000 each to be taken by the District Judge of the United States for the Eastern District of Tennessee. On June 7, 1909, a certificate of the said judge that such recognizances had been taken was filed in this court.

The motions for leave to file petitions for rehearing were received by the clerk of this court during vacation (June 1–October 11, 1909). November 1, 1909. Leave to file petitions for rehearing denied and the above named six defendants ruled to appear for judgment on November 15, 1909.

On November 15, 1909, *Mr. Solicitor General Bowers* announced to the court that the said six defendants were present in court in response to the rule issued against them, and asked that sentence be pronounced.

These defendants were then called to the bar by the clerk.

The Chief Justice announced the judgment of the court as follows:

You, Joseph F. Shipp, Jeremiah Gibson, Luther Williams, Nick Nolan, Henry Padgett and William Mayes, are before this court on an attachment for contempt.

On return to a rule to show cause you have presented such evidence as you were advised and been fully heard orally and on printed briefs, and after thorough consideration you have been found guilty. You have also been permitted severally to present petitions for rehearing and move that leave be granted to file them, which after consideration have been denied.

The grounds upon which the conclusion was reached are set forth in the opinion filed herein on Monday, May 24, 1909, and need not be repeated, nor need we dwell upon the destructive consequences of permitting the transaction complained of to pass into a precedent for unpunished contempt.

It is considered by the court, and the judgment of the court is, that as punishment for the contempt you, Joseph F.

Shipp, Luther Williams and Nick Nolan, and each of you, be imprisoned for the period of ninety days, and that you, Jeremiah Gibson, Henry Padgett and William Mayes, and each of you, be imprisoned for the period of sixty days, in the jail of the District of Columbia. The marshal of this court is charged with the execution of this judgment.

November 17, 1909, the marshal filed a return that the judgment of the court had been executed according to the tenor thereof.

MacKENZIE *v.* MacKENZIE.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 465. Motion to dismiss submitted October 11, 1909.—Decided October 18, 1909.

A writ of error to review the judgment of the highest court of a State dismissed for want of jurisdiction without opinion.
Writ of error to review 238 Illinois, 616, dismissed.

Mr. R. G. Dyrenforth for the plaintiff in error.

Mr. Harris F. Williams for the defendant in error.

Per Curiam. Dismissed for want of jurisdiction.

RAND, McNALLY & CO. *v.* KENTUCKY.

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

No. 136. Motion to dismiss or affirm submitted October 18, 1909.—Decided November 1, 1909.

A judgment of the state court affirmed without opinion on authority of previous decisions.
32 Ky. Law Rep. 1168, affirmed.

Mr. Amos C. Miller and *Mr. Wm. M. Beckner* for plaintiffs in error.

Mr. Frederick S. Tyler and *Mr. James C. Sims* for defendant in error.

Per Curiam. Judgment affirmed, with costs. *Chanute* v. *Trader,* 132 U. S. 210; *Wilson* v. *North Carolina,* 169 U. S. 586; *Central Land Co.* v. *Laidley,* 159 U. S. 103; *Bacon* v. *Texas,* 163 U. S. 207; *Eustis* v. *Bolles,* 150 U. S. 361; *White* v. *Leovy,* 134 U. S. 91; *Electric Co.* v. *Dow,* 166 U. S. 489; *Pierce* v. *Somerset Railway,* 171 U. S. 641; *Shepard* v. *Barron,* 194 U. S. 553; *Rand, McNally & Co.* v. *Commonwealth,* 106 S. W. Rep. 238; *S. C.,* 108 S. W. Rep. 892, 32 Ky. Law Rep. 441, 1168; *Commonwealth* v. *Ginn & Co.,* 111 Kentucky, 110.

STRONG *v.* GASSERT.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 401. Motion to dismiss or affirm submitted November 1, 1909.—Decided November 8, 1909.

A writ of error to the highest court of a State dismissed for want of jurisdiction on the authority of previous decisions.
Writ of error to review 38 Montana, 18, dismissed.

Mr. M. S. Gunn for plaintiff in error.

Mr. W. C. Keegin for defendant in error.

Per Curiam. Writ of error dismissed for want of jurisdiction. *McCorquodale* v. *Texas,* 211 U. S. 432; *Corkran Oil & Development Co.* v. *Arnaudet,* 199 U. S. 182; *Arkansas Southern Railroad Co.* v. *German National Bank,* 207 U. S. 270.

PFAELZER *v.* BACH FUR COMPANY.

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

No. 290. Submitted November 1, 1909.—Decided November 8, 1909.

A writ of error to the Circuit Court of the United States dismissed for want of final judgment on the authority of *McLish* v. *Roff*, 141 U. S. 661.[1]

Mr. A. S. Gilbert for plaintiff in error.

Mr. Benjamin N. Cardozo for defendant in error.

Per Curiam. Writ of error dismissed for want of final judgment. *McLish* v. *Roff*, 141 U. S. 661.

BARKER *v.* BUTTE CONSOLIDATED MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 32. Submitted November 12, 1909.—Decided November 15, 1909.

A writ of error to the highest court of a State dismissed for want of jurisdiction on the authority of previous decisions.
Writ of error to review 35 Montana, 327, dismissed.

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[1] The headnote in *McLish* v. *Roff* is as follows:
Under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 826, "to establish Circuit Courts of Appeal," etc., the appeal or writ of error which may be taken "from the existing Circuit Courts direct to the Supreme Court," "in any case in which the jurisdiction of the court is in issue," can be taken only after final judgment; when the party against whom it is rendered must elect whether he will take his writ of error or appeal to this court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case.

Mr. Lewis O. Evans for plaintiff in error.

Mr. John J. McHatton for defendant in error.

Per Curiam. Writ of error dismissed for want of jurisdiction. *Butte City Water Co.* v. *Baker,* 196 U. S. 119; *Haire* v. *Rice,* 204 U. S. 291; *Sayward* v. *Denny,* 158 U. S. 180; *Moran* v. *Horsky,* 178 U. S. 205; *Beals* v. *Cone,* 188 U. S. 184; *Iowa* v. *Rood,* 187 U. S. 87; *Stuart* v. *Hauser,* 203 U. S. 585; *Gatewood* v. *North Carolina,* 203 U. S. 531; *Bachtel* v. *Wilson,* 204 U. S. 36; *Iowa Central Railway Co.* v. *Iowa,* 160 U. S. 389.

JEROME H. REMICK & COMPANY *v.* STERN.

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

No. 352. Submitted November 8, 1909.—Decided November 15, 1909.

Writ of error to the Circuit Court dismissed for want of final judgment on authority of *McLish* v. *Roff,* 141 U. S. 661.

Mr. Moses H. Grossman for plaintiff in error.

Mr. Julius Henry Cohen for defendant in error.

Per Curiam. Writ of error dismissed for want of final judgment. *McLish* v. *Roff,* 141 U. S. 661; *Pfaelzer* v. *Bach Fur Company of Illinois,* decided November 8, 1909, *ante,* p. 584.

NORTH CAROLINA MINING COMPANY *v.* WESTFELDT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 580. Motion to dismiss or affirm submitted November 8, 1909.—Decided November 15, 1909.

An appeal from the Circuit Court of Appeals (166 Fed. Rep. 706) dismissed for want of jurisdiction on the authority of prior decisions.

CAUSE below heard before Fuller, Circuit Justice, and Morris and Brawley, District Judges, composing the court, and decree rendered January 12, 1909, 166 Fed. Rep. 706; petition for rehearing denied February 4, 1909; application for certiorari denied April 19, 1909, 214 U. S. 516; application to the Circuit Court of Appeals, Waddill, McDowell and Keller, District Judges, sitting, for allowance of appeal denied May 13, 1909; appeal granted June 12, 1909, by Goff, Circuit Judge, and motion to set aside that order denied August 21, 1909, Goff, Circuit Judge, stating: "I find myself impelled to the conclusion that the disposition by the Supreme Court of a motion to dismiss said appeal, will under the circumstances now existing best protect the interests of all the parties hereto, and will also settle a question of practice concerning which there is at this time doubt and confusion."

Mr. Joseph J. Hooker, Mr. James H. Merrimon, Mr. Hannis Taylor and *Mr. Charles A. Moore* for the appellant.

Mr. Julius C. Martin, Mr. Alfred S. Barnard and *Mr. F. A. Sondley* for the appellees.

Per Curiam. Appeal dismissed for want of jurisdiction.

Macfadden v. *United States*, 213 U. S. 288; *Greeley* v. *Lowe*, 155 U. S. 58; *In re Winn*, 213 U. S. 458; *In re Moore*, 209 U. S. 490.

GUARANTY TRUST COMPANY *v.* METROPOLITAN STREET RAILWAY COMPANY.

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

No. 607. Motion to dismiss submitted November 8, 1909.—Decided November 15, 1909.

An appeal from the Circuit Court dismissed without opinion on the authority of previous decisions.

Mr. Julien T. Davies, Mr. Brainard Tolles and *Mr. John C. Spooner* for the appellant.

Mr. Arthur H. Masten, Mr. Matthew C. Fleming, Mr. W. M. Chadbourne, Mr. Wm. M. Coleman, Mr. James Byrne and *Mr. Frank H. Platt* for the appellees.

Per Curiam. Appeal dismissed for want of jurisdiction. *Carey* v. *Houston & Texas Central Railway Co.*, 150 U. S. 170; *In re Lennon*, 150 U. S. 393; *Cornell* v. *Green*, 163 U. S. 75; *Empire State-Idaho Mining & Developing Co.* v. *Hanley*, 205 U. S. 225; *Goodrich* v. *Ferris*, 214 U. S. 71; *Farrell* v. *O'Brien*, 199 U. S. 89; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *United States* v. *Larkin*, 208 U. S. 333; *Atlantic Trust Co.* v. *Chapman, Receiver*, 208 U. S. 360; *Bien* v. *Robinson, Receiver*, 208 U. S. 423; *Delmar Jockey Club* v. *Missouri*, 210 U. S. 324; and see *In re Metropolitan Railway Receivership*, 208 U. S. 90; *Guaranty Trust Co.* v. *Metropolitan Street Ry.*

Co., 166 Fed. Rep. 569; 168 Fed. Rep. 937; 170 Fed. Rep. 335; 170 Fed. Rep. 625; 170 Fed. Rep. 626; 171 Fed. Rep. 1014; 171 Fed. Rep. 1015; 171 Fed. Rep. 1019; *Morton Trust Co.* v. *Metropolitan Street Ry. Co.*, 170 Fed. Rep. 336; *Guaranty Trust Co.* v. *Second Ave. Ry. Co.*, 171 Fed. Rep. 1020; *Pennsylvania Steel Co.* v. *Metropolitan Street Ry. Co.*, 170 Fed. Rep. 623.

HELVETIA-SWISS FIRE INSURANCE COMPANY *v.* BRANDENSTEIN.

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

No. 481. Motion to dismiss submitted November 15, 1909.—Decided November 29, 1909.

A writ of error to the Circuit Court of Appeals dismissed without opinion on the authority of *Macfadden* v. *United States*, 213 U. S. 288.[1]

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[1] The pertinent headnotes in *Macfadden* v. *United States* are as follows:

Although where a real constitutional question exists a writ of error can be sued out directly from this court to the trial court under § 5 of the act of 1891, the right to do so is lost by taking an appeal to the Circuit Court of Appeals. *Robinson* v. *Caldwell*, 165 U. S. 359.

The Circuit Court of Appeals does not lose its jurisdiction of an appeal under § 6 of the act of 1891 because questions were involved which would have warranted a direct appeal to this court under § 5 of that act.

Where the case can be taken directly to this court under § 5, or to the Circuit Court of Appeals under § 6, and the latter appeal is taken, while a writ of error will lie to the Circuit Court of Appeals if the jurisdiction of the Circuit Court rests, as shown by plaintiff's statement, on grounds, one of which is reviewable by this court, it will not lie if the only ground of jurisdiction is one where the judgment of the Circuit Court of Appeals is final.

Mr. Frederick B. Campbell for plaintiff in error.

Mr. William V. Rowe and *Mr. Royall Victor* for defendants in error.

Per Curiam. Writ of error dismissed for want of jurisdiction. *Macfadden* v. *United States*, 213 U. S. 288.

KANSAS CITY STAR COMPANY *v.* JULIAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 85. Motion to dismiss or affirm submitted November 29, 1909.—Decided December 6, 1909.

Where the Federal question is first raised in the petition to the highest court of the State for rehearing it is too late. *Loeber* v. *Schroeder*, 149 U. S. 580.

Where the judgment of the state court rests on non-Federal grounds broad enough to sustain it this court cannot review it under § 709, Rev. Stat.

Writ of error to review, 209 Missouri, 35, dismissed.

Mr. Isaac N. Watson, Mr. Hannis Taylor, Mr. Wash. Adams and *Mr. Frank Hagerman*, for the plaintiff in error.

Mr. John H. Atwood, Mr. O. H. Dean and *Mr. Ira Julian*, for the defendant in error.

Per Curiam. Writ of error dismissed for want of jurisdiction. *Sayward* v. *Denny*, 158 U. S. 180; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 307, 308; *State* v. *Bland*, 186

The judgment of the Circuit Court of Appeals in a criminal case is final, and is no less so because the appellate jurisdiction of this court might have been invoked directly under § 5 of the act of 1891.

Missouri, 691, 701, *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 653; case below, 209 Missouri, 35.

The attention of the state Supreme Court was not called to any Federal question until in the petition for rehearing, and that was too late. *Loeber* v. *Schroeder*, 149 U. S. 580, 585, and cases.

The judgment rested on non-Federal grounds broad enough to sustain it. 209 Missouri, 35; *Cincinnati Street Ry. Co.* v. *Snell*, 193 U. S. 30; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322.

MILLS *v.* JOHNSON.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 36. Argued November 12, 1909.—Decided December 13, 1909.

Writ of error to review a judgment of the state court dismissed for want of jurisdiction without opinion on authority of previous decisions.

Mr. Frederic D. McKenney and *Mr. R. S. Neblett* for plaintiffs in error.

Mr. Robert E. Prince, Mr. Richard Mays and *Mr. W. S. Simpkins* for defendants in error.

Per Curiam. Writ of error dismissed for want of jurisdiction. *Beale's Heirs* v. *Johnson*, 45 Tex. Civ. App. 119; 99 S. W. Rep. 1045; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Same* v. *Same* (No. 2), 212 U. S. 112; *McCorquodale* v. *Texas*, 211 U. S. 432; *Cox* v. *Texas*, 202 U. S. 446; *Harding* v. *Illinois*, 196 U. S. 78; *Arbuckle* v. *Blackburn*, 191 U. S. 405.

THOMAS *v.* IOWA.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 448. Argued December 13, 1909.—Decided December 20, 1909.

A writ of error to review a judgment of the highest court of a State, dismissed for want of jurisdiction without opinion.
Writ of error to review, 135 Iowa 717; 109 N. W. Rep. 900, dismissed.

Mr. J. T. Mulvaney for plaintiff in error.

Mr. Charles W. Lyon for defendant in error.

Per Curiam. Writ of error dismissed for want of jurisdiction. No further opinion will be filed.[1]

Ex parte UNITED STATES CONSOLIDATED SEEDED RAISIN COMPANY.

PETITION FOR MANDAMUS.

No. —. Original. Submitted December 20, 1909.—Decided January 3, 1910.

Motion for leave to file petition for a writ of mandamus or certiorari denied.

Mr. John H. Miller for petitioner.

Per Curiam. Motion for leave to file petition for writ of mandamus or certiorari denied.

[1] This case had been once before to this court on writ of error and the writ dismissed. See 209 U. S. 258.

HUSTON, JUDGE, *v.* STATE OF OKLAHOMA *ex rel.* HASKELL, GOVERNOR.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 325. Motion to dismiss submitted December 20, 1909.—Decided January 3, 1910.

Writ of error to review judgment of highest court of a State, dismissed for want of jurisdiction without opinion on authority of previous decisions.
Writ of error to review 21 Oklahoma, 782, dismissed.

Mr. E. G. Spilman for plaintiffs in error.

Mr. A. C. Cruce for defendant in error.

Per Curiam. Writ of error dismissed for want of jurisdiction. *Haire* v. *Rice,* 204 U. S. 291; *Corkran Oil Co.* v. *Arnaudet,* 199 U. S. 146; *Luther* v. *Borden,* 7 How. 1; *Taylor* v. *Beckham,* 178 U. S. 548; case below, 21 Oklahoma, 782.

PERTH AMBOY DRY DOCK COMPANY *v.* MONMOUTH STEAMBOAT COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 609. Submitted December 20, 1909.—Decided January 3, 1910.

Decree of the District Court of the United States affirmed without opinion.

Mr. James D. Dewell, Jr., and *Mr. Avery Fayette Cushman* for appellant.

Mr. Charles N. Snyder for appellee.

Per Curiam. Decree affirmed with costs.

KENYON *v.* FOWLER, RECEIVER OF AMERICAN EXCHANGE NATIONAL BANK OF SYRACUSE.

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

No. 87. Argued January 18, 1910.—Decided January 24, 1910.

Judgment of the Circuit Court of Appeals affirming a judgment of the District Court for an assessment of stock of an insolvent national bank made by the Comptroller, affirmed without opinion.
155 Fed. Rep. 107, affirmed.

Mr. Dorr Raymond Cobb for plaintiff in error.

Mr. Leonard C. Crouch for defendant in error.

Per Curiam. Judgment affirmed with costs, and cause remanded to the Circuit Court of the United States for the Northern District of New York. *Keyser* v. *Hitz*, 133 U. S. 138; *Finn* v. *Brown*, 142 U. S. 56; *Richmond* v. *Irons*, 121 U. S. 27; *Matteson* v. *Dent*, 176 U. S. 521. Opinion below, 155 Fed. Rep. 107; *S. C.*, 83 C. C. A. 567.

DYER *v.* CITY OF MELROSE.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 93. Argued January 20, 1910.—Decided January 24, 1910.

A judgment of the state court sustaining a tax on property of an officer of the United States Navy affirmed on the authority of previous cases.[1]

197 Massachusetts, 99, affirmed.

Mr. Chester M. Pratt for plaintiff in error.

Mr. Claude L. Allen for defendant in error.

Per Curiam. Judgment affirmed with costs. *Hibernia Savings Society* v. *San Francisco,* 200 U. S. 310; *McIntosh* v. *Aubrey,* 185 U. S. 122; *Railroad Co.* v. *Peniston,* 18 Wall. 5; case below, *Dyer* v. *Melrose,* 197 Massachusetts, 99.

BERGER *v.* TRACY.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 97. Submitted January 21, 1910.—Decided January 24, 1910.

A writ of error to review judgment of the highest court of a State dismissed for want of jurisdiction, on authority of *Castillo* v. *Mc-*

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[1] As stated in the brief of defendant in error:

"This case presents the single question whether money which the plaintiff in error has received as salary or emoluments from the Federal Government, after being so received and deposited in national banks, subject to check, is exempt from taxation by local authorities in Massachusetts, on the principle that a State cannot lay a tax upon an office under the Government of the United States, nor upon any means or instruments used solely for the maintenance of the Federal Government or the performance of any of its functions."

Connico, 168 U. S. 674; no Federal question was suggested prior to petition for writ of error.
Writ of error to review 135 Iowa, 597, dismissed.

Mr. Chester C. Cole for plaintiff in error.

No appearance for defendant in error.

Per Curiam. Writ of error dismissed for the want of jurisdiction. *Castillo* v. *McConnico*, 168 U. S. 674. No Federal question suggested prior to petition for writ of error. Case below, 135 Iowa, 597.

UNITED STATES *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.

CERTIFICATE FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 597. Motion to dismiss submitted January 31, 1910.—Decided January 31, 1910.

A certificate in which there was no opinion, judgment or order of the court below dismissed on authority of *Baltimore & Ohio Railroad Company* v. *Interstate Commerce Commission*, *ante*, p. 216.

The Attorney General and *The Solicitor General* for the United States.

No appearance for The Terminal Railroad Association of St. Louis *et al.*

Per Curiam. Certificate dismissed on authority of *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 215 U. S. 216.

Decisions on Petitions for Writs of Certiorari from October 11, 1909, *to February* 20, 1910.

No. 457. American Wood Working Machinery Company et al., Petitioners, *v.* The Union Trust Company et al. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Charles A. Douglas* for petitioners. No appearance for respondents.

No. 458. William F. Goessling, Petitioner, *v.* Thomas B. Collier. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edward S. McCalmont* and *Mr. L. P. Loving* for petitioner. No appearance for respondent.

No. 464. Novelty Incandescent Lamp Company, Petitioner, *v.* The Edison Electric Light Company. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. A. Parker Smith* for petitioner. *Mr. Richard N. Dyer* and *Mr. John Robert Taylor* for respondent.

No. 471. The Henry DuBois Sons Company, Claimant, etc., Petitioner, *v.* The Steam Tug Eugene F. Moran, Michael Moran, Claimant, et al.; and No. 472. The Henry DuBois Sons Company, Claimant, etc., Petitioner, *v.* The New York Central & Hudson River Railroad Company et al. October 18, 1909. Petition for

writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. James Emerson Carpenter* and *Mr. Samuel Park* for petitioner. *Mr. William S. Montgomery, Mr. Archibald G. Thacher* and *Mr. Charles C. Burlingham* for respondents.

No. 475. PYMAN STEAMSHIP COMPANY, LIMITED, PETITIONER, *v.* MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Parker Kirlin* for petitioner. *Mr. Joseph H. Choate, Jr.*, for respondent.

No. 476. AMERICAN MANUFACTURING COMPANY, PETITIONER, *v.* THE STEAMSHIP WILDENFELS, ETC., ET AL. October 18, 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. James J. Macklin* and *Mr. de Lagnel Berier* for respondents.

No. 477. CHARLES F. HARRIS, LATE OWNER OF THE STEAM TUG DE VEAUX POWEL, PETITIONER, *v.* THE FERRYBOAT LACKAWANNA, ETC., THE HOBOKEN FERRY COMPANY, CLAIMANT. October 18, 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. James J. Macklin* and *Mr. de Lagnel Berier* for respondent.

No. 479. BETTIS MAJORS AND A. T. BALL, TRUSTEE,

PETITIONERS, *v.* H. C. WILLIAMSON. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. D. Saunders, Mr. Joseph Hirsch* and *Mr. Murray F. Smith* for petitioners. *Mr. George Anderson* for respondent.

No. 517. HUB CONSTRUCTION COMPANY, PETITIONER, *v.* NATHANIEL W. HOBBS, TRUSTEE. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Thomas G. Frost* for petitioner. *Mr. Edwin G. Eastman* for respondent.

No. 587. THE CITY OF NEWBURYPORT, PETITIONER, *v.* CITIZENS' SAVINGS BANK. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. William R. Harr* for petitioner. *Mr. Edward F. McClennan* for respondent.

No. 596. WM. G. HUEY ET AL., PETITIONERS, *v.* ARTHUR K. BROWN, SURVIVING RECEIVER, ETC. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Samuel W. Pennypacker* for petitioners. *Mr. Charles H. Burr, Mr. Reynolds D. Brown* and *Mr. Malcolm Lloyd, Jr.,* for respondent.

No. 600. THE ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY ET AL., PETITIONERS, *v.* THE WABASH RAILROAD COMPANY ET AL; and No. 601. CYRUS F. PIERSON

ET AL., PETITIONERS, *v.* THE WABASH RAILROAD COMPANY ET AL. October 18, 1909. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Lawrence Maxwell, Mr. Murray Seasongood* and *Mr. John C. F. Gardner* for petitioners. *Mr. John G. Milburn, Mr. John H. Doyle, Mr. Rush Taggart* and *Mr. Judson Harmon* for respondents.

No. 608. JOHN J. BOLAND ET AL., PETITIONERS, *v.* THE STEAM VESSEL OCEANICA, ETC. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. George Clinton* for petitioners. *Mr. Thomas C. Burke* for respondent.

No. 610. DUDLEY O. WATSON ET AL., PETITIONERS, *v.* ERNEST H. GREENWOOD ET AL. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Edgar J. Pershing* for petitioners. *Mr. Joseph de F. Junkin, Mr. G. W. Pepper* and *Mr. W. B. Bodine, Jr.*, for respondents.

No. 616. THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, CLAIMANT, ETC., PETITIONER, *v.* THE STEAMSHIP CALDERON, ETC. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William S. Montgomery* for petitioner. *Mr. Harrington Putnam* for respondent.

No. 617. EDWARD CARDWELL, PETITIONER, *v.* THE UNITED STATES. October 18, 1909. Petition for a writ of certiorari

to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Arthur A. Birney* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 618. E. E. Androvette, Petitioner, *v.* The Steamship Baralong, etc. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William S. Montgomery* for petitioner. *Mr. J. Parker Kirlin* and *Mr. John M. Woolsey* for respondent.

No. 619. The American Trust Company of Boston, Mass., Petitioner, *v.* W. & A. Fletcher Company. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. William Arthur Sargent* and *Mr. Elmer P. Howe* for petitioner. *Mr. Harrington Putnam* and *Mr. Edward S. Dodge* for respondent.

No. 620. Alfred L. Sweeney, Petitioner, *v.* Edward B. Smith et al. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. William L. Royall* and *Mr. George Demming* for petitioner. *Mr. William A. Glasgow, Jr.*, for respondent.

No. 621. The Mutual Life Insurance Company of New York, Petitioner, *v.* Adolph C. Griesa et al. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr.*

Thomas F. Doran for petitioner. No appearance for respondents.

No. 625. THE HOOD RUBBER COMPANY, PETITIONER, *v.* THE ATLANTIC MUTUAL INSURANCE COMPANY. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Harrington Putnam* for petitioner. *Mr. John G. Milburn* and *Mr. Walter F. Taylor* for respondent.

No. 626. THE ÆTNA INDEMNITY COMPANY, PETITIONER, *v.* THE FARMERS' NATIONAL BANK OF BOYERTOWN. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. George M. MacKellar* and *Mr. Gustavus Remak, Jr.*, for petitioner. *Mr. S. H. Alleman* for respondent.

No. 627. THE DELAWARE & HUDSON COMPANY, PETITIONER, *v.* THE ALBANY & SUSQUEHANNA RAILROAD COMPANY ET AL. October 18, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. James M. Beck* and *Mr. Charles F. Brown* for petitioner. *Mr. George Wellwood Murray, Mr. E. Parmalee Prentice* and *Mr. Charles P. Howland* for respondents.

No. 407. YELLOW POPLAR LUMBER COMPANY, PETITIONER, *v.* S. F. CHAPMAN. November 1, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied, and parts of petition and brief of

petitioner stricken from the files on account of impertinent and improper matter. *Mr. George S. Wright* for petitioner. *Mr. J. F. Bullitt* for respondent.

No. 520. JOHN A. KUYKENDALL, ADMINISTRATOR, ETC., PETITIONER, *v.* THE UNION PACIFIC RAILROAD COMPANY. November 1, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. D. W. Wood* for petitioner. *Mr. Robert S. Lovett* for respondent.

No. 643. THE UNITED STATES, PETITIONER, *v.* AUTHEL H. FREEMAN ET AL. November 1, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *The Attorney General* and *The Solicitor General* for petitioner. *Mr. Charles A. Moore* for respondents.

No. 644. THOMAS S. NOWELL ET AL., PETITIONERS, *v.* J. C. MCBRIDE, AS RECEIVER, ETC., ET AL. November 1, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George M. Nowell* for petitioners. *Mr. E. S. Pillsbury* for respondents.

No. 646. JACOB KERRCH ET AL., PETITIONERS, *v.* THE UNITED STATES. November 1, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. James E. Cotter* and *Mr. Conrad Reno* for petitioners. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Harr* for respondent.

No. 634. PETER T. COFFIELD ET AL., PETITIONERS, *v.* THE FLETCHER MANUFACTURING COMPANY. November 8, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Richard J. McCarty* for petitioners. *Mr. Edmund E. Wood* for respondent.

No. 642. THE TUNIS LUMBER COMPANY ET AL., PETITIONERS, *v.* CUMBERLAND LUMBER COMPANY. November 8, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert M. Hughes* for petitioners. No appearance for respondent.

No. 635. GUARANTY TRUST CO. OF NEW YORK, PETITIONER, *v.* METROPOLITAN STREET RAILWAY COMPANY ET AL.; No. 636. MORTON TRUST COMPANY, PETITIONER, *v.* GUARANTY TRUST COMPANY OF NEW YORK ET AL.; and No. 654. METROPOLITAN SECURITIES COMPANY, PETITIONER, *v.* WILLIAM W. LADD, RECEIVER, ETC. November 15, 1909. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Julien T. Davies, Mr. Brainard Tolles* and *Mr. John C. Spooner* for the Guaranty Trust Company of New York. *Mr. Bronson Winthrop* and *Mr. Charles Thomas Payne* for the Morton Trust Company. *Mr. Richard Reid Rogers* for the Metropolitan Securities Company. *Mr. Arthur H. Masten, Mr. Matthew C. Fleming, Mr. James Byrne, Mr. Frank H. Platt, Mr. J. Parker Kirlin, Mr. W. M. Chadbourne* and *Mr. W. M. Coleman* for respondents in Nos. 635 and 636, and *Mr. Joseph H. Choate, Mr. Arthur H. Masten* and *Mr. Robert C. Beatty* for respondents in No. 654.

No. 656. THE CALIFORNIA DEVELOPMENT COMPANY, PETI-

TIONER, *v.* THE NEW LIVERPOOL SALT COMPANY. November 15, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Maxwell Evarts* and *Mr. Eugene S. Ives* for petitioner. *Mr. Charles Page, Mr. Edward J. McCutchen* and *Mr. Samuel Knight* for respondent.

No. 431. SARAH J. EDDY, PETITIONER, *v.* THE CITY AND COUNTY OF SAN FRANCISCO. November 15, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Julius Kahn* for petitioner. *Mr. A. B. Browne* for respondent.

No. 665. DERING COAL COMPANY, PETITIONER, *v.* H. ERNEST HUTTON, ADMINISTRATOR, ETC. November 15, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John G. Thompson* and *Mr. Charles Troup* for petitioner. *Mr. Lincoln B. Smith* for respondent.

No. 662. COMMERCIAL MICA COMPANY, PETITIONER, *v.* MICA INSULATOR COMPANY. November 29, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Joseph R. Edson* and *Mr. William R. Rummler* for petitioner. *Mr. William Houston Kenyon* for respondent.

No. 671. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, PETITIONER, *v.* GEORGE H. MCFADDEN ET AL.

November 29, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Frederick B. Campbell* for petitioner. *Mr. John G. Johnson* for respondent.

No. 666. FRANK J. PRAME, PETITIONER, *v.* ALBERT T. FERRELL. December 6, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Jesse A. Fenner* for petitioner. *Mr. William Howell* for respondent.

No. 685. SAMUEL GOMPERS ET AL., PETITIONERS, *v.* THE BUCK'S STOVE & RANGE COMPANY. December 6, 1909. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. J. H. Ralston, Mr. F. L. Siddons, Mr. W. E. Richardson* and *Mr. Alton B. Parker* for petitioners. No brief filed for respondent.

No. 639. HENRY D. SPENCER ET AL., PETITIONERS, *v.* VICTOR M. WATKINS ET AL. December 6, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Newel H. Clapp, Mr. Edward F. Treadwell* and *Mr. John S. Partridge* for petitioners. *Mr. Frank B. Kellogg* and *Mr. C. A. Severance* for respondents.

No. 670. CHARLES W. MORSE, PETITIONER, *v.* THE UNITED STATES. December 6, 1909. Petition for a writ of certiorari

to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Martin W. Littleton* for petitioner. *The Attorney General, The Solicitor General* and *Mr. H. L. Stimson* for respondent.

No. 673. NELLIE F. KEIPER, ADMINISTRATRIX, ETC., PETITIONER, *v.* THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. December 6, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. J. Claude Bedford* for petitioner. *Mr. Thomas De Witt Cuyler* for respondent.

No. 682. MAX WEBER ET AL., PETITIONERS, *v.* THE GRAND LODGE OF KENTUCKY, FREE AND ACCEPTED MASONS. December 6, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Louis J. Blum* and *Mr. Edgar C. Blum* for petitioners. *Mr. Charles H. Fisk* and *Mr. Alexander Pope Humphrey* for respondents.

No. 683. JACKSONVILLE TOWING & WRECKING COMPANY ET AL., PETITIONERS, *v.* THE STEAMSHIP BAYAMO, ETC. December 13, 1909. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. Bisbee* and *Mr. George C. Bedell* for petitioners. *Mr. Charles S. Haight* for respondent.

No. 691. NEW LIVERPOOL SALT COMPANY, PETITIONER, *v.* CALIFORNIA DEVELOPMENT COMPANY ET AL. December 13, 1909. Petition for a writ of certiorari to the United States

Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edward J. McCutchen, Mr. Charles Page* and *Mr. Samuel Knight* for petitioner. No appearance for respondent.

No. 703. C. L. VAN SICE, PETITIONER, *v.* THE IBEX MINING COMPANY. January 3, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edwin H. Park* and *Mr. Samuel Herrick* for petitioner. *Mr. Charles J. Hughes, Jr.,* and *Mr. Charles Cavender* for respondent.

No. 698. ABRAHAM ACORD ET AL., PETITIONERS, *v.* WESTERN POCAHONTAS CORPORATION. January 3, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Arthur English* for petitioners. *Mr. J. L. Bumgardner* and *Mr. F. B. Enslow* for respondent.

No. 709. CHARLES E. DAVIS, PETITIONER, *v.* THE UNITED STATES. January 3, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Jackson H. Ralston* and *Mr. Joel Branham* for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

No. 711. PEALE, PEACOCK & KERR OF NEW YORK, PETITIONER, *v.* JOHN M. GRAHAM. January 3, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals

for the First Circuit denied. *Mr. Ezra R. Thayer* for petitioner. *Mr. Robert M. Morse* and *Mr. William M. Richardson* for respondent.

No. 717. THE STEAMSHIP FOLMINA, ETC., PETITIONER, *v.* GUSTAVE A. JAHN ET AL. January 10, 1910. 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. John M. Woolsey* for petitioner. *Mr. Frederick M. Brown* for respondents.

No. 719. WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, PETITIONER, *v.* THE WAGNER ELECTRIC MANUFACTURING COMPANY. January 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Paul Bakewell* and *Mr. Thomas B. Kerr* for petitioner. No appearance for respondent.

No. 586. HARRY HAYNES, PETITIONER, *v.* THE BALTIMORE & OHIO RAILROAD COMPANY. January 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. (Mr. Justice Lurton did not participate in the disposition of this application.) *Mr. Orville S. Brumback* for petitioner. *Mr. F. A. Durban* for respondent.

No. 701. METROPOLITAN LIFE INSURANCE COMPANY, PETITIONER, *v.* ELIZA A. WILLIAMSON. January 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. G. M. Thomas*

and *Mr. Richard W. Walker* for petitioner. No appearance for respondent.

No. 710. JOHN R. WALSH, PETITIONER, *v.* THE UNITED STATES. January 17, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John S. Miller, Mr. Merritt Starr* and *Mr. E. C. Ritsher* for petitioner. *The Attorney General, The Solicitor General* and *Mr. E. W. Sims* for respondent.

No. 658. COMMERCIAL UNION ASSURANCE COMPANY (LIMITED), OF LONDON, ENGLAND, PETITIONER, *v.* RICHMOND COAL COMPANY. January 24, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. T. C. Van Ness* and *Mr. Walter D. Davidge* for petitioner. *Mr. Emery S. Sykes* for respondent. *Mr. E. S. Pillsbury* and *Mr. William A. Maury* filed a brief as *amici curiæ* by leave of the court.

No. 732. FRIES-BRESLIN COMPANY, PETITIONER, *v.* WILLIAM BERGAN ET AL. January 24, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Roger Foster* for petitioner. *Mr. Ira Jewell Williams* and *Mr. F. R. Shattuck* for respondents.

No. 730. HENRY G. THOMAS, PETITIONER, *v.* FLORENCE HUNT DE WINTER ET AL. January 31, 1910. Petition for a writ of certiorari to the Court of Appeals of the District of

Columbia denied. *Mr. Conrad H. Syme* and *Mr. James W. Beller* for petitioner. *Mr. P. H. Marshall* for respondents.

No. 733. THE COMMISSIONERS OF LINCOLN PARK, PETITIONER, *v.* WESTRUMITE COMPANY OF AMERICA. January 31, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William R. Rummler* and *Mr. Eugene G. Mason* for petitioner. *Mr. Walter H. Chamberlin* for respondent.

No. 745. VIRGINIA PASSENGER & POWER COMPANY ET AL., PETITIONERS, *v.* LANE BROS. CO. January 31, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Henry W. Anderson* and *Mr. Eppa Hunton, Jr.*, for petitioners. *Mr. Thomas S. Martin* for respondent.

No. 748. THE UNITED STATES, PETITIONER, *v.* J. R. SIMON & COMPANY. January 31, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *The Attorney General, The Solicitor General,* and *Mr. Assistant Attorney General Lloyd* for petitioner. *Mr. Howard T. Walden, Mr. Henry J. Webster* and *Mr. W. Wickham Smith* for respondents.

No. 749. THE UNITED STATES, PETITIONER, *v.* LEOPOLD BARUCH. January 31, 1910. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second

Circuit granted. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Lloyd* for petitioner. *Mr. Albert H. Washburn* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM OCTOBER 11, 1909, TO FEBRUARY 20, 1910.

No. 3. UNITED STATES OF AMERICA, SUING AT THE COSTS AND FOR THE BENEFIT OF PENN IRON COMPANY, LIMITED, PLAINTIFF IN ERROR, *v.* WILLIAM R. TRIGG COMPANY AND VIRGINIA TRUST COMPANY. In error to the Supreme Court of Appeals of the State of Virginia. October 11, 1909. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. George Bryan* for plaintiff in error. *Mr. Frank W. Christian* and *Mr. Leigh Robinson* for defendants in error.

No. 10. THE PEOPLE OF PORTO RICO, APPELLANTS, *v.* THE ROMAN CATHOLIC APOSTOLIC CHURCH IN PORTO RICO. Appeal from the Supreme Court of Porto Rico. October 11, 1909. Dismissed, per stipulation. *Mr. Frank Feuille, Mr. Charles Hartzell, Mr. Henry M. Hoyt, 2d.,* for appellants. *Mr. Paul Fuller* and *Mr. Frederic R. Coudert* for appellee.

No. 14. THE ROMAN CATHOLIC APOSTOLIC CHURCH IN PORTO RICO, APPELLANT, *v.* THE PEOPLE OF PORTO RICO. Appeal from the Supreme Court of Porto Rico. October 11, 1909. Dismissed, per stipulation. *Mr. Frederic R. Coudert* and *Mr. Paul Fuller* for appellant. *Mr. Frank Feuille, Mr. Charles Hartzell* and *Mr. Henry M. Hoyt, 2d.,* for appellees.

No. 78. W. B. HADLEY, ACTING AUDITOR OF PORTO RICO, APPELLANT, *v.* H. H. SCOVILLE, CLERK, ET AL. Appeal from the District Court of the United States for Porto Rico. October 11, 1909. Dismissed with costs, on motion of counsel for appellant. *Mr. Henry M. Hoyt, 2d.*, for appellant. *Mr. N. B. K. Pettingill* for appellees.

No. 82. SUPREME COUNCIL OF THE ROYAL ARCANUM, PLAINTIFF IN ERROR, *v.* A. G. BRENIZER. In error to the Supreme Court of the State of North Carolina. October 11, 1909. Dismissed with costs, on motion of counsel for plaintiff in error. *F. H. Busbee* and *Mr. Charles W. Tillett* for plaintiff in error. No appearance for the defendant in error.

No. 170. JULIO O. ABRIL, AS ATTORNEY IN FACT OF JOSE T. SILVA, APPELLANT, *v.* MODESTO COBIAN Y MUNIZ. Appeal from the Supreme Court of Porto Rico. October 11, 1909. Dismissed with costs, on motion of counsel for appellant. *Mr. John Larkin* for appellant. *Mr. Charles F. Carusi* for appellee.

No. 216. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* EMMA M. SEWELL. In error to the Supreme Court of the State of Kansas. October 11, 1909. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Robert Dunlap* for plaintiff in error. *Mr. Charles F. Hutchings* for defendant in error.

No. 326. WARD LUMBER COMPANY, INCORPORATED, PLAIN-

TIFF IN ERROR, *v.* HENDERSON-WHITE MANUFACTURING COMPANY, INCORPORATED. In error to the Supreme Court of Appeals of the State of Virginia. October 11, 1909. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Aubrey E. Strode* for plaintiff in error. No appearance for defendant in error.

No. 403. HARRISON CROOK, PLAINTIFF IN ERROR, *v.* INTERNATIONAL TRUST COMPANY OF MARYLAND. In error to the Court of Appeals of the District of Columbia. October 11, 1909. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Wilton J. Lambert* for plaintiff in error. *Mr. Walter C. Clephane* and *Mr. W. Calvin Chesnut* for defendant in error.

No. 404. HARRISON CROOK, PLAINTIFF IN ERROR, *v.* INTERNATIONAL TRUST COMPANY OF MARYLAND. In error to the Court of Appeals of the District of Columbia. October 11, 1909. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Wilton J. Lambert* for plaintiff in error. *Mr. Walter C. Clephane* and *Mr. W. Calvin Chesnut* for defendant in error.

No. 17. THE IRRIGATION LAND & IMPROVEMENT COMPANY, APPELLANT, *v.* ETHAN ALLEN HITCHCOCK, SECRETARY OF THE INTERIOR. Appeal from the Court of Appeals of the District of Columbia. October 22, 1909. Dismissed on motion of *Mr. George H. Patrick* for appellant. *Mr. George Turner* and *Mr. George H. Patrick* for appellant. *The Attorney General, The Solicitor General* and *Mr. Joseph R. Webster* for appellee.

No. 33. INTERNATIONAL TEXTBOOK COMPANY, APPELLANT, *v.* THE CITY OF OTTUMWA. Appeal from the Circuit Court of the United States for the Southern District of Iowa. November 1, 1909. Dismissed with costs, on motion of counsel for appellant. *Mr. David C. Harrington* for appellant. No appearance for appellee.

No. 83. FAIRMONT COAL COMPANY ET AL., APPELLANTS, *v.* MERCHANTS' COAL COMPANY. Appeal from the United States Circuit Court of Appeals for the Fourth Circuit. November 1, 1909. Dismissed with costs, on motion of counsel for appellants. *Mr. Edgar H. Gans* for appellants. *Mr. William A. Glasgow, Jr., Mr. Frank Gosnell* and *Mr. George Weems Williams* for appellee.

No. 84. WASHINGTON GAS LIGHT COMPANY ET AL., APPELLANTS AND PLAINTIFFS IN ERROR, *v.* HENRY B. F. MACFARLAND ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA. Appeal from and in error to the Court of Appeals of the District of Columbia. November 1, 1909. Dismissed with costs, on motion of counsel for appellants and plaintiffs in error. *Mr. R. Ross Perry, Mr. R. Ross Perry, Jr.,* and *Mr. Wilton J. Lambert* for appellants and plaintiffs in error. *Mr. Edward H. Thomas* for appellees and defendants in error.

No. 304. MARY HALLIGAN, AS ADMINISTRATRIX, ETC., APPELLANT, *v.* THE TRINIDAD SHIPPING & TRADING COMPANY, LIMITED, ET AL. Appeal from the District Court of the United States for the Southern District of New York. November 1, 1909. Dismissed, per stipulation. *Mr. W. W. Gooch* and *Mr.*

Frederic C. Scofield for appellant. *Mr. J. Parker Kirlin* and *Mr. Charles R. Hickox* for appellees.

No. 502. R. G. MULLEN, APPELLANT, *v.* FRED FORNOFF, CAPTAIN, ETC. Appeal from the District Court for the First Judicial District of the Territory of New Mexico. November 1, 1909. Dismissed with costs, on motion of counsel for appellant. *Mr. William P. Borland* for appellant. No appearance for appellee.

No. 44. OSWALD C. LUDWIG, AS SECRETARY OF STATE OF THE STATE OF ARKANSAS, APPELLANT, *v.* THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. November 11, 1909. Dismissed, per stipulation. *Mr. George W. Hendricks, Mr. William H. Arnold, Mr. William F. Kirby* and *Mr. Hal L. Norwood* for appellant. *Mr. Thomas S. Buzbee* for appellee.

No. 219. ALPHONSE DUFAUR ET AL., APPELLANTS, *v.* THE UNITED STATES. Appeal from the District Court of the United States for the Northern District of Illinois. November 29, 1909. Dismissed per stipulation, on motion of *Mr. Solicitor General Bowers* for appellee. *Mr. Holmes Conrad* and *Mr. E. N. Zoline* for appellants. *The Attorney General* and *The Solicitor General* for appellee.

No. 55. FRANK P. PLAMONDON, PLAINTIFF IN ERROR, *v.* THE STATE OF KANSAS. In error to the Supreme Court of the

State of Kansas. December 2, 1909. Dismissed with costs, pursuant to the tenth rule. *Mr. C. A. Magaw* for plaintiff in error. *Mr. Fred S. Jackson* for defendant in error.

No. 444. HENRY C. KING, PLAINTIFF IN ERROR, *v.* THE STATE OF WEST VIRGINIA ET AL. In error to the Supreme Court of Appeals of the State of West Virginia. December 14, 1909. Dismissed with costs, pursuant to the tenth rule. *Mr. Maynard F. Stiles* and *Mr. John G. Carlisle* for plaintiff in error. *Mr. John F. Dillon, Mr. Harry Hubbard, Mr. Edward C. Lyon, Mr. William G. Conley, Mr. John A. Sheppard, Mr. C. W. Campbell, Mr. Wells Goodykoontz, Mr. D. J. F. Strother* and *Mr. L. C. Anderson* for defendants in error.

No. 227. ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* W. C. GERATY. In error to the Supreme Court of the State of South Carolina. December 20, 1909. Dismissed with costs, on motion of *Mr. Frederic D. McKenney* of counsel for plaintiff in error. *Mr. Frederic D. McKenney* and *Mr. P. A. Willcox* for plaintiff in error. No appearance for defendant in error.

No. 539. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* AMERICAN BONDING COMPANY OF BALTIMORE. In error to the United States Circuit Court of Appeals for the Ninth Circuit. January 3, 1910. Dismissed on motion of *Mr. Solicitor General Bowers* for plaintiff in error. *The Attorney General* and *The Solicitor General* for plaintiff in error. No appearance for defendant in error.

No. 540. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* RUDOLPH AXMAN. In error to the United States Circuit Court of Appeals for the Ninth Circuit. January 3, 1910. Dismissed on motion of *Mr. Solicitor General Bowers* for plaintiff in error. *The Attorney General* and *The Solicitor General* for plaintiff in error. No appearance for defendant in error.

No. 528. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* MITCHELL E. PICKENS. In error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas. January 3, 1910. Dismissed with costs, on motion of *Mr. Evans Browne,* in behalf of counsel for plaintiff in error. *Mr. Andrew H. Culwell* and *Mr. Gardiner Lathrop* for plaintiff in error. *Mr. Waters Davis* for defendant in error.

No. 341. CENTRAL OF GEORGIA RAILWAY COMPANY, APPELLANT, *v.* WILLIAM A. WRIGHT, COMPTROLLER-GENERAL OF GEORGIA, ET AL. Appeal from the Circuit Court of the United States for the Northern District of Georgia. January 3, 1910. Dismissed with costs, on motion of counsel for appellants. *Mr. Alexander R. Lawton, Mr. Henry C. Cunningham* and *Mr. T. M. Cunningham, Jr.,* for appellant. No appearance for appellees.

No. 420. JOHN HOBSON NELSON, APPELLANT, *v.* THE CITY OF MURFREESBORO ET AL. Appeal from the Circuit Court of the United States for the Middle District of Tennessee. January 3, 1910. Dismissed with costs, on motion of counsel for appellant. *Mr. John J. Vertrees* for appellant. No appearance for appellees.

No. 76. J. A. HUGHES, PLAINTIFF IN ERROR, *v.* THE COLLIN COUNTY NATIONAL BANK. In error to the Circuit Court of the United States for the District of Colorado. January 7, 1910. Dismissed with costs, pursuant to the tenth rule. *Mr. Clayton C. Dorsey* and *Mr. William D. Hodges* for plaintiff in error. No appearance for defendant in error.

No. 175. CUDAHY PACKING COMPANY, PLAINTIFF IN ERROR, *v.* THE STATE OF MINNESOTA. In error to the Supreme Court of the State of Minnesota. January 18, 1910. Dismissed, per stipulation. *Mr. Moritz Heim* for plaintiff in error. *Mr. E. T. Young, Mr. George W. Peterson* and *Mr. Al J. Smith* for defendant in error.

No. 507. WOODWARD CARRIAGE COMPANY ET AL., APPELLANTS, *v.* PITTS LIVERY COMPANY ET AL. Appeal from the District Court of the United States for the Western District of Texas. January 19, 1910. Dismissed with costs, on motion of counsel for appellants. *Mr. T. D. Cobbs* for appellants. No appearance for appellees.

No. 338. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* CHARLES S. SARGENT. In error to the United States Circuit Court of Appeals for the Eighth Circuit. January 24, 1910. Dismissed on motion of *Mr. Solicitor General Bowers* for plaintiff in error. *The Attorney General* and *The Solicitor General* for plaintiff in error. *Mr. Luther C. Harris* for defendant in error.

No. 750. FRED ANDERSON, PLAINTIFF IN ERROR, *v.* THE

UNITED STATES. In error to the District Court of the United States for the District of Minnesota. January 24, 1910. Docketed and dismissed on motion of *Mr. Solicitor General Bowers* for defendant in error. *The Attorney General* and *The Solicitor General* for defendant in error. No appearance for plaintiff in error.

No. 109. T. M. STANCLIFT ET AL., ETC., APPELLANTS, *v.* CHARLIE FOX ET AL. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. January 24, 1910. Dismissed with costs pursuant to the tenth rule. *Mr. William T. Hutchings* for appellant. *Mr. Preston C. West* for appellees.

No. 695. RACHEL A. RICHARDSON, CLAIMING TO BE RACHEL A. BROWN, PLAINTIFF IN ERROR, *v.* MARY S. REEVES ET AL. In error to the Court of Appeals of the District of Columbia. January 26, 1910. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Tracy L. Jeffords* for the plaintiff in error. *Mr. Benjamin H. Schwartz* and *Mr. Milton Strasburger* for defendants in error.

CASE DISPOSED OF IN VACATION.

No. 65. PATRICK COX, APPELLANT, *v.* LUMAN T. HOY, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS. Appeal from the District Court of the United States for the Northern District of Illinois. July 7, 1909. Dismissed pursuant to the 28th rule. *Mr. William Dillon* for appellant. *Mr. William G. Johnson* and *The Attorney General* for appellee.

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ADMIRALTY.

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Salvage service, over which a court of admiralty has jurisdiction, may arise from all perils which may encompass a vessel when on waters within the admiralty jurisdiction of the United States, and this includes services rendered to a vessel undergoing repairs in dry dock and in danger of being destroyed by fire which originated on land. *The Steamship Jefferson*, 130.

2. *Jurisdiction over vessel in dry dock.*

A vessel used for navigation and commerce does not cease to be a

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A carrier may charge and receive compensation for services that it may render, or procure to be rendered, off its own line, or outside of the mere transportation thereover. *Interstate Com. Com.* v. *Stickney*, 98.

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Where the terminal charge is reasonable it cannot be condemned, or the carrier charging it required to change it because prior charges of connecting carriers make the total rate unreasonable. *Ib.*

3. *Reasonableness of charge; considerations in determining.*

In determining whether the charge of a terminal company is or is not reasonable the fact that connecting carriers own the stock of the terminal company is immaterial, nor does that fact make the lines of the terminal company part of the lines or property of such connecting carriers. *Ib.*

4. *Hepburn Act; charges embraced within* § 15.

The inquiry authorized by § 15 of the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, relates to all charges made by the carrier; and, on such an inquiry, the carrier is entitled to have a finding that a particular charge is unreasonable before he is required to change it. *Ib.*

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1. *Contract clause; impairment of charter contract obligation. Invalidity of Minneapolis street railway rate ordinance of* 1907.

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2. *Contract clause; impairment of charter contract obligation. Power of State to determine procedure for transfer of stock of corporation. Validity of Kansas law of* 1899.

The State creating a corporation may determine how transfers of its stock shall be made and evidenced, and a change in the law imposing no restraint upon the transfer, but only affecting the method of procedure, does not impair the obligation of the charter contract within the meaning of the contract clause of the Federal Constitution; and so held that the corporation law of Kansas of 1899 is not void as to stockholders who purchased stock prior thereto and sold it thereafter, because it required a statement of the transfer of stock to be filed in the office of the Secretary of State in order to relieve the transferor of stockholder's liability, the act not depriving him of any defense that might be made at the time the stock was acquired. *Henley* v. *Myers*, 373.

3. *Contract clause; impairment of obligation of stockholder's contract by State in changing methods of procedure in actions to enforce liability.*

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1. *Statutory and common-law rights distinguished.*

Statutory copyright is not to be confounded with the exclusive property of the author in his manuscript at common law. *Caliga* v. *Inter Ocean Newspaper Co.*, 182.

2. *Statutory copyright a new right.*

In enacting the copyright statute Congress did not sanction an existing right but created a new one dependent on compliance with the statute. *Ib.*

3. *Applications; amendments—Validity of copyright granted on second application.*

Under existing copyright law of the United States there is no provision for filing amendments to the first application; and, the matter being wholly subject to statutory regulation, copyright on a second application cannot be sustained. *Ib.*

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The statutory limit of copyright cannot be extended by new applications. *Ib.*

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1. *Duration; effect of franchise granted subsequent to act of incorporation to extend life of charter.*

Where the corporate existence has been recognized after the expiration of the shorter period and the State has not moved in *quo warranto*, a franchise legally granted by municipal ordinance and legislative enactment for the life of the charter of a public service corporation cannot be impaired during the term specified in the charter filed before the grant was made, although such term be longer than that allowed by the act under which the corporation was organized. *Minneapolis* v. *Street Railway Co.*, 417.

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A suit brought by shippers to enjoin a railroad company from putting a tariff schedule into effect on the ground that it violates rights secured by the act to regulate commerce is a case arising under the Constitution and laws of the United States, and the jurisdiction of the Circuit Court over the person of the defendant must be determined accordingly. *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 501.

2. *Of case arising under Constitution and laws of United States; residence of defendant in district essential.*

Under the jurisdictional act of March 3, 1875, c. 137, 18 Stat. 470, as amended by the act of March 3, 1887, c. 373, 24 Stat. 552, corrected by the act of August 13, 1888, c. 866, 25 Stat. 433, the Circuit Court in the district of which the defendant is not an inhabitant has not jurisdiction of a case arising under the Constitution and laws of the United States, even though diverse citizenship exist, the plaintiff resides in the district, and the cause be one alone cognizable in a Federal court. *Ib.*

3. *Status of case as one arising under laws of United States.*

While the construction of the act of Congress under which a patent issued and what rights passed under the patent present Federal questions which give the Circuit Court jurisdiction of the case as one arising under the laws of the United States, if prior decisions have so defined such rights that they are removed from controversy, jurisdiction does not exist in the absence of diverse citizenship. *McGilvra* v. *Ross*, 70.

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1. *Amendment of complaint on reopening case for further evidence.*

Where a case is opened that further evidence may be produced, it is also open for the amendment of the original pleadings or for additional pleadings appropriate to the issue; and permission by the lower court to file such supplemental complaint is not inconsistent with the mandate of this court remanding the case with directions to grant leave to both sides to adduce further evidence. *Rio Grande Dam &c. Co.* v. *United States*, 266.

2. *Assignment of errors; court may notice error not assigned.*

Assignment of errors is not a jurisdictional requirement; and, although by the rule errors not assigned are disregarded, the court at its option may notice a plain error not assigned or specified. *Old Nick Williams Co.* v. *United States*, 541.

3. *Jurisdictional question considered although not assigned as error.*

Even if not assigned as error, this court will consider the jurisdictional question of whether there is power in the court, in view of the provisions of the act to regulate commerce, to grant the relief prayed for in regard to matters within the competency of the Interstate Commerce Commission. *Balto. & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 481.

4. *Following decisions of territorial courts on questions of local practice.*

Practice of the courts in a Territory is based upon local statutes and procedure and this court is not disposed to review the decisions of the Supreme Court of the Territory in such cases, and, following the Supreme Court of the Territory of New Mexico, this court holds that the power of that court to affirm or reverse and remand includes the power to modify, and extends to proceedings in mandamus. *Santa Fé County* v. *Coler*, 296.

5. *Conformity in Federal courts with practice in state courts.*

Under § 914, Rev. Stat., requiring the practice in the Federal courts to conform as near as may be to the practice in the state courts, the defendant in an action in the United States Circuit Court in South Carolina is not required to plead all counterclaims and offsets as the state courts have not so construed the provisions of §§ 170, 171 of the Code of Procedure of that State. *Virginia-Carolina Chemical Co.* v. *Kirven*, 252.

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1. *Labor and material law of* 1905; *application to persons furnishing labor and materials to subcontractor.*

Under the labor and material law of February 24, 1905, c. 778, 33 Stat. 811, amending the act of August 13, 1894, c. 280, 28 Stat. 278, indemnity is provided for persons furnishing labor and materials to a subcontractor as well as to the contractor in chief for the construction of a public building. *Mankin* v. *Ludowici-Celadon Co.*, 533.

2. *Labor and material law of* 1905; *extent of application of indemnity provided.*

The indemnity extends to the full amount furnished notwithstanding the contract may have already paid the subcontractor in full or or in part. Provisions in state statutes, limiting recovery against contractor to amount remaining unpaid to subcontractor, do not affect suits under the Federal statute which contains no such provisions. *Ib.*

3. *Subcontractors' status under act of* 1905.

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RAILROADS.

Lessor company's responsibility to public.

A lessor railroad company remains responsible, so far as its duty to the public is concerned, notwithstanding it may lease its road, unless relieved by a statute of the State. *Illinois Central R. R. Co.* v. *Sheegog*, 308.

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REMOVAL OF CAUSES.

1. *Joint liability—Effect of dismissal of case as to defendants, residents of plaintiff's State, on right of non-residents to remove.*

Where plaintiff in good faith insists on the joint liability of all the defendants until the close of the trial, the dismissal of the complaint on the merits as to the defendants who are citizens of plaintiff's State does not operate to make the cause then removable as to non-resident defendants and to prevent the plaintiff from taking a verdict against the defendants who might have removed the cause had they been sued alone, or if there had originally been a separable controversy as to them. *Lathrop, Shea & Henwood Co.* v. *Interior Construction Co.*, 246.

2. *Joinder of parties; bona fides affecting right of removal.*

Where the joinder of the resident and the non-resident defendants prevents removal to the Federal court, the fact that on the trial the jury finds against the non-resident defendant only has no bearing on the question of removal if the joinder was not fraudulent. *Illinois Central R. R. Co.* v. *Sheegog*, 308.

3. *Joinder of parties; sufficiency of allegation of fraud.*

A plaintiff may sue the tort-feasors jointly if he sees fit, regardless of motive, and an allegation that resident and non-resident tort-feasors are sued for the purpose of preventing removal to the Federal court is not a sufficient allegation that the joinder was fraudulent. *Ib.*

4. *Joinder of parties; joinder of lessor and lessee railroads as tort-feasors held not fraudulent.*

Whether defendants can be sued jointly as tort-feasors is for the state court to decide; and so held that, where the state court

STATES.

1. *Jurisdiction over beds of streams and other waters.*

Each State has full jurisdiction over the lands within its borders including the beds of streams and other waters, *Kansas* v. *Colorado*, 206 U. S. 46, 93, subject to the rights granted by the Constitution of the United States. *McGilvra* v. *Ross*, 70.

2. *Police power; exercise not to conflict with Federal authority.*

A State cannot so exert its police power as to directly hamper or destroy a lawful authority of the United States. *Flaherty* v. *Hanson*, 515.

3. *Power in respect of rights created by former legislation for security of debts of municipality.*

The legislature of a State cannot take away rights created by former legislation for the security of debts owing by a municipality of the State or postpone indefinitely the payment of lawful claims until such time as the municipality is ready to pay them. *Hubert* v. *New Orleans*, 170.

4. *Taxing power of United States may not be burdened by.*

A State cannot place a burden on a lawful taxing power of the United